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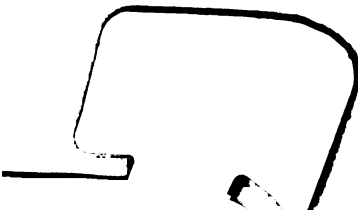
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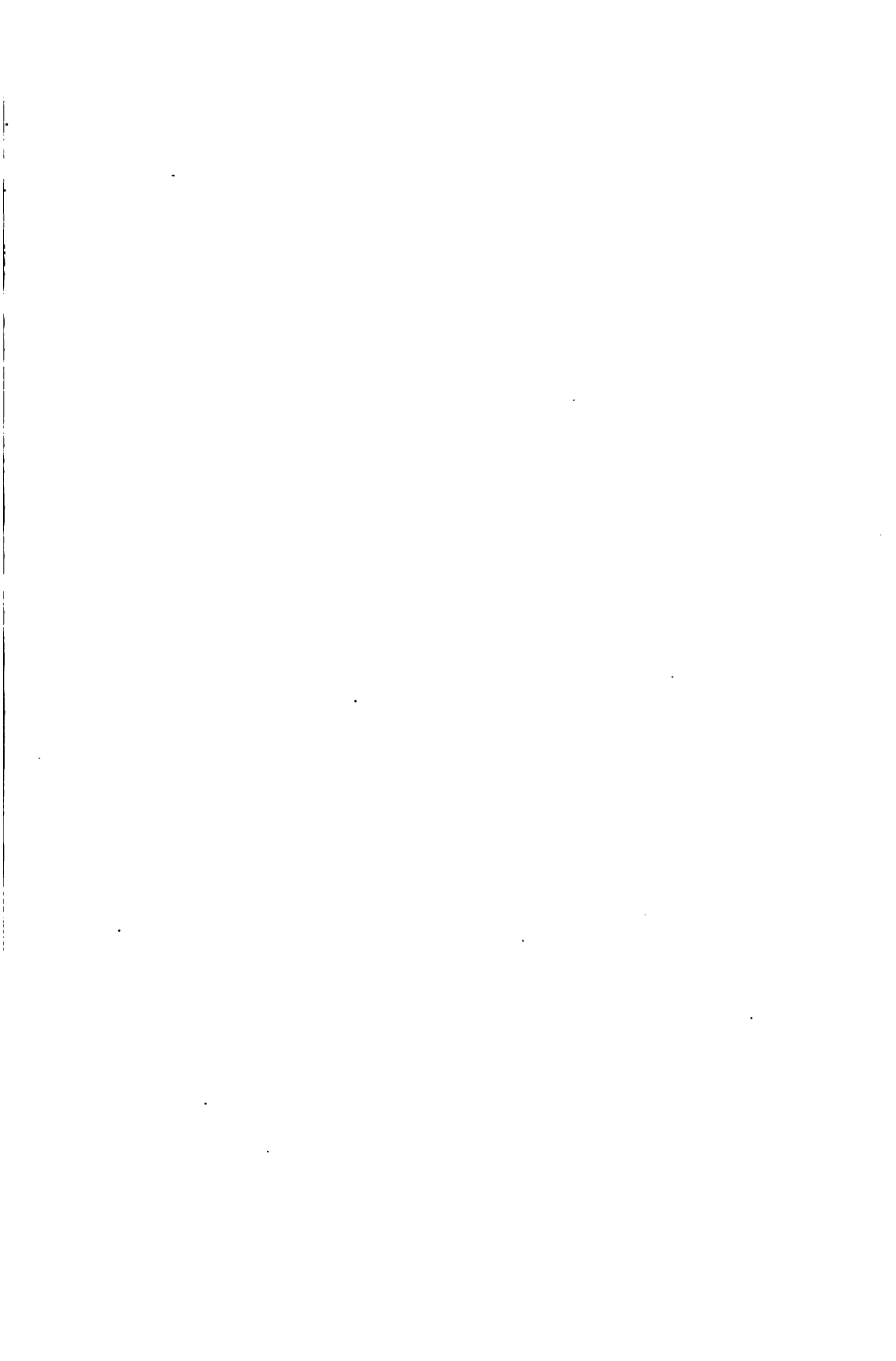
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PROMISSORY NOTES.

27

[Franklin Common Pleas, 1889.]

JACOB S. BALDWIN V. W. P. HARRISON ET AL.

1. A promissory note drawn, dated and signed in Ohio, and sent by the makers to their attorney in another state, and there delivered to the payee, is a contract of the latter state although the note is silent as to the place of payment, and payments were made thereon after maturity in Ohio.
2. A contract made in Ohio may be enforced in said state, although consideration, in whole or in part, involves the settlement and compromise of a criminal prosecution in another state, providing such contract was made with reference to the laws of the latter state, as the place of performance; and providing further that such compromise and settlement are authorized by the law of the latter state.
3. The presumption is, in absence of express agreement, that parties contract with reference to the state wherein their contract would be valid.

This was an action to recover on two promissory notes, dated respectively "Columbus, O., February, 1887," reading:

"On or before October 1, 1887, I promise to pay to the order of Jacob S. Baldwin ——— Dollars, with interest at seven per cent. per annum, value received—(Signed), W. P. Harrison, and others."

The defendants in their answer averred that the notes were accepted by plaintiff to suppress a certain criminal prosecution against said W. P. Harrison, and in consideration of plaintiff's agreement not to prosecute the defendant W. P. Harrison for an alleged conspiracy, and to secure a *nolle prosequi* to be entered dismissing said criminal proceeding, and that the notes were without any valuable consideration, to which plaintiff replied by general denial and setting out further in such reply that the real

consideration for said notes was a mutual agreement between plaintiff and defendant to dismiss a certain suit for damages which this plaintiff was then prosecuting against the said defendant, and the dismissal of attachment process therein granted, and the transfer and delivery to defendant of certain stock.

The proof shows that Harrison was indicted in Pennsylvania for falsely, maliciously conspiring to cheat and defraud this plaintiff, at the August session of the quarter sessions of Pennsylvania, A. D. 1886, and that the consideration for the said notes was the agreement of the plaintiff not to prosecute said W. P. Harrison for said crime and to secure a *nolle prosequi* to be entered dismissing said indictment found under the following law of Pennsylvania, to-wit: "In all cases where a person shall on complaint of another, be bound by recognizance to appear, or shall for want of security be committed, or shall be indicted for assault and battery or other misdemeanor, to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, or not being an infamous crime, and for which there shall also be a remedy by action if the party shall appear before the magistrate who may have taken the recognizance or made the commitment, or before the court in which the indictment shall be, and acknowledge to have received satisfaction for said injury, it shall be lawful for the magistrate in his discretion to discharge the recognizance which may have been taken for the appearance of the defendant, or in case of committal, to discharge the prisoner, or for the court also where such proceeding has been returned to the court, in their discretion to order a *nolle prosequi* to be entered on the indictment as the case may require upon payment of costs."

It also appeared in evidence that about February 3, 1887, (the date of the said notes) an officer from Pennsylvania accompanied by the plaintiff, came to Columbus, with a requisition upon the Governor of Ohio, for the arrest and return of W. P. Harrison to Washington county, Pennsylvania, to answer to the charge made in said indictment; that while action on said requisition was pending, the said plaintiff and defendant W. P. Harrison came to an understanding or agreement, by the terms of which the said Harrison was to execute and deliver to the plaintiff the notes described in the petition, with approved sureties thereon; and that the plaintiff should dismiss his civil action in attachment, then pending in the common pleas court of Franklin county, and transfer to said W. P. Harrison certain stock which he held in said Pump Company to the amount of \$7,000, and should also dismiss said criminal prosecution in Washington county, Pennsylvania; that said civil action was thereupon dismissed, and said stock transferred to said Harrison.

Nothing was said as to the place of payment of said notes, nor was any place of payment specified in them.

Testimony was offered and admitted, however, tending to prove that both of said parties had knowledge of the existence of said law of Pennsylvania, as to the right of the parties to settle and compromise such cases.

It also appeared in evidence, that upon the terms of said agreement being arrived at, the plaintiff returned to his home in Washington county, Pennsylvania, and that no further steps were taken upon said requisition nor upon said indictment; that in the course of about two months thereafter, said notes having been executed with the sureties thereon, were sent by said Harrison to his attorney, and were delivered by him at Washington county, Pennsylvania, to plaintiff; that as said notes became

due, the plaintiff requested payment by letter, and some payments were made upon the first note falling due.

It also appeared in evidence that upon the delivery of said notes to said plaintiff, he signed an agreement subject to the approval of the court and district attorney, that upon the payment to plaintiff, the prosecutor, of the sum of \$5,680, a *nolle prosequi* was to be entered in said criminal proceeding and the said Baldwin was to release quit-claim deed, and discharge the said W. P. Harrison from all and every claim, civil or criminal, arising out of any transactions of any kind or nature between said Harrison and Baldwin.

Evidence was also adduced as to said enactments of law in the state of Pennsylvania, and as to the further facts alleged in said reply, bringing said settlement and compromise, so far as said criminal charge was involved, within the purview of said enactments.

In arguments upon questions of law Fairbanks, Smith & Steele, attorneys for plaintiff, cited:

Courts sanction the recovery of compensation for an injury received, when the party inflicting same, may also be prosecuted criminally—*B. & W. R. R. v. Dean*, 1 Gray, 96-97; *Howk v. Minnick*, 19 Ohio St., 462; *Ford v. Skinner*, 4 Ohio, 378; *Wharton Crim. Pl.*, sec. 384, 453-4; *Wharton on Crim. Law*, sec. 1559; *Rex v. Hardy* 14 Q. B., 529; *Stanel v. State*, 150 Ga., 155.

A contract made with reference to law of another state is an exception to general rule that the construction and validity of same depends upon *lex loci contractus*. 2 *Parsons on Notes and Bills*, 319; *Salle v. Chandler*, 216 Mo., 128 *Sherill v. Hopkins*, 1 Cowan, 103; 1 Bl., 258; 1 East, 6, 515; 1 B. & P., 138; *DeWolf v. Johnson*, 10 Wheat., 367.

Place of making note is place where delivered, not where dated. *Hyde v. Goodnow*, 3 N. Y., 266; *Edwards on Notes*, 187; *Brown Bros. v. Fredand*, 34 Miss., 181; 10 West Law J., 134; 2 Handy, 42; *Reznor v. Hatch*, 7 Ohio St., 249; *Hunt v. Gaylor*, 25 Ohio St., 621-625; *Wright*, 180; 2 *Disney*, 9; *Gray v. Rainey*, 89 Ill., 225; *Hart v. Willis*, 52 Iowa, 58; *McIntyre v. Parks*, 3 Met., 207; 4 *Allen*, 364; 8 *Gray*, 284; *Cook v. Moffat*, 5 How., 295.

Samuel C. Luccock and T. B. Galloway, attorneys for defendant, argued:

1. The consideration for these notes was principally an agreement to suppress a criminal prosecution: The entire consideration must fail in such a case. *Widoe v. Webb*, 20 Ohio St., 431; *Ohio ex rel. v. Board of Ed'n*, 35 Ohio St., 519, 527; *Roll v. Raguet*, 4 Ohio, 400; *Doty v. Bank*, 16 Ohio St., 133.

2. The Pennsylvania statute relied on is a penal statute, and should be strictly construed. *Turner v. State*, 1 Ohio St., 422; *Spice v. Steinruck*, 14 Ohio St., 213; *Shultz v. Cambridge*, 38 Ohio St., 659.

3. The permission given by the Pennsylvania statute relied on was never exercised in conformity with that statute in this, that the proof shows that the court in which the action was pending was never made aware of the agreement; and that a requisition was applied for in this case, and awarded by the Governor of Pennsylvania for bringing the accused to trial, thus placing it out of the power of the Pennsylvania court to approve such a settlement as this without violating its own public policy, and the plain intentment of the law with reference to requisitions. *Compton v. Wilder*, 40 Ohio St., 130, 133.

4. The courts of this state will not enforce a contract, valid by the laws of a sister state, if thereby the laws and public policy of our own state are, or will be, palpably violated. *Kenaga v. Taylor*, 7 Ohio St., 134; *Goudy v. Gebhart*, 1 Ohio St., 262, 266.

The court (Abernethy, J.), after stating the issues so made by the pleadings, charged the jury as follows:

"In regard to these issues so made, I charge you that the defendants, having admitted the execution of said notes, must satisfy you by a preponderance of the evidence that said notes were given in whole or in part, for the purpose of suppressing a criminal prosecution in violation of law, or that said notes were given without consideration.

"I further charge you that the act of assembly of the state of Pennsylvania, which has been offered in evidence and referred to as the ninth section of the act of March 31, 1860, does authorize and sanction the settlement and compromise of offenses of the character of that described in the pleadings in this case; and if you find that said act was in force at the time of the execution of the notes sued on in this case, and that the agreement 'to settle and compromise all claims, civil or criminal arising out of any transactions of any kind or nature' then existing between the said plaintiff and W. P. Harrison, as stipulated in the paper writing, which has been signed by the said plaintiff Jacob S. Baldwin, and offered in evidence, was made by said parties with reference to the law of said state of Pennsylvania as to its performance, then, and, in that case, I charge you that said parties had a right to make such settlement and compromise, under and by virtue of said act of assembly of Pennsylvania, provided you find that said agreement to dismiss said prosecution constituted any part of the consideration for the execution of said notes.

"And, for the purpose of determining the question as to whether said agreement was made with reference to the said law of Pennsylvania, as to its performance, you will consider the testimony which has been adduced before you, as to the transactions between said plaintiff and said W. P. Harrison, in said state, as well as the pendency of any criminal prosecution, and the delivery of said notes to said plaintiff in said state, if you find these facts to exist."

Upon this issue the court further charged: "I further charge you that said agreement, if made with reference to the law of the state of Ohio, as to its performance, would be in violation of the law of said state, and could not be enforced.

"In regard to this question as to the place of performance of said agreement, the presumption of law is, that the parties contracted with reference to the state wherein such contract would have been valid, and not to the state where the same would have been invalid."

The jury found for the plaintiff. Motion for a new trial overruled.

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## PLEADING.

29

[Hancock Common Pleas, 1890.]

## ANTONELLE, HELM &amp; CO. V. HUSTON AND FREEMAN.

1. H. & F. entered into a contract with the trustees of the waterworks of a city to construct certain portions of the water works that said trustees were empowered to build. They sublet said works to A. H. & Co. Under said contracts 15 per cent. of the total value of the work done was to be retained until the final completion of the said works. A. H. & Co. worked for several months and then failed. They then brought suit against H. & F., setting forth the several contracts and assignments by way of subletting, and simply alleging that they had performed so much work and had been paid on account so much, claimed to recover the balance, which balance was the 15 per cent. before referred to. Held: On demurrer to the petition, that the allegation of performance of the work contemplated by the contract was to the satisfaction of the city or its representatives, was a condition precedent to the right to recover on the contract.
2. Allegations of general indebtedness on a contract are not a substitute for the necessary code allegations of performance.
3. An averment that an amount is due or that the defendant is indebted is a legal conclusion and tenders no issue.

It is not clear whether the plaintiff seeks to recover on the contract for its breach, or to recover as of the rescission of the same upon a *quantum meruit*. There can be no recovery upon the contract if it is to be considered as abandoned; but the moment that the contract is considered as still subsisting and in force, there can be no recovery except upon the contract.

Treated as an action to recover upon a *quantum meruit* for work and labor performed where the plaintiffs have abandoned a contract because of the non-performance by the defendants of their part of the contract, this action would not lie, for facts sufficient are not stated. To sustain such an action it must appear that the abandonment was without the fault of the plaintiffs; that the defendants were in the wrong, and that the abandonment, so far as the plaintiffs are concerned, was rightful, and that they were not in the wrong. That being shown they are entitled to be restored to what they have lost by virtue of their efforts to perform, and would be entitled to maintain the action.

The plaintiffs also claim to recover for an estimate payable on the certain day, but that day appears to be after the date for the completion of the work according to the contract, and further there is also a total failure to allege the performance to the satisfaction of the engineer of the trustees, hence the demurrer must be sustained to that also.

H. & F.'s contract with the city provided for their personal supervision over the work, and further provided that they would not sublet without the consent of the city. Such consent does not appear, but it appearing that the city paid estimates during the progress of the work, the city will be held to have waived any question that might arise by reason of such subletting.

Where the time of performance is fixed by contract and no allegation is made in the petition of an extension of said time, in the absence of a general allegation of performance by the plaintiff or something that would be a substitute therefor, in an action brought after said date fixed for performance, the presumption will be that the plaintiffs themselves are in default.

## PENDLETON, J.

In the case of Antonelle, Helm & Co. against Huston & Freeman there is a demurrer to the amended petition on the ground that the amended petition does not state facts sufficient for a cause of action.

The demurrer raises the question whether the facts stated in the petition constitute a cause of action.

The petition sets forth three contracts: two of the same between the city of Findlay and the defendants in this case, and the third purports to be a contract between the plaintiff and defendants here, whereby the defendants sublet to the plaintiffs certain work and labor and the furnishing of materials necessary to complete and comply with the contracts between the city and the defendants, and in accordance with certain plans and specifications which are set forth in the pleading and copies attached as exhibits. From an inspection of the amended petition, it is not very certain whether or not the action here, as set forth in the amended petition, is for a breach of the contract between the plaintiffs and defendants, or whether or not the object is to recover as of a rescission of the same, together with the original contract as between the city and the defendants. There are some allegations looking toward a recovery upon the contracts as if they still were subsisting. There are other allegations that tend to the view that the recovery is sought to be had upon certain estimates alleged to have been made upon a contract or contracts, one alleged to be abandoned and possibly sufficient is averred to show that they have both been rescinded.

In this latter view of the case, the recovery sought to be had would be inconsistent if the allegations of the petition intended to mean what they freely say in some of its parts; that is, that the defendants have abandoned their contracts with the city, then it may be inferred also, that the city abandoned the contract on its part so far as the defendants were concerned, and because of the right reserved in those contracts, giving to the city the option to annul the same for non-compliance with their terms. If this latter view is the fair inference, the abandonment of the contract or rescission of it, defeats any recovery upon it. There can be no recovery upon the contract if the contract is to be considered and treated as abandoned.

In case the contract be treated as abandoned, and I speak of the three as a whole, then in case the contract was rescinded by the plaintiffs because of some breach by the defendants and accruing right to rescind therefor, then there possibly might be a right of recovery on the *quantum meruit* treating the contracts as no longer subsisting; however, the moment the contract is to be considered as still subsisting and in force, there can be no recovery except upon the contract.

Now, it is sufficiently averred in the amended petition to authorize a recovery upon it as a subsisting contract for money alleged to be due and for breach of the same contract. It is averred in the petition which pleads the contract, in legal effect, that Huston and Freeman agreed with said board of trustees to furnish all materials, tools, and labor necessary to complete said work to the satisfaction of said trustees on or before the thirty-first day of October, 1888; and in the contract between the city and the plaintiffs in this action, it is provided in substance that the plaintiffs here are to complete the contract between the defendants and the city in accordance with the plans and specifications which were, by the terms of the contracts with the city, made part thereof. And it is further alleged between the parties here that the work contemplated

in this agreement is to be completed to the satisfaction and acceptance of the engineer of said trustee, on or before the first day of October, 1888.

Treating the petition as one founded upon a contract and the breach thereof, the first legal question arises whether or not the plaintiffs show that they have complied with the conditions precedent; in other words, the petition seems to have no allegation of performance either to the satisfaction of the city or its representatives, nor that the work was completed at all.

The fifteen per cent. estimate reserved by the terms of the contract, was so reserved until after the completion of the work, and as a condition precedent to entitle the plaintiffs to recover, they must aver and prove that they have performed in accordance with the terms and of the contract, and instead of so averring, they merely say as substitute, or make-shift, in lieu thereof, that the defendants are still indebted to them in the sum of \$6,004.86 on account of the percentage so retained. No facts are averred showing compliance with the contract in this regard, other than allegations of general indebtedness. Clearly, such allegations are not a substitute for the necessary code allegations: sec. 5091 of the Rev. Stat. requires that conditions precedent be averred as performed, in order to entitle one to recover, and if they are denied they have to be proved as a condition precedent. Now I refer to Bates' Pleading, page 135; an averment that an amount is due, or that defendant is indebted, is a legal conclusion, and renders no issue, it must be alleged that defendant has not paid, or the like, and the causes are cited by the author. This is not the rule under section 5086, where one may, by pleading under that section, copy the instruments, a promissory note, etc., in the pleading by short form. That, however, is not this case. The author here further says of the allegation, that defendant became indebted for services rendered; that such an allegation is a conclusion of law. It does not state that the services were rendered, but that he became indebted, so of the words "indebted for lumber sold and delivered." A mere denial of indebtedness is a legal conclusion. The cases cited by Judge Bates sustaining this view of this allegation are sufficient to fix the character of it as being merely a legal conclusion.

The petition, therefore, is defective in this, as a suit brought to recover for breach of a contract, there is an entire failure to aver performance of those things that seem to be necessary in order to entitle plaintiff to recover at all, to-wit: the conditions precedent set forth in the contract, treated as a suit to recover upon the *quantum meruit* for work and labor performed where the plaintiffs have abandoned a contract because of the non-performance by the defendant, the action would not lie for the reason that sufficient facts upon that view were not stated; in which case it will have to appear that the abandonment was without the fault of the plaintiffs, and sufficient facts would have to be averred to show that the defendants were in the wrong, and that the abandonment, so far as the plaintiffs are concerned, was rightful, and that they were not in the wrong, but that they should be restored to what they lost by virtue of their efforts to perform. One of the principles established in contracts, I think, is this: one who undertakes the performance of a contract, in order to recover upon it for a breach by the other party to the contract, must not only aver but prove substantial compliance upon his part. *Machurin v. Stone*, 37 Ohio St., 49; *Ginther v. Shultz*, 40 Ohio St., 104; *Goldsmith v. Hand*, 26 Ohio St., 101.

Upon the view of the case that a rescission, and a recovery as of a rescission is inconsistent with a recovery upon the contract as subsisting, I cite *Trimble v. Doty*, 16 Ohio St., 118, 128, 129; *Brown v. Witter*, 10 Ohio, 142, 144. The latter case is a case of a land contract, and I merely call attention to it for the reason that the judge has tersely and aptly stated the remedies that one may have where there is a breach of a contract. As I understand them, when the contract is subsisting and merely broken, any recovery by either party must be upon the contract. These cases all show there can be no recovery upon the *quantum meruit* so long as the contract itself is subsisting, and in such case the recovery must be upon and in pursuance of the terms of the contract. The case of *Brown v. Witter* further shows that where one party to a contract fails to perform, the other party may have another remedy, to-wit: his right to specific performance in equity. The case also shows the third aspect that I have commented upon; that is, where a contract has been rescinded, the parties may be restored to their original position, unless one party who seeks to be restored is in such default that equity will not aid him.

The conclusion that I then reach upon the demurrer as to this fifteen per cent. reserved is that no good cause of action is set forth in the amended petition.

Now, a few words further on the demurrer—as to the allegation contained in the amended petition; that on or about October 8, I think it is, 1888, the engineer in charge of said work made another estimate in favor of defendants for work done, and for improvement amounting to eight thousand cubic yards of rolled embankment, for which plaintiffs were to receive ten cents per cubic yard. That on or about the eighth day of October, 1888, the board of trustees approved and accepted said report, and paid the defendants the amount thereof. Plaintiffs say they were entitled to receive on said estimate the sum of \$600 from defendants, and as soon as the same was approved and accepted by the board of water-works trustees, that they demand the amount, etc, etc.

To this part of the petition it is sufficient to say, that there is no allegation that this work was performed by the plaintiffs. There is no allegation that the work was performed to the acceptance of the party named as the acceptor thereof in the contract, or on either of the contracts.

There is no allegation that it was performed before the abandonment of the contract. The plain inference is from what subsequently follows, that it may have been performed by the defendants themselves; or that it may have been performed after the contract was abandoned, and independently of it.

The general allegations in the petition carry the strong inference that the abandonment alleged of the defendants, carried with it the abandonment of the contract by the plaintiffs, who only stood in the shoes of the defendants, and their right to continue the work under the defendants' contract was dependent upon the contracts with the city, and merely optional with the city after the abandonment by the principal contractor. I have said this much on the merits of the case as to the demurrer, and it may be further noted that these contracts with the city are personal in their nature. If it be understood that the personal supervision of the contract is reserved and that it involves personal performance and is purely a contract personal, it is neither assignable nor transferable as a contract. But one may substitute another to do his work for him with the consent only of the other contracting party. The option is here reserved to the city on both contracts to treat the contracts as of no effect at the

election or option of the city for any breach of the terms, one of which was for an assignment without the consent of the city. It is nowhere averred that this subletting was with the consent of the city; it is, however, presumed, that in as far as the city accepted the work and the labor of the defendants stipulated for in the contract with the defendants, that the city waived any question that might otherwise arise pending the estimates made and up to the time fixed for the full performance of the contract, which, so far as the plaintiffs are concerned, was the first day of October, 1888.

Whether time is of the essence of such a contract, will make but little difference, for the time fixed for the full performance is provided, and in the absence of a general allegation of performance, or something that would be a substitute therefor, we take it that it fairly appears upon the face of this pleading that the plaintiffs themselves are in default, and if so, no cause of action is stated in the amended petition. This is the conclusion we reach and the demurrer is sustained.

W. T. Porter, of Porter and Rendigs, Cincinnati, and A. Blackford, for the demurrer.

Dunn, Meehan and Doty, *contra*.

## BUILDING ASSOCIATION.

56

[Hamilton Common Pleas, 1890.]

### \*GEORGE H. EVERMAN V. MARIA THERESA SCHMITT.

1. In Ohio, a borrowing shareholder or member of a building association, incorporated under the Rev. Stat., is under personal obligation to share in losses; and this liability is not affected by the circumstance that his dues paid and dividends credited, amount in the aggregate to the sum loaned or advanced to him on his shares, provided there has been no actual adjustment as provided in sec. 3835 Rev. Stat., (77 O. L., 208).
2. Where the conditions of the borrower's mortgage have been wholly fulfilled by him in good faith whilst the building association was in actual operation as a going corporation, and before its being placed in the hands of a receiver, the borrower is entitled to a cancellation of his mortgage, although, in the absence of an actual adjustment under the Rev. Stat., his personal liability to share in the losses continues.
3. The provision in sec. 3835 Rev. Stat., as to adjustment, does not execute itself, and until an actual adjustment is had, the terms of said provision do not come into operation.

SHRODER, J.

On May 6, 1880, the New Ohio Building Association, a corporation, advanced to the defendant, a shareholder, the sum of \$3,000, being the estimated value of twelve shares held by her. At the same time she executed to the association a mortgage on her real property to secure the prompt payment of her weekly dues, interest, premiums and assessments, "until such time as the weekly dues paid and dividends declared and unpaid shall amount to said sum of \$3,000." This was in accordance with Art. XII, sec. 4, of the constitution of the association. The mortgage was duly recorded. She fulfilled the conditions of the mortgage until and inclusive of November 27, 1889. On this day, at a regular meeting, in good faith she made the regular weekly payment of the dues, and so forth, owing to the association. With this payment the aggregate of the weekly dues paid by her and dividends declared and unpaid, amounted to \$3,000. Before the

\*This judgment was reversed by the Supreme Court; opinion 53 O. S., 174.

next meeting day, the corporation having been found insolvent, was placed in charge of the plaintiff as receiver. It is now ascertained by calculation made by expert accountants of the receiver, that the association's losses are such as would require an assessment upon all the members of 31 139-1000 per cent. to make an equitable adjustment and distribution of the assets among all members, borrowers and non-borrowers. The amount of defendant's assessment, according to this calculation, is \$934 17-100. Upon her refusal to pay, the receiver brought this action to obtain satisfaction of this claim by means of a foreclosure of the mortgage and a sale of the property. The defendant by her answer and cross-petition claims, among other things, that her membership has ceased with the payment of \$3,000 in dues and dividends, and also prays that her mortgage be ordered cancelled of record.

In *Seibel v. Building Association* (43 Ohio St., 371), the syllabus reads; "Section 3835 Rev. Stat., as amended April 15, 1880 (77 Ohio L., 208), does not provide for the cancellation of parts of a loan as year by year dues are paid in on shares, but such a loan is to be settled with such dues and other credits, when the share is fully paid; and designating the ordinary dues, as 'dues paid on loans awarded' does not change their nature or application." On page 375, the Supreme Court, in the opinion, says: "This is not a provision that dues when paid shall be credited on loans awarded; but the various items of dues paid and earnings credited—from first to last—are put into one amount and so remain until the share is paid in full, and then such amount is applied to offset the loan and the loan as settled \* \*." Again: "And when the share is paid—and not before—the whole amount paid and credited on this share is applied to satisfy the loan not including the premiums or interest paid in another way."

In Ohio, the payment of dues by a borrowing member is not a specific partial payment on account of the advances made to him upon his shares. It is but the weekly installment due from him as a stockholder upon his subscription for the shares of stock held by him. His personal right is to share finally in the accumulated assets of the corporation, and to share in the meantime, in accordance with the Rev. Stat., in the earnings distributed as dividends. His personal obligation is to pay his shares in full by rates of stated dues and to bear his proportion of the losses (R. S., 3835a); and this personal contract is not modified or otherwise affected by reason of advances being made to him, except so far as there may be an actual adjustment with the corporation, under R. S., 3835c. 83 O. L., 116-117; 77 O. L., 208. Ordinarily the borrowers' weekly payments and unpaid dividends in a going corporation create, when aggregating the amount of a share, a liability to him on the part of the corporation, as against which it may set off the amount advanced to the borrower upon the share.

In the absence of any actual adjustment or compromise with the corporation, the borrower, as a stockholder, however, retains his right to participate in the earnings, in accordance with the Rev. Stat., and continues under the obligation to pay his stock in full and his proportion of the losses. *Seibel v. Building Association*, 43 O. S., 371-375; *Hinman v. Ryan*, 2 Circ. Dec., 305. The contention of the defendant that her membership has ceased, and that she is not to bear her proportion of the losses, can not, therefore, be sustained.

She also asks to have her title quieted as to this mortgage, and for a cancellation of the mortgage. The statutes do not make provisions restrictive or otherwise, requiring the taking of securities or in respect to the nature or extent of the securities which building associations may deem advisable to require or accept for the payment of dues and other payments. When the constitution of the association provides for this matter, its provisions constitute the authority which the officers and directors have in the premises.

In order to ascertain the character and extent of the security, which it was the intention of both parties to give and accept when the advances were made, the court will look to the written memorial of such intention as adopted by the parties. Where the acts and intentions of the parties are within the authority conferred by the constitution, and in writing expressed without any uncertainty, the court must give effect to the clearly expressed intention. In this case the condition of the mortgage, as already stated, is the written evidence adopted by the parties as to the extent of the mortgage security which the parties intended to give and accept. Its terms and stipulations are clearly in accordance with art. 12, secs. 1 and 4 of the constitution of the association. The conditions provide that the security should continue "until such time as the weekly dues paid and dividends declared and unpaid shall amount to \$3,000," and that if the stipulated requirements of payment of dues, interest, premium and assessments are fulfilled up to that time, then the mortgage is to be null and void as a security. Now, it

is admitted that up to and inclusive of November 27, 1889, when the dues and dividends amounted to \$3,000, the defendant fulfilled all the stipulated requirements of the mortgage. It follows that although the defendant is not released from her personal liability to pay all lawful assessments for losses, she is nevertheless entitled to have her mortgage canceled and her title quieted as against the assertion of it against her estate.

This holding as far as it relates to the mortgage as a security does not apply to the cases referred to in the argument of borrowers who had not paid in the stipulated advanced amount whilst the corporation was going, and the terms of whose mortgages can not be and are not fulfilled, because of the corporation's discontinuance of business and of the appointment of a receiver.

Decisions in other states, owing to differences in the statutes, afford little or no aid in the consideration of questions arising in this case under the Ohio statutes and decisions relative to building association corporations. No reference is, therefore, made to them.

For the reasoning of the judges in analogous cases, reference may be made to the decisions reported in 4 H. & N., 196; 26 Beavan, 511; 29 Beavan, 362; L. R., 3 Eq., 158.

A decree will be entered in conformity with this decision.

Huntington & Holmes, for plaintiff.

Drausin Wulsin and F. O. Squire, for defendant.

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## TAXATION.

107

[Franklin Common Pleas, 1890.]

### \*STATE OF OHIO V. PITTSBURGH, CINCINNATI & ST. LOUIS RY. CO.

If supplemental sec. 251a of the Rev. Stat. lays a tax upon companies and corporations operating railroads in whole, or in part, in this state, it is not a tax on property, but a tax for an exceptional purpose; and, therefore, it does not contravene secs. 2 and 5 of art. 12 of the constitution.

PUGH, J.

By sec. 251 of the Rev. Stat., which has been in force several years, the president, or other officer in charge, of each railroad situated in whole or in part within this state, is required, on or before the first day of September, of each year, to make and file in the office of State Commissioner of Railroads and Telegraphs, a report, verified by oath, for the year ending on the thirtieth day of June preceding. The details of this report are specifically designated by this section, but it is unnecessary, for the purposes of this case, to mention them.

On April 15, 1889, the general assembly enacted a supplement to this section numbered sec. 251a, by which every corporation or company operating a railroad, or any part of a railroad, within this state, at the time of the filing of the annual report mentioned, is required to pay to the commissioner a fee of \$1 per mile for each mile of track, whether main, branch, double or side track, operated by it within this state.

The cause of action stated in the plaintiff's amended petition is that during the year ending June 30, 1889, the defendant operated 274.63 miles of railroad within this state; that on October 16, 1889, it filed its annual report, which it should have filed on or before September 1, 1889; that it should at the same time have paid to said commissioner the fee of \$1 per mile, for each mile of track operated in this state; but that it failed and refused to pay the same, either at the time the said report was filed, or at any other time. The prayer is for a judgment for \$274.63, and interest.

To this pleading the defendant interposed a general demurrer.

In the argument it was contended by the defendant that supplemental sec. 251a violates sec. 2 of article 12, of the state constitution, which ordains that all taxes on property shall be levied by a uniform rate; because it imposes a tax in addition to other taxes, which the company, in common with all other persons and corporations, pays.

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\*This judgment was reversed by the Supreme Court; opinion, 49 O. S., 189.

Further, it was contended that the law was repugnant to sec. 5 of the same article, which ordains: "No tax shall be levied, except in pursuance of law, and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied."

It was suggested that the motive for enacting this section by the legislature was a demagogical one; that the desire was to loot the railroad companies. But the question is not one of motive; it is whether the legislature, in the enactment of this law, kept within constitutional boundaries. Cooley's Const. Limitations, 222.

After as careful consideration as could be given to this case in the short time intervening since its submission, the conclusion reached is, that neither of the sections of the constitution mentioned has any sort of application to the statute in question. Both sections treat of the same kind of taxes. The taxing power is an attribute of sovereignty. *Nathan v. Louisiana*, 8 How., 82, 83.

It is vested in the legislature and "reaches all of the property and business within the state, which are not properly denominated the means of the general government," and it may be exercised at its discretion, subject only to the limitations contained in the national and state constitutions.

Said Judge Field, in 15 Wallace, 319: "The subjects of taxation are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. \* \* \* And the amount of taxation may be determined by the value of the property, or its use, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures and in transportation. Unless restrained by the provisions of the federal constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

Again, in 15 Wallace, 283, Judge Strong said: "We think, also, that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax, from their corporations, the states are not obliged to impose a fixed sum upon the franchises, or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privilege granted, or to the extent of their exercise, or to the results of such exercise."

Judge Cooley says, "it is not uncommon, to require that corporations shall pay a certain sum annually assessed according to the amount or value of their capital stock, or some other standard; \* \* \*" *Cooley's Taxation*, 223.

These citations are made to illustrate the proposition that there are different forms and modes of taxation, and that it is not essential to valid taxation that it should be laid upon property, and according to its value.

A state legislature in its powers corresponds to the British Parliament, except as it may be controlled by the national or state constitutions. Whatever power is not denied to it, either expressly or by implication, it possesses. Passing on a constitutional question, a court will consider, not whether the legislature is authorized to pass the law, but whether it was prohibited from passing it. An act of the legislature is only void, because it violates some prohibition of the national or state constitution; whereas, an act of congress is void, if it is not authorized, expressly or impliedly, by the national constitution.

Express constitutional warrant for the exercise of the taxing power by the legislature was not necessary, but even that exists in this state; and it is expressed in sec. 1 of art. 2, which vests all the legislative power of the state in the general assembly. The grant is not circumscribed there; but its limitations are contained in secs. 1, 2, 3 and 5 of art. 12; and by sec. 6 of art. 13 it is made the duty of the legislature to restrict and limit the power of assessment, a form of taxation, exercised by cities and villages, so as to prevent its abuse. Nowhere else is there restrain, restriction, or limitation, on the taxing power.

The old constitution contained only one of these restrictions, namely, the negation of a poll tax.

But both secs., 2 and 5 of art. 12, are confined in their application to taxes on property and for purposes of general revenue. In express terms, sec. 2 is so limited to taxes on property; and, by construction, it has been held to be limited to taxes levied for general revenue purposes. It does not, the Supreme Court has adjudged, "cover the whole ground included within the limits of the taxing power." *Zanesville v. Richards*, 5 Ohio St., 589; *Baker v. Cincinnati*, 11 Ohio St., 540. In the latter case, page 541, Judge Gholson used this plain language:



"If there be a species of taxation, or a subject matter of taxation, not embraced in that section, there is nothing in it by which they are prohibited or excluded." A tax for a special purpose could not be affected by this section; nor could a tax levied on anything else than property be affected by it. If the object of the tax is regulation, or supervision, this section does not determine how it shall be laid. A charge for a license, the issuing of which discommodates or causes expense to the government, is not touched by this section. An assessment, although a tax, is not included within its meaning. A requirement that a citizen shall work the roads, is, in one sense, a tax, but it is not regulated by this section. These propositions are sustained by abundant adjudications of our own Supreme Court and the Supreme Courts of other states, whose constitutions contain parallel provisions. Some are cited: *Cin. Gas Light & Coke Co. v. The State*, 18 Ohio St., 238; *Hill v. Higdon*, 5 Ohio St., 243; *Reeves v. Treas. Wood Co.*, 8 Ohio St., 333; *Baker v. Cincinnati*, 11 Ohio St., 534; *City of East St. Louis v. Wehrung*, 46 Ill., 392; *Addison v. Saulnier*, 19 Cal., 83; *Carter v. Dow*, 16 Wisc., 318; *State v. Herrod*, 29 Iowa, 123, 125; *Mitchell v. Williams*, 27 Ind., 62; *Leav. City v. Booth*, 15 Kan., 628; *Home Ins. Co., of New York v. State of New York*, 10 U. S. Sup. Ct. R., 593.

In *Baker v. Cincinnati*, 11 Ohio St., 541, Judge Gholson said: "But even as to property, it has been held, that an assessment is not taxing within the meaning of that section." (Sec. 2, of art. 12). "It has been so held, not only on the limited ground that it is admitted in cities and villages, under sec. 6 of art. 13. of the constitution; \* \* \* \* but on the broader ground that the power to authorize assessments, as distinguished from taxes, is comprehended under the general grant of legislative powers to the general assembly."

The case in 18 Ohio St., is instructive. The statute required the gas-light companies to pay the salary of the inspector provided for them. Judge Brinkerhoff said: "The above section (sec. 2 of art., 12), "of the constitution is, in effect, a mandate upon the legislature that all property of every nature shall be taxed by a uniform rule, but the charge of assessment here complained of is not a tax on property, but rather a charge upon individual corporations—artificial persons—and the business in which they are engaged; and it by no means follows that because the state is compelled to tax all property by a uniform rule, that it is therefore cut off from all power to lay assessments and charges for exceptional and special purposes coming clearly within the general legislative power conferred by the constitution upon the general assembly."

These examples of valid taxes levied for special purposes, called assessments and licenses, are not exhaustive of the power of the legislature. They only prove that courts have not yet decided cases in which taxes or charges laid for exceptional or special purposes were designated by some other name or names. The examples destroy the universality of the rule of equality and uniformity contended for by the defendant. They show that assessments and license taxes are not the only modes and forms by which the legislature may lay taxes or charges for special purposes.

It is entirely competent for the legislature to devise other forms and modes of imposing to taxes and charges for special purposes and label them by some other name than assessments or license taxes.

The difficulty of drawing the line between constitutional and unconstitutional taxation has always been recognized by the courts. They have always declined the task of defining the line in advance, preferring to leave each case to be decided upon its own facts. It is not the intention to decide in this case that the annual fee required to be paid by corporations and companies operating railroads in this state, if it is a tax, belongs to the class of assessments, or of license taxes. But the decision is, that, assuming it is a tax, it was one which was laid for a special and exceptional purpose. It is not a tax on property. Therefore, it is not a tax that comes within the purview of either sec. 2 or 5 of art. 12 of the constitution.

The facts (1) that a license tax is greater than the mere cost of issuing it, and (2) that the surplus arising from the tax goes into the general treasury to swell the general revenue fund, have been held to be of no significance in a case like this.

See *Baker v. City of Cincinnati*, 11 Ohio St., 534; *Charity Hospital v. Stickney*, 2 La. Ann., 550; *Tenny v. Lewy*, 16 Wisc., 566; *Chilvers v. The People*, 11 Mich., 43; *Ash v. The People*, 11 Mich., 347; *Johnson v. Philadelphia*, 60 Penn. St., 445; *Henry v. The State*, 26 Ark., 523; *Orton v. Brown*, 35 Miss., 436.

The argument of the defendant was ingenious and attractive; and it was logical in form. All taxes must be equal and uniform, it was urged; the tax levied by this statute is not equal and uniform; therefore it is void. But the fallacy was

in the major premise. All taxes, as has been shown upon authority, are not required to be equal and uniform.

The tax in this case might be justified, constitutionally, on the ground that its object is to pay, or help to pay, the compensation of the railroad commissioner and his clerks, and the expenses of his office. Whether it is sound policy is not for the court to decide. But the state policy to pay officers in this way is established. In some instances an officer receives a certain salary; in others a certain sum, and, by way of making it adequate, also certain fees paid by them for whom the officer renders the service. It is within the competency of the legislature to thus levy a tax for the compensation of officers. The duties of the commissioner are important and responsible. He watches the condition of the railroads. He has power, and it is his duty, to require railroad companies to provide for the safety of their crossings, bridges and tracks, and also to prescribe the rate of speed at which their cars shall pass over dangerous places or structures. When differences arise between railroad companies and citizens, he is required to examine the facts and merits of the controversies and report his conclusions to the legislature. Primarily, these requirements benefit the public and persons dealing with the companies; secondarily, they benefit the railroad companies themselves; and it may have been deemed wise by the legislature that the companies should pay the expense of such services. Analogically, the fact that a surplus may arise from the tax, and the fact that the fees are required to be paid into the general treasury, are of no moment.

This tax may be vindicated on another ground, namely, that it is a tax upon "the right or privilege given by the state to the corporations and companies of being such corporations, and of doing business in a corporate capacity." But this does not mean that it is a tax on the "privilege or franchise which, when incorporated, the company may exercise." The distinction between these two propositions is explained by Judge Field in *Home Insurance Co. v. State of New York*, supra. As was said there, the right or privilege of being a corporation is of great value; the numbers seeking incorporation prove this; and as a condition to the continued exercise of the privilege, the legislature may require "that the corporation shall pay a specific sum to the state each year or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe." This case is a very instructive one, and by analogy, it strongly supports the conclusion of this court in this case.

The demurrer to the petition is overruled.

D. K. Watson, Attorney-General, for plaintiff.

Watson & Burr, for defendant.

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### DELINQUENT TAXES.

[Hamilton Common Pleas.]

WALTZ v. HIRTZ ET AL.

When purchaser of land sold at delinquent tax sale can not recover from the owner the amount paid, nor subsequent taxes paid by him.

In this case it appears that there were two subdivisions of real estate made by two persons in the city of Cincinnati. One was the subdivision of E. Benckenstein, the lots being numbered from 1 to 10, and the other was the subdivision of J. C. Benckenstein, the lots being numbered from 1 to 27. Lot No. 23 in J. C. Benckenstein's subdivision was owned by Laura Challen. On the tax duplicate there was listed for taxation, in her name, lot No. 23 E. Benckenstein's subdivision, and under such description sold at delinquent tax sale, and a tax deed was made to the purchaser by such description. Laura Challen sold and conveyed lot 23 in J. C. Benckenstein's subdivision to Mary Hirtz, who took and remained in possession of the same. The purchaser at the tax sale, having such tax deed for lot 23 in E. Benckenstein's subdivision, mortgaged lot 23, J. C. Bencken-

stein's subdivision, to the plaintiff, Waltz. After the tax sale, the tax purchaser had the description on the auditor's duplicate changed to lot 23, J. C. Benckenstein's subdivision, and paid the taxes on the same for some years, when the mortgagee brought this suit to foreclose his mortgage against the mortgagor and Mary Hirtz. She, without tendering the amount paid at the tax sale, or subsequent taxes paid by the holders of the tax title, with interest, filed her answer and cross-petition to quiet her possession and title as against the plaintiff and such mortgage claim. By reply, the plaintiff sets up such tax, purchase money and the subsequent tax payments by him, and asked to enforce his mortgage for the same, with interest from the time of his respective payments.

At the trial, it appeared that neither Mary Hirtz nor her grantor, Laura Challen, ever requested such change to be made on the auditor's duplicate, nor the purchase at the tax sale, nor any subsequent payment of taxes.

A. S. Longley and Alfred Yapple, for Mary Hirtz, contended (1). That lot 23 J. C. Benckenstein's subdivision was not listed for taxation, and could not be sold for taxes, being omitted property, and therefore a tender of tax, purchase money and subsequent taxes paid by such tax purchaser need not be tendered in order to maintain an action to quiet title. *Gage v. Kaufman*, 133 U. S. Rep., 471. (2). That the purchaser, in this case, did not acquire the state's lien for taxes, and the right to recover subsequently paid taxes under sec. 2880 Rev. Stat., as that section applies only where the proceedings to sell are defective; nor did sec. 2881 apply, as there was no mistake as to "owner," and there was not a sufficient description of the lot, as required by that section; that these sections are not broad enough to cover a description void for uncertainty, as in the case of an assessment under the act of April 24, 1890, sec. 14, 87 v. 288.

W. A. Goodman, for plaintiff, claimed that the description was sufficient, reasonably, to apprise the owner and purchasers at tax sale of the property intended to be sold for such taxes.

EVANS, J.

"A lot advertised and sold for delinquent taxes must be described with such a degree of accuracy that not only will the owner be apprised that his property is delinquent, but that bidders at the sale will understand from the description just what the property is intended to be sold, in order to obtain the full benefit of competition among purchasers.

"This lot having been advertised as in one subdivision, named in the notice, when it was in fact in a different subdivision, having a different name, the description is insufficient and purchasers at such a sale acquire no rights as against the owner."

Petition dismissed and title of Mary Hirtz quieted.

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## EASEMENTS.

[Hamilton Common Pleas, July 24, 1890.]

## MOERLEIN BREWING CO. v. ELIZA FASSE ET AL.

An easement by parol in an underground drain through another's land held good, there being nothing said of it in the deed. Knowledge of its existence at the time of sale of land sufficient to bind the grantee. The drain must be a necessity.

SHRODER, J.

This case was submitted to the court upon affidavits and evidence as upon a final hearing. It is for an injunction to restrain the defendants from interfering with the drain which is laid under the sidewalk in front of her premises, to which the plaintiffs claim they have a right. It also appears that the plaintiffs, prior to and since 1876, were the owners of a parcel of real estate on the southeast corner of Gilbert avenue and Church avenue, Walnut Hills, extending a great number of feet along the south side of Church avenue; in 1876, for the purpose of draining off water that would seep into the cellar of the house located at the corner, or near the corner of Gilbert avenue and Church avenue, the plaintiffs laid a private drain four inches in diameter from their cellar along the sidewalk until it reached the then east line of their premises. The conformation of the ground in that neighborhood was such that on Church avenue the grade declines so that at the east line of their premises, as then owned by them, the level of the street was on a level with the cellar, the pavement of the cellar at said corner; the conformation of the ground is also such, then, as it is now, that the water which seeps into the cellar came from the premises south of this as abutted upon Gilbert avenue; the water that seeps therefore, into the cellar and ran through this drain was natural water as would seep through the ground. I say this because it is charged that some of the water came from the vault on the premises; but the testimony, as well as personal inspection of the ground, so far as the inspection would throw any light upon the matter, satisfies the court that the water and the seepage from the vault runs in another direction, and not towards the cellar. In 1882 the plaintiffs sold and conveyed the east 150 feet of this parcel of property to the defendant, Eliza H. Fasse. At that time the drain was lying in the place where it was originally located in 1876. The deeds of conveyance contained no express reservation of a right to this drain upon this part of the premises, that is, the east 150 feet. The conveyances were made in three different times, and neither of the deeds contain such expressage of reservation. It was a matter of dispute at the trial whether Mrs. Fasse, or her grantor from the plaintiff, Weidgenant, knew or had notice of this drain. As I said before, the testimony was offered to the court in the shape of affidavits. The majority of the witnesses testified that she knew of it; she herself denies that she knew of it, saying that the first knowledge she had of it was within the last year or two when she built a confectionery at the east line; then, for the first time the plumbers called her attention to this drain. But previous to this she had built a house, and this drain was exposed. She claims that she was sick, confined to her house at that time and did not know of it. At the time her husband was engaged at a different business, and the testimony is that she gave attention to the building of this house. The probabilities are against her statement; it is not likely that a woman

building a house at a locality where she resides, would overlook or not know of the existence of a drain when it was exposed at a place where she would likely see it. She does not give any specific statement as to her illness, or how she was confined, or the length of time she was confined to her house. Taking her testimony together with the testimony of the other witnesses, I can not come to any other conclusion than that the preponderance and weight of the evidence is that she knew, or had notice of the existence of this drain when she purchased this property and took these conveyances.

Now, if this is a drain which necessarily must be used for the enjoyment of the property of the grantor, then the weight of the authority is that the reservation of the right to a drain upon the premises would be implied as a part of the grant. The necessity, however, must be a strict necessity, and in this case, as there is no other outlet, the necessity is a strict one, because otherwise, in wet weather during the spring this cellar will fill up with water, and being below the surface of the street, there is no other way of getting it out in to the street, except by pumping it out, and sometimes pumping will not answer the purpose where there is a great fall of rain during the spring, after the winter thaw; it can be done by running pipes from the level of the cellar until it reaches the gutter, or until it reaches a culvert at the Protestant Grave Yard. Now, if the city has a right to allow a private individual to use the streets, as a sewer for private purposes, along property beyond his own, then the city would also have a right, if its usage warranted, to allow a drain to be used under the sidewalk, for the control of the city extends from house line to house line, the outer margin to be used for sidewalk, the balance for general travel by vehicle; the city has urgent rights for the purpose of laying water pipes and gas pipes and other pipes, and other uses; but notwithstanding these rights the city has no further authority than is especially granted to it by the legislature, and in conformity with this principle the rights to lay gas pipes, and water pipes and electric conduits have generally been understood to be given by general or special legislative authority. If the city has a right to lay a water drain, a private drain of this size in the street, then the evidence in this case, which is to the effect that there are a number of drains laid under sidewalks, in Walnut Hills, would warrant the city to lay drains under sidewalks, and if this is the case, assuming the city has the right to grant such privilege and give such permits, the evidence is that the engineer originally laid this drain, gave the levels; and the evidence is also that other authorities of the city, such as sanitary officers, knew of the existence of this drain. The evidence would therefore authorize the court to say that the city did not object and gave a license for the use of this drain to Weidgenants as they had used it. But I do not want to decide here whether or not the city has a right to allow a drain to be laid, because if the city had not the right, then the Weidgenants would have no outlet for this water than that which they now have, they could not run it into the street and dig a trench, because if we found the city had no right to allow that, that privilege could not be afforded to the Weidgenants; then it becomes simply a right-of-way, the right to use this drain by necessity, and such being the case, this necessity would authorize a finding that there was a reservation implied by law to use this drain when the deeds were conveyed. So in either event there was no right on the part of these defendants to disturb that drain. But it appears in the case that the plaintiff or her tenant

was using this drain for purposes other than carrying off this seepage; that they have an ice closet, or ice chest, or what you may call it, in the cellar, and the drippings from this run into this drain. It amounts to as much as four or five gallons a day. I do not know what effect it would have upon this drain, how extensive a flow of four or five gallons of water would be for twenty-four or twenty-five hours; that is a matter of which I have no experience; but as a matter of strict right the plaintiffs have no right to use this drain to carry off that water. It also appears from inspection that the defendants are about laying down a cement pavement, through the other defendant, The Charles Kuhl Artificial Stone Co. Upon an inspection of the premises day before yesterday, I notice that this drain keeps considerably under the surface until it reaches the east 25 feet of this 150 feet, at which point it approached the curb, and then as it comes to the outlet it raises to the surface. I also observe that there are drains connecting from other houses, in front of them, running across the premises out into the gutter, which drains appear right on the surface, as the ashes, or charcoal ashes, or whatever composition these men have, are laid there. They seem to have no difficulty at all with these drains; the drains are laying there and the ashes are padded around the drain pipes. If those drain pipes can be tolerated by the Artificial Stone Co. there is no reason why this drain pipe should be in their way at the east end as it approaches the outlet. On that point itself, if it were in equity, the facts would not sustain it.

It appears that 22 feet of this drain pipe at the east end was taken out by the defendants some two years ago; the plaintiff was content to suffer this without any complaint or seeking any remedy in court. But within the last few weeks a number of feet west of this have been taken out—I believe eight feet, if my memory serves me right.

Mr. Porter: The only part of the pipe that was taken out, was taken out two years ago.

Court: Then if there was none additional taken out there is nothing to be said about that. If damages had been asked, I would have allowed damages as to the 22 feet. No damages allowed; but the decree can be drawn up in such a way as not to interfere with the relaying of the 22 feet at the expense of the plaintiff, who must do it within the next seven days, if the parties do not intend to take an appeal, so that the work of the stone pavement can go on without delay, and the defendants will be restrained from permitting the drippings of water from any other source than natural, or permitting drippings from this ice box or any other artificial source to run into this drain. The 22 feet to be relaid by the defendant. I had in my mind that some additional number of feet were taken off recently; as to that I would allow you damages, or to compel them as far as I am ordered to do so to pay for the restoration of that. The costs of this case will be divided, because evidence is that the plaintiff allowed the drainage of that ice box to run through this drain.

If the parties desire to appeal, a bond of \$200.00 will be taken.

No appeal was taken.

J. H. Charles Smith, for plaintiffs.

Porter & Rendigs, for defendants.

## CORPORATIONS—STOCKHOLDER'S LIABILITY.

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[Meigs Common Pleas, April Term, 1890.]

## EDWARD TURNBULL V. POMEROY SALT CO. ET AL.

1. A petition which sets out facts showing a liability of certain defendants as stockholders in an insolvent corporation, for unpaid stock, and also facts which show an individual liability, in addition, under a statute, states two distinct causes of action; and they are therefore properly separated and numbered as such.
2. When there are two or more counts in a pleading, separately stated and numbered, and no reference is made by either to matter in any other, on demurrer to one count, it must stand or fall by its own averments, and can not be helped or hurt by facts in another count, however sufficient to that end in themselves.
3. Where by a count of the petition it appears that the plaintiff is a creditor, and sues for himself and all other creditors of a manufacturing corporation, organized under the laws of Ohio, to subject unpaid stock subscriptions to payment of the corporate debts; that long before, the corporation had assigned all its property to the plaintiff for the benefit of its creditors; that this had been wholly exhausted, the fund arising therefrom distributed, leaving large sums due to the plaintiff and other creditors; that he had filed his final account as assignee, which had been approved by the probate court having jurisdiction of the assignment, but was not discharged from the trust—on demurrer, held:
  - a. That in his right as a creditor of the corporation, he could maintain the action.
  - b. That it was well brought, although the debt alleged to be due from the corporation to the plaintiff had not been reduced to judgment, and without averring either a previous demand by the plaintiff, or call by the company, for the unpaid subscriptions.
4. In a suit by a creditor for himself and the other creditors of an insolvent corporation, to recover unpaid stock subscriptions, as against a general demurrer, in order to show the liability of alleged stockholders, it is sufficient to state that they hold stock of the corporation; the amounts by them severally held; that it never was fully paid, and that on the stock held by each, a specified sum is due and unpaid; regardless of whether the alleged holders be original takers, or transferees of the stock by them respectfully owned.
5. Where a creditor brings an action to enforce an individual statutory liability, against the stockholders of an insolvent Ohio corporation; for the purposes of reference to a master in chancery, to ascertain and report who are and have been stockholders, with a view to further relief, as respects parties defendant, it is in the first instance sufficient if the petition shows that the plaintiff has brought in all who were stockholders when the corporation became insolvent, and at the time suit was begun, or given valid reasons for not so doing; although other persons may be found, who, by reason of once having been stockholders, must be made parties before a final decree will be entered.
6. An act passed May 1, 1854, to authorize manufacturing corporations to increase their capital stock in certain cases, after specifying the steps to be taken for that purpose, limits such increase "to an amount not exceeding the actual outlays and expenditures" of the company, "in the legitimate business thereof;" provides that "every such increase of capital stock shall be made up by the actual payment of the amount thereof, in money, into the funds" of the company; that no increase "shall be allowed or recognized in law, unless the same shall have been actually paid up in money," in "good faith;" and that the stockholders of a company increasing its "capital stock agreeably to the provisions of this act, shall be held individually liable, for all debts due and owing by such company." A later act, passed April 12, 1865, enacts that stockholders of "any manufacturing company which has heretofore increased" its capital stock "under the act" above referred to, "shall be individually liable for all the debts of such company, to an amount over and above the stock owned by him or her in such company, and any unpaid installments thereon, to a further sum equal in amount to such stock"—which, as to both forms of

liability, is still in force. In an action by the creditor of an insolvent manufacturing corporation to enforce, as against its stockholders, the additional liability arising from an increase of the capital stock of such corporation, under said act of 1854; where the petition expressly shows that an increase of stock was in fact made by the stockholders of the corporation, under that act, in 1856, from \$25,000, to \$75,000; that a record of the vote therefor, and the amount of such increase was duly made and filed in the recorder's office of the county in which the said corporation is located; that upon this increase of stock it carried on its business of making and selling salt, until May, 1887; that the debt on which plaintiff sues, is evidenced by a note of the corporation, made September 26, 1884; on demurrer, because there was no allegation that the increase did not exceed the outlays and expenses of the corporation, in its legitimate business, nor that it was made up by actual payment of the amount, in money, into the corporate funds, held:

1. That the stockholders, whether original takers, or transferees, are estopped, on the facts stated, to make these questions.
2. That the two acts, are in pari materia; that the effect of the later enactment is to validate a de facto increase of capital stock, of the character alleged, made prior to its passage, under the act of 1854, so far as the rights of creditors are concerned, whose claims arose since the last act was passed, to the extent at least which it creates liability for them, based upon a previous increase of stock.
3. That the individual liability of the stockholders of the corporation, defendant, for its debts, arising under the said statutes, from the increase of its capital stock, is enforceable in equity, at the suit of any creditor, on behalf of himself and all other creditors, when, in addition to other necessary facts, it is averred that the corporation is wholly insolvent, and has no property whatever subject to execution.

This is an action by a creditor, for himself and all other creditors of a manufacturing corporation, organized under the laws of Ohio, against it and its stockholders, seeking to collect unpaid stock subscriptions, and to enforce an additional statutory liability. The petition is in two counts. In the first, the plaintiff sets out, in addition to what is above stated, that the company, defendant, is located in Pomeroy, Meigs Co., O.; that September 26, 1884, it made and delivered to him its promissory note of that date, for \$6,650, at 6 months, with interest, which is wholly unpaid; that the company is insolvent, and has no property of any kind subject to execution; that May 26, 1887, it made an assignment of all its property, real and personal, to the plaintiff, for the benefit of all its creditors, under the voluntary assignment laws of Ohio; that he was afterward, by the probate court of said county, duly appointed, and so qualified, as such assignee; that he thereupon took possession of all the property, of said company, chattel and real, converted the same into money, applied the funds so obtained in payment of the expenses and costs of his trust, and on the debts of the corporation; that as assignee he rendered his final account to said probate court, which was duly approved and settled by it, November 8, 1888; that after the application of the funds derived from all the property of the company, as aforesaid, there is still due from it to its general creditors, more than \$29,500. It is then alleged "that the following named individual defendants are now stockholders, and all the stockholders of the said defendant, corporation, the Pomeroy Salt Company, in the following amounts of stock, to-wit Horace M. Horton, in the sum of \$11,128." etc.; in the same way naming each, and the amount of his stock, "that the several amounts of stock last aforesaid have never been fully paid for, either by the said stockholders, or their respective assignors, or any prior owner of said stock, or any one for them, or either of them: but that, upon their respective amounts of such stock of the said corporation, the last aforesaid



detendants yet owe to the said defendant, the Pomeroy Salt Company, the following sums payable by each of them respectively, on demand, to-wit: Horace M. Horton, \$7,418," etc.; naming each, and the sum unpaid, in the same way; "that said sums are due and unpaid by each of them respectively."

The second count says the plaintiff "brings this action against all the stockholders of the said defendant, the Pomeroy Salt Company, and sues them on his own behalf and also on behalf of all the other creditors of the company; but if it should prove to be the fact that there are other stockholders of the said corporation, when they are ascertained, the plaintiff demands that they be made defendants herein." It is then averred that said Salt Company was organized on or about December 11, 1851, with a capital stock of \$25,000, for the purpose of manufacturing salt; that on or about February 11, 1856, the said "corporation and the stockholders thereof, under and by virtue of a statute of the state of Ohio \* \* entitled 'an act to authorize manufacturing companies to increase their capital stock in certain cases, passed May 1, 1854, by a vote of the majority of the stockholders thereof, to increase the stock of said corporation from \$25,000 to \$75,000, at a meeting thereof held on the eighth day of November, A. D. 1856, did increase its capital stock from \$25,000 to \$75,000, divided into 750 shares of \$100 each; and that a record of said vote, and of the said increase was duly made, and filed in the recorder's office of the said county of Meigs;" that the said "company has been such corporation, with its capital stock so increased, carrying on the said business of making and selling salt, from the said eleventh day of February, A. D. 1856, to the twenty-sixth day of May, A. D. 1887; \* \* that said corporation is located in the city of Pomeroy, county of Meigs, and state of Ohio." The count then shows its debt of \$6,650, with interest, to the plaintiff, on the note above referred to; that the "company is wholly and entirely insolvent, and has no property whatever, subject to execution out of which said claim can be made, or any part thereof; \* \* \* that the following named defendants are the present stockholders of the said defendant, the Pomeroy Salt Company, and were all the stockholders at the time it became insolvent, and that they then owned, and now own, the stock of the same in the following amounts, to-wit: Horace M. Horton, in the sum of \$11,128, etc., naming each one, and his stock in the same way. Reasons are then alleged, as of non-residence, for not bringing in some, named as stockholders, with other averments, immaterial to the questions to be decided. The prayer is, for a master in the case, to ascertain and report who are the stockholders of said corporation, liable to its creditors herein, the amount of stock held by each, who were the stockholders when each claim proved, accrued, the transfers of stock, if any, who are insolvent, what sums are unpaid and due on stock, the amount of the company's debts, etc., etc., and for general relief. To each count of the petition, general and special demurrers, and motions were interposed, on which it was submitted.

SIBLEY, J.

There are two matters presented by this case, in their nature preliminary to more important questions, relating as they do, solely to points of practice.

The plaintiff grounds his title to relief on what is set out as two separate causes of action. It was urged in argument, that 'the facts

alleged in the two counts of the petition show but a single cause of action—a debt payable contingently from one or both of two funds. But *Warner v. Callender*, (20 Ohio St., 190, 195), in effect, rules the other way. There, as here, the alleged causes of action were: (1) to subject unpaid stock subscriptions, and (2) the statutory liability of stockholders, to the claims of creditors of an insolvent corporation. Below, a demurrer was interposed to the petition on the ground of a misjoinder of causes of action. The ruling on that was before the court for review, and they say in terms "that these causes of action were properly joined in the same action." Though the assertion of claim on "two funds" is spoken of, no intimation is given that the facts set out in form as two causes of action constituted in law but one. Yet that must have been considered, for if they showed but one cause of action, there was no question of misjoinder in the record. The recent case of *Barrack v. Gifford* (*ante* 470 O.S., 180) assumes the same view. Accurate analysis of the two grounds of claim will lead to the same result. The first count proceeds upon the obligation to pay for stock subscribed for in a corporation; the second, upon a liability additional to that, created by statute. The two causes of action, are the acts wrongful in legal contemplation, (1) of not paying for the stock, and (2) of failing to perform the statutory duty. *Veeder v. Baker*, 83 N. Y., 156; *Bliss*, on Code Pl., sec. 113.

The other point is, whether in aid of a demurrer to one count of a pleading, the court will notice facts stated in another, there being no reference by either count to what is contained in the other. Mr. Pomeroy has laid down the principle, decisive here, giving the cases in its support. He says that a cause of action, attacked by demurrer, "must stand or fall by its own averments, and cannot be helped out by any facts, however sufficient in themselves, alleged in another paragraph or count." *Remedies*, section 574; *Bliss Code Pl.*, section 121.

Nearly all the grounds which the Code enumerates are specified in some of the demurrers to both counts of the amended petition. Most of them, however, were not relied on in argument, and require notice only as the final ruling may involve their decision.

The first count is demurred to upon two grounds which merit attention, viz.: That by reason of his relation to the Salt Company, as its assignee in insolvency, the plaintiff is disabled to maintain this action; and if this be not so, that the facts stated show no right of action in equity against those who are sued as stockholders of the company.

The fact that the plaintiff has not been discharged from the office of assignee, although his trust has been completely executed, except as it may touch the unpaid subscriptions sought in this suit to be collected, will not bar his right to proceed as a creditor in this action. No authority which supports the contention that it would, has been cited, and the reason of the thing is clearly the other way. His double relation of trustee and creditor, to the fund possibly to be derived from the alleged stock subscriptions, is not shown to be an obstacle to a suit as creditor, rather than assignee. It certainly imposes no obligations more incompatible in the one case than the other. Equity can deal with his rights and duties both as creditor and assignee. Moreover, it cannot be doubted that any other creditor might maintain the action, and that upon the final hearing relief would be granted to all parties, as herein sought, if the proofs called for it. Why not then in this suit? The plaintiff is no less a creditor because he is assignee. The trust so far as can be perceived, neither abridges nor suspends his individual rights. But, on the case made

by this count, had he proceeded as assignee, his "proper remedy is by bill in equity, making all the delinquent share-owners parties to the bill." Cook on Stock & Corp. Law, section 208; Lionberger v. Bank, 10 Mo. App., 506; Sawyer v. Hoag, 17 Wall, 610; Upton v. Tribilcock, 91 U. S., 45. Nor, so far as can be seen, is the right of the plaintiff here affected by the proposition that as assignee he is invested with the legal title, and right to sue at law, for the unpaid subscriptions. For they, as a part of the capital stock of this insolvent corporation, whether in his hands, or held by the stockholders, constitute a trust fund for its creditors, who in equity have a lien upon it for the payment of their claims. Gilmor's Ex. v. Bank, 8 Ohio St., 70; Henry v. R. R. Co., 17 Ohio St., 187; Gooin v. C. & W. C. Co., 18 Ohio St., 169; County v. Allen, 103 U. S., 498; Bartlett v. Dun, 57 N. Y., 587; Ry. Co. v. Ham, 114 U. S., 594; Hastings v. Dean, 76 N. Y., 9; Lionberger v. E. S. Bank, 10 Mo. App., 506.

On the facts alleged, the rights of the plaintiff and other creditors of the Salt Company in equity, to this unpaid stock, as a trust for their benefit, had attached before suit was begun. Beyond this also, lay the statutory liability, in case what could be obtained on subscriptions proved insufficient. Suing as assignee, he was entitled to recover only the unpaid stock. But as creditor, in one action he may subject both funds, if the debts require it. He was not compelled so to proceed, and thus take upon himself the costs and expenses of a suit, if it failed upon the merits. But having done so, to the obvious benefit of everyone interested in a cheap and speedy settlement of all questions as to the rights of creditors, growing out of the insolvency of this company, it does not seem to be for those who appear on the record to be withholding its only assets, to object. So far, then, as respects the capacity of the plaintiff, or the character in which he sues, the action must be regarded as well brought. The facts showing his trust are also properly stated, as they enable the court to deal with the stock fund, should any be recovered, as the equities of the case, in view of the assignment, may require.

The construction of the record already announced, disposes of any questions upon the statute of limitations, as they arose only on the theory that facts set out in the second count would be considered in aid of a demurrer to the first. Aside from that, the general demurrers to the first alleged cause of action are put on three grounds, viz.: no demand of payment is alleged; judgment on plaintiff's claim, with execution returned *nulla bona*, is not shown; and what is set out, is insufficient to charge alleged stockholders, as such.

On the facts of this count, no demand for unpaid stock subscriptions was necessary. For the purposes of an action like this, they will either be treated as due, or court of equity will itself make the calls and enforce their payment. Sanger v. Upton, 9: U. S., 56; Henry v. R. R. Co., *supra*, 191; Hatch v. Dana, 101 U. S., 205; Harmon v. Page, 62 Cal., 448; G. P. Ry. Co. v. Fitter, 60 Pa. St., 124; Glenn v. Semple, 80 Ala., 159; Lane's Appeal, 105 Pa. St., 49—51 Am. R., 166.

Generally, under the law of this state, the creditors of private business corporations have three sources to which, contingently, they may look for the payment of their claims. The first is, all property of the corporation, subject to the levy of an execution. This constitutes its legal assets, from the fact that it can be reached through an action at law. The next resource of creditors, held to be secondary to that just stated, is the capital stock of the corporation, paid and unpaid. Beyond

this, and as a third fund, generally to be resorted to only after exhausting the legal assets and stock, is the statutory liability of stockholders. Both the stock and statute liabilities are regarded as equitable assets, as neither can be reached by creditors in an action at law, but only by a court of equity. *Patterson v. Synde*, 106 U. S., 519; *Umsted v. Buskirk*, 17 Ohio St., 113; *Pfohl v. Simpson*, 74 N. Y., 137.

Now it is perfectly settled that so long as a corporation has legal assets, the creditor is regarded as having a complete remedy at law, and there is no jurisdiction in equity to apply equitable assets in satisfaction of his debt. But it is equally well established, that if the corporation be insolvent, and its legal assets are exhausted, the creditor is entitled to, and on a proper showing of those facts, will receive the aid of equity, in subjecting equitable assets to the payment of his claim. All this is elementary, yet it appears necessary in getting at the exact point in contention here, so far as principles go which is, whether the facts of this count show that the plaintiff has no remedy at law, and is therefore entitled to the equitable relief he seeks. As that is their obvious effect, if they can be considered, the controversy is narrowed to the proposition, made in argument, that a judgment and execution returned *nulla bona*. constitute the only sufficient evidence that a party is without legal remedy, in a case of this kind.

By express provision of statute, that has been the law in New York, as to corporations like this, since 1848, and the same is true of some other states. *Bank v. Bliss*, 89 N. Y., 338; *Cook on Stock & Corp. Law*, section 200. The general rule in equity also, undoubtedly, is, to require that form of evidence of want of legal remedy. But in Ohio practice it was long since modified to the extent of holding, "that the issuing of an execution, and its return, was not necessary, if the fact of no property is averred in the petition." *Bomberger v. Turner*, 13 Ohio St., 270. Going still further, in a case where the point came into discussion, the Supreme Court of the United States, say:

"It is, no doubt, generally true that a creditor's bill to subject his debtor's interest in property to the payment of the debt, must show that all remedy at law had been exhausted. And generally, it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is, that until such a showing has been made, it does not appear, in most cases, that resort to a court of equity is necessary, or in other words, that the creditor is remediless at law. \* \* \* But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form. *Bona, sed impossibilia non cogit lex*. It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. This is certainly true where the creditor has a lien or trust in his favor. So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor. \* \* \* The foundation upon which these and many other similar cases rest, is, that judgments and fruitless executions are not necessary to show that the creditor has no legal remedy." Case

v. Beauregard, 101 U. S., 690. And it has been expressly held that "where a corporation is without any assets or property whatever, and notoriously insolvent, it is not necessary in such a case to obtain a judgment against the corporation, and return of execution *nulla bona*, before the liability of a stockholder can be enforced in equity. It is a maxim of the law that the law will not attempt to do an act which is vain, or to enforce an act which would be fruitless. Judgment and execution returned *nulla bona* are only evidence of, and constitute one kind of proof, of insolvency. Although the proof may be declared to be sufficient by statute, it does not exclude other methods." *Hodges v. S. H. Min. Co.*, 9 Or., 200; *Turner v. Adams*, 46 Mo., 95; *Paine v. Stewart*, 33 Conn., 516; *Assoc. v. Kellog*, 52 Mo., 583; *Postlewait v. Howes*, 3 Iowa, 366, 383.

Obviously, if judgment and execution are not indispensable as proof, they cannot be in averment. And such is the effect of the cases, or their facts. *Hoydes v. Min. Co.*, *supra*; *Aultmans' Appeal*, 98 Pa. St., 505; *Crawford v. Rohser*, 59 Md., 599; *Paine v. Stewart*, *supra*.

How then stands this case? If the truth of what is set out in the first count be assumed, all legal remedy had been exhausted long before suit was brought, not by judgment and execution, it is true, but in a proceeding provided for by law, and under the authority of a court of record. On what principle or ground of policy can it be said that, as evidence of want of remedy at law, this should not be equally efficacious with a sheriff's return of no property? How could a case be made, in which the expense of getting judgment, and issuing execution thereon would be more "vain," or the proceeding less a "meaningless form?" There is another aspect, however, in which this contention may be viewed, which tends to the same result. It has been over fifty years settled in Ohio, "that in equity \* \* \* the stock of a trading corporation is a pledge for the payment of its debts;" and that if not paid by subscribers, "equity may compel it to be done in a proper case, where good faith requires it." *Gilmer's Ex'r v. Bank*, *supra*. This is only a pithy statement of the doctrines respecting an equitable trust and lien, as to capital stock, already referred to above. Some courts of authority go so far as to hold that this is a subsisting and continuing trust, not within the operation of statutes of limitation. *Payne v. Bullard*, 23 Miss., 88, 55 Am. Dec., 74; *Hightower v. Thornton*, 8 Ga., 486, 52 Am. Dec., 412; *McGinnis v. Barnes*, 23 Mo. App., 413. All the authorities agree that creditors are entitled to its execution, and to the aid of equity, at the suit of any of them, for himself and the rest, by applying the trust fund to the satisfaction of their claims, whenever the legal assets of the corporation are exhausted. But this is an implied trust (2 Story's Eq. Jur., section 1252) and therefore on principles well settled, all the facts upon which it arises and becomes enforceable may be proved by parol. 2 Perry on Trusts, section 137; 2 Whart. on Ev., section 903. And on this ground it has been declared that "creditor's bills in the names of individual creditors, whether by judgment or otherwise," may be brought to subject unpaid stock, when that is shown to be necessary for the payment of their claims. *Lane's Appeal*, 105 Pa. St., 49, 51 Am. R., 169; 1 Lawson's R. & R., section 495; *Bell's Appeal*, 115 Pa. St., 88, 2 Am. St., 532; *Graham v. R. R. Co.*, 102 U. S., 161. The whole ground is in principle covered, however, by our own court, in *Barrick v. Gifford*, 47 O. S., 180, and the claim of some of the defendants that judgment or execution is

necessary to the attaching of equitable jurisdiction, in a case of the character here shown, entirely overthrown.

But it is further objected, that facts to show the liability of the several alleged stockholders, as such, are not set out.

The explicit averment is, by name and the amount of stock held by each, that the defendants are stockholders in specified sums; that the shares which they severally hold have never been fully paid up; and that on the stock alleged to be held by each, a definite sum is due and unpaid. Upon principles well settled, that would be good against an original holder. *Stoutenburg v. Lybrand*, 13 Ohio St., 228. Now the law is, that the transferee of stock "impliedly assumes all the obligations which rested upon the former holder as a member of the company, and is liable for calls to the same extent as the former holder before the transfer was made." 1 *Morawetz on Corp.*, section 159; *Pullman v. Upton*, 96 U. S., 328; *Angel & Ames on Corp.*, section 534; *Webster v. Upton*, 91 U. S., 65; *Bell's Appeal*, *supra*, 2 Am. St. R., 532. The last case cited holds, "that the obligation to make good the unpaid portions of capital stock, when the necessities of creditors require it, is a charge upon the stock, which passes with it to the holders of it. It is an equitable obligation founded upon no statute, and rests upon those who are the owners of the stock at the time of the insolvency." 2 Am. St. R., 536. It clearly follows, therefore, that the allegation of present ownership, with stock unpaid, in a suit like this, is sufficient to charge the holder—to call upon him to account, or show why he should not.

This disposes of all that needs discussion, on the demurrers to the first count; and the conclusion is that they are not well taken, and therefore must be overruled.

Coming now to the second count, one point made is that it fails to show that all who possibly may be liable as shareholders, on some of this company's debts, have been made parties. But it clearly appears that all who were stockholders, when the corporation became insolvent, and at the time suit was brought—those owning its total capital stock—are made parties, or valid reasons given for not bringing them in. The plaintiff also prays a reference to a master to have it ascertained who besides those made parties, or alleged to be shareholders, may be liable as such, and demands that they be made defendants when found; that is, in effect for a discovery on this point. Therefore, agreeing that the objection would be good to prevent a final decree against those actually in, until a master has reported on this question, it seems not well made as a bar to the relief sought in anticipation of that. Enough is certainly averred to entitle the plaintiff to a reference on the general matters respecting which it is prayed; and if so, the demurrers, general, or for a defect of parties, defendant, will not lie. *Miers v. Turnpike Co.*, 11 Ohio, 273.

The general demurrer to this count, however, raises questions more vital than those which relate merely to pleading and practice. The right of the creditors of this corporation to enforce the statutory liability here in controversy, against its stockholders, depends upon the validity as between them and the creditors, of the increase of capital stock, set out as made in 1856, under the act of May 1, 1854. There is but one section of this statute, which is as follows:

"That any company heretofore, or that may hereafter be incorporated and organized under the laws of this state, and in accordance therewith, for building and manufacturing purposes including gas companies,

are hereby severally authorized, upon a vote to that effect of a majority of the stockholders, to increase from time to time, their capital stock to an amount not exceeding the actual outlays and expenditures of such company, in the legitimate business thereof; a record of such vote, and the amount of such increase of stock shall be made, filed, and kept in the same manner and place as the original stock of such company, is by law required to be recorded, filed or kept: provided, every such increase of capital stock shall be made up by the actual payment of the amount thereof, in money, into the funds of such company; and no such increase of capital stock shall be allowed or recognized in law, unless the same shall have actually been paid up in money, as aforesaid, in good faith; and in no event shall such company use its credit for the purpose of raising funds for the payment of such increase of capital stock; and all bonds or other obligations, made or issued for such purpose, shall be void and of no effect. The stockholders of any company heretofore organized or incorporated, which may increase its capital stock agreeably to the provisions of this act, shall be held individually liable for all debts due and owing by said company, except the stockholders of gas companies, who shall be individually liable in a further amount, over and above the amount of stock by them severally subscribed, equal in amount to such stock." 1 S. & C., 369.

Two defects are asserted, as to the statement of facts relating to the alleged increase of capital stock, under this act. One is, the failure to state that it did not exceed the outlays and expenses of the company in its legitimate business; the other, that it is not averred to have been made up by the actual payment thereof, in money, into the corporate funds. The contention is, that in the absence of either, and especially of both of these allegations, the transaction for an increase, as set out, is to be held absolutely void; in which view, no liability can arise upon it.

On the authorities, and having regard to the facts disclosed in this count, whether the question as to the validity of this increase can be raised, except by the state, is very doubtful. *Pullman v. Upton*, 96 U. S., 328; *Clark v. Thomas*, 34 Ohio St., 62. *Cook on Stock & Corp. Law*, section 228.

So far as respect an excessive issue, that the action taken was not void, but only voidable, at the instance of the state, seems quite clear. The case differs from those in which the exact amount to which an increase may go is specified by the statute authorizing it, and the issue exceeds the limit. Even then it would be void only as to the excess, and so a defense to none except those holding the illegal stock. But here it was by the law left to the judgment of the stockholders, looking to what they deemed the needs of the corporate business, to say what the increase should be. Hence their action, if not fraudulent, is conclusive of its legality. On the other point the case is perhaps more difficult. The provision is that no increase "shall be allowed or recognized in law," unless it has been paid up in money. But taking the whole act together, this does not appear to show an intention that stock in fact issued upon such increase, shall be absolutely void because unpaid. When that was to be the effect of the statute, upon action thereunder, it is expressed; as in a few lines following the clause in question, in regard to bonds of the company issued to raise money to make up the increase. It is explicitly declared that they "shall be void and of no effect." That is clear and emphatic. If there was the same intention as to an unpaid increase of stock, why was it not in like terms expressed? The policy of the statute

in this feature seems to have been to put restrictions upon a mere "watering" of corporate stock, at the same time that it authorized increases commensurate with the growth of business, and the larger capital thereby made necessary. To that end, and for the purpose of having the corporate assets correspondingly enlarged, it was required to be made up in money. This evidently would be in the interests, and for the protection of those dealing with the company. Light is in this view thrown upon the negative clause, respecting the allowance or recognition in law of an unpaid increase. This is given all necessary operation, when the failure is held to be ground to avoid the issue, by the state, and an answer to claims based upon it, by holders of such stock. To go further would be to make it a sword in the hands of wrongdoers. This is not required by the terms of the act, and manifestly should not be by its construction. The result then is that the increase, on the state of fact alleged, was not void, but only voidable. Hence it may be the basis of liability to creditors, such as the act imposes, upon the principle of an equitable estoppel. After what is alleged to have been done has stood for more than thirty years, evidence by a public record, and the company during all that time has carried forward its business upon the presumed credit of it, holders of the stock will not be heard to deny their liability consequent thereon, under the statute, as to debts made since the increase, by saying, if such be the facts, that it was fraudulently excessive and never paid up. On this proposition, as applied to this case, the authorities are decisive. *Chub v. Upton*, 95 U. S., 665; *Clark v. Thomas*, 34 Ohio St., 46, 62; *Gilmer's Ex. v. Bank*, *supra*; *Kent v. O. M. Co.*, 78 N. Y., 159; *Voorhees v. Receiver*, 19 Ohio 463; *Goff v. Flesher*, 33 Ohio St., 107; *Veeder v. Mudgett*, 95 N. Y., 295; *Rowland v. F. M. Co.*, 38 Ohio St., 270; *Cook on Stock & Corp. Law*, section 288.

But there is another view of the matter, which seems to cut off all question at this point. "The correct rule of interpretation is, that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any of them, and it is an established rule of law that all acts *in pari materia*, are to be taken together as if they were one law. \* \* \* And if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they would amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *U. S. v. Freeman*, 3 How., 564. The same court has held, also, that "where a legislature has full power to create corporations; its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to an organization, and makes a *de jure* out of a *de facto* corporation." *Comanche Co. v. Lewis*, 133 U. S., 198.

An act which passed and took effect April 12, 1865, section 5, provides that "the stockholders of any manufacturing, bridge or gas company, increasing its capital stock under this act, or which has heretofore increased the same under the act entitled 'an act to authorize manufacturing companies to increase their capital stock in certain cases,' passed May 1, 1854, shall be individually liable for all the debts of such company to an amount over and above the stock by him or her owned in such company, and any unpaid installments thereon, to a further sum equal in amount to such stock, etc." *Swan & S.*, 237. This section was amended, but not changed on the points here material, in 1872, (69 Ohio L., 25), and in its operation upon the stock and individual liability, is



continued in force by Rev. Stat., sec. 3258. Bishop on Stat. Crimes, section 181.

Now, with reference to the effect of this statute, how stands the case? In 1856, as this count shows, every step for the increase of its capital stock, in the sum named, had been taken by the stockholders of this Salt Company down to and including the filing of a certified record of its action in that regard with a public officer, as required by the act of 1854; the stock itself was then also issued, and became the basis, for so much, of the company's credit and business, from that time to the date of the later enactment; but it had not been paid for by the holders. As above shown, the increase was not void because unpaid. Hence it is to be regarded as good *de facto*, so long as the state saw fit not to set it aside. By its terms, the act of 1865 includes the stockholders of "any manufacturing company" which had "increased" its capital stock "under" the act of 1854. It also covers this exact case by making such stockholders liable for "unpaid installments" on their stock, as well as for the additional amount which it provided, when necessary to pay corporate debts. Further, in referring to increases under the earlier act, for the purposes of the liabilities which the later one creates, it omits the requirement in the first, that they should have been made "agreeably" to its provisions. Expressly, then, and by the clearest recognition of the validity of a *de facto* increase of capital stock, such as here is in question, for the purposes of liability against stockholders, by it created, the act of 1865 operated to make it a *de jure* increase. Therefore from that time on, and as to all debts since made by the corporation, at least, it must be so treated.

Taking these acts of 1854 and 1865 together, it is a question whether the liability in a case like this is not direct, rather than collateral, as under the general statute. Here it is provided that the stockholders shall be "individually liable for all the debts of such company to an amount," etc. The other liability is "to the creditors of the corporation to secure the payment of the debts," etc. Rev. Stat., sec. 3258. The chief difference, practical to the case is, that if the liability be direct, the creditor must proceed in equity, which alone can give adequate remedy, and where jurisdiction will be taken to avoid a multiplicity of suits. *Harris v. Dorchester*, 23 Pick., 112; *Pfohl v. Simpson*, 74 N. Y., 137; *Bank v. Stevenson*, 5 Allen, 398; *Hornor v. Henning*, 93 U. S., 228. But if this view be not well founded, and equity will assume jurisdiction only when want of legal remedy is shown, the averments in the second count, that the Salt Company is wholly insolvent, and has no property whatever subject to execution, from which the plaintiff's claim, or any part thereof can be made, as matter of pleading, on that point, are good against a general demurrer. The evidence of insolvency, and want of legal assets, need not be set out. *Bomberger v. Turner*, 13 Ohio St., 264; *Terry v. Tubman*, 92 U. S., 156; *Hodges v. Min. Co.*, 9 Or. 200; and cases on like point, *supra*.

This disposes of the questions on the demurrers to the second count, so far as discussion is called for, and the result is that they must be overruled. The motions are in several instances frivolous, and in none, well taken. They are therefore all overruled.

W. H. Lasley, for plaintiff.

E. A. Guthrie, for Welch, defendant.

M. M. Granger, for Hildreth's ex'r.

S. S. Knowles, for Geo. Hildreth.

Grosvenor & Vorhes, J. U. Myers, Russell & Webster, for other defendants.

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## SPECIFIC PERFORMANCE.

[Superior Court of Cincinnati, 1890.]

## URSULINE COMMUNITY V. HENRY HUNEKE.

A good title must be tendered within a reasonable time after sale of real estate in order to entitle plaintiff to specific performance of contract.

NOYES, J.

This was an action to compel specific performance of contract for the purchase of a parcel of real estate lying on the east side of Sycamore street, north of Liberty, Cincinnati. Said property was conveyed by Anna Gallager, a nun, to the plaintiff, a corporation under the laws of California and located at Santa Rosa, California. Prior to April 16, 1889, Meyers, Gibbs & Co., auctioneers, advertised said premises to be sold at auction on said day, perfect title to be given. On the day of the sale the auctioneer stated that title and immediate possession would be given to the purchaser. With this understanding the defendant bid on the same and it was knocked down to him as the highest bidder, and he signed a memorandum of purchase. It appeared from the evidence that the power of attorney given was not sufficient to authorize the agent at Cincinnati to make a deed, so that a deed had to be prepared and sent to California for execution. About a month after the sale a deed was tendered to defendant which he declined to accept on account of informalities in its execution. Suit was then brought to compel defendant to take under said deed.

It further appeared from the evidence of the officers of plaintiff, taken by deposition in California, that the board of directors of said corporation never passed a resolution authorizing the sale of real estate, or the making of a power of attorney, or of the deed tendered to defendant. They thereupon met as a board and passed a resolution ratifying the acts of its officers and agent, and in the meantime, the president having died, and in order to cure any defects relating to the former deed, a new deed was executed and tendered to the defendant on the day of trial, about eleven months after the date of sale.

The testimony also showed that defendant, who is a grocer, was occupying his present store under a five years lease which expired in June following the sale, and that it was important to him for several reasons to get immediate possession of plaintiff's lot, so that he could build on the same.

*Held:* That the title offered to defendant under the first deed was not good, and that defendant was not obliged to take it, and that it would be inequitable to compel him to take it under the second deed, tendered so long after the sale, when one of the conditions of the sale was immediate possession; a good title should have been tendered within a reasonable time. Petition dismissed.

Stephens & Lincoln, for plaintiff.

J. H. Charles Smith and J. R. Saylor, for defendant.

## INTOXICATING LIQUORS.

153

[Hamilton Common Pleas.]

## \* JOHN LEDERER V. STATE OF OHIO.

1. The information or indictment under Statute 8092-18 (sec. 11) S. & B. R. S., on the charge of allowing a saloon to remain open on Sunday need not state the purpose or intent for being open.
2. If the place where intoxicating liquors are sold on other days of the week, be accessible (either by front or rear door), so that one's patrons, or the public, may enter and occupy as a public resort on Sunday, then such place is not closed, and is open in violation of the statute: And if such place be one hall or room, in which the proprietor also keeps a restaurant, cigar-stand, gives musical concert or theatrical performance, and keeps open on Sunday, as a public resort, carrying on any such other business, selling non-intoxicating drinks (and serving them at the tables and in the part of the room where intoxicating liquors were sold and drank on other days of the week), then such place, room or part of a room is open and the law is thereby violated, although the bar, beer pumps and counter be securely enclosed by a wire or other screen, and no intoxicating liquors were sold or exposed for sale on that day.

## BUCHWALTER, J.

The plaintiff in error was prosecuted in the police court, and waiving trial by jury, was found guilty by the trial judge, upon the charge of allowing his saloon to remain open on Sunday; was sentenced to imprisonment in the workhouse for ten days, and to pay a fine of \$25.00 and the costs. The information, in substance, charged that he did, June 16, 1889, on the first day of the week, commonly called Sunday, unlawfully and knowingly allow to remain open a certain place (not a regular drug store), where, on other days of the week \* \* \* than Sunday, he therein exposed for sale and sold intoxicating liquors.

The bill of exceptions sets out fully the evidence heard, and contains a plan showing the interior arrangement of the "Atlantic Garden," the place wherein the plaintiff in error carried on business.

A motion for new trial was filed, overruled, and exception taken. The proof sets out the facts without any material controversy, so as to raise distinctly the legal issues.

The place wherein plaintiff in error carried on business is a large hall building enclosed and used as one room. It extends from Vine street to College street, with a public entrance at each street. On the one side is located the cigar counter, the bar counter, beer pumps, and beer waiters' counter and, further to the rear, the orchestra platform. On the other side is located the lunch counter and its attachments. In the rear and central part of the room are located the beer and lunch tables.

The proprietor carried on, in these premises, the following various kinds of business: Keeping a saloon, (selling intoxicating liquors, chiefly beer); concert hall entertainment, (for which he had a license from the city comptroller); keeping a restaurant, (for which he likewise had a license); and keeping a cigar-stand.

It is manifest these various kinds of business were harmoniously operated together on days other than Sunday. The beer, wine, liquors and cigars being served with the musical and theatrical entertainment, and with lunch and dinner. The regular dinner was served on certain tables usually kept for that purpose. The various drinks are generally served by the waiters, at the various beer tables set about the hall, chiefly in the rear part. The beer was delivered by the bartender, from the beer pumps, to the waiters' counter the waiters giving their checks for the same, delivering it to the patrons at the tables, collecting pay therefor, and settling at the counter.

On the Sunday named, in the information the proprietor had the beer pumps locked in and locked, and a wire screen enclosed the bar counter, being on top of the counter, in front, to the height of four feet, and extending at the ends, four feet to the floor, thus having a uniform height of eight feet from the floor. The bar was visible through the wire screen, but the doors at each end were locked.

\*This judgment was affirmed by the circuit court; 3 Circ. Dec., 302.

No intoxicating liquors (as beer, wine, or whiskey) were sold, or exposed for sale, on that Sunday; but lunch, regular dinner, lemonade and mineral water were served in the room or place, at these tables. In obedience to the proprietor's orders the doors were opened at a quarter before noon, and they remained open during the day, about twenty persons being present at the time when the officers passed through; the front door was partly open, and the place accessible, at both ends, to patrons and the public.

Two legal issues are raised on this record, viz.: Counsel for plaintiff in error claims:

1. Insufficiency of the information, because it does not set out the intent or purpose of keeping open.
2. That, on the facts in proof, there was no violation of law:—for that the proprietor closed the part of the place or room where such liquors were, on other days, sold or exposed for sale.

The information was drawn strictly in the words of that part of the statute which pertains to the offense of "allowing to remain open." He is charged with knowingly doing that which the statute says he shall not do. In offenses of this character it is sufficient to follow the language of the statute, in the information. *Kern v. The State of Ohio*, 7 Ohio St., 411; *Miller & Gibson v. The State of Ohio*, 475; *Oshe v. The State*, 37 Ohio St., 494. The indictments in the cases cited were for keeping a place where intoxicating liquors are sold contrary to law as provided in sec. 6942 of Rev. Stat. If a man put himself in a state of intoxication, he is guilty of offense against the law; and the information, or indictment, which alleges his state of intoxication is sufficient without also averring the intent or purpose for becoming so.

It was held, in *Fant v. The People*, 45 Ill., 259, that in prosecutions of this character, "the indictment need only charge that the accused 'kept open a tippling house on the Sabbath day or night,' and that 'it was surplusage to aver the purpose' of doing so.

In *Lynch v. People*, 16 Mich., 472, the complaint simply charged the defendant with keeping open, in the language of the ordinance, and did not aver the purpose of keeping open. A conviction was sustained, the opinion being delivered by Judge Cooly.

See, also, *Moliter v. State of Ohio*, ante 10 Dec. Re. 324, where the common pleas court of Cuyahoga county held the intent or purpose to sell alleged in the information surplusage.

The pleader in criminal causes must bear in mind the distinction between misdemeanors of this character and those crimes or felonies involving deceit, fraud, false pretense, dishonesty, or malice, wherein the state of mind with which an act is done is an essential element of the crime. Observing this distinction, the rule herein stated is not at variance with that announced by Judge Ranney, *Dillingham v. The State*, 5 Ohio St., 280, 383, in the body of his opinion, wherein he says, "That in accusations for this offense (false pretense) is not sufficient to simply follow the language of the statute. \* \* That the particular pretense or pretenses by which the money is obtained must be specifically stated."

A much more serious question is involved in what was the legislative meaning of the words "shall be closed," "allowed to be open, or remain open." And this brings us to the consideration of the second question in this case: Whether the plaintiff in error "closed," or "allowed to remain open on Sunday the place where such liquors were usually sold or exposed for sale?"

Section 11 of the amended act passed April 14, 1888, No. 8092-18, *Smith & Benedict, Revised Statutes*, provides: "That the sale of intoxicating liquors, whether distilled, malt, or vinous, on the first day of the week, commonly called Sunday, except by a regular druggist on the written prescription of a regular practicing physician for medical purposes only, is hereby declared to be unlawful, and all places where such intoxicating liquors are on other days sold or exposed for sale, except regular drug stores, shall on that day be closed, and whoever makes any such sale or allows any such place to be open or remain open on that day, shall be fined in any sum not exceeding one hundred dollars, and not less than twenty-five dollars and be imprisoned in the county jail or city prison not less than ten days and not exceeding thirty days." And, by way of defining the legislative meaning of the word "place," it says, "In regular hotels and eating houses, the word 'place' herein used shall be held to mean the room or part of room where such liquors are usually sold or exposed for sale, and the keeping of such room or part of room securely closed shall be held, as to such hotels and eating houses, as a closing of the place within the meaning of this 'act.'"

Does the record in this case show that the proprietor (keeping a restaurant or eating house in connection with the saloon) did keep such part of the room, hall, or place where such liquors were usually sold, or exposed for sale, securely closed, on Sunday? On the correct answer to this question depends the guilt or innocence of the plaintiff in error as to the charge of violation of law as stated in the information.

There can be no dispute as to what part of this place was closed. It was the bar and beer pumps. According to the scale of the plan in proof, (five feet to an inch), the enclosure of the bar would be a space of twenty-five or thirty feet long by eight feet wide, and around the beer pumps six by ten feet; or, in a rough estimate, about one-twenty-fifth part of the entire hall or place.

Were intoxicating liquors sold, or exposed for sale, in other parts of the hall on other days of the week? It appears to me to be the inevitable conclusion that beer and other intoxicating drinks and liquors were, on such other days, sold and exposed for sale all over that hall or room, at the various tables provided for that purpose. At these tables the patrons were served, the delivery was made to them at those parts of the room, and they there paid the waiters for the same. The system of delivering to the waiters by the bar tender, charging to them and taking their checks, was but a convenient system of delivery and collection on behalf of the proprietor. He, and not the waiter, carried on that business and sold the drinks to the patrons.

If the court were to technically hold that the proprietor sold and exposed for sale beer, etc., to the waiters, then the sale and exposure for sale and delivery were at the beer waiters' counter, and that was not enclosed.

The business of the plaintiff in error was chiefly keeping a beer hall. The concert, restaurant and cigar businesses were but accessories to it. It was the saloon business which required and occupied so large a hall.

Nor does it satisfy the law to open such a place, make it accessible to one's patrons and the public as a place of resort on Sunday, to serve lunch, lemonade and mineral water, but make the act of closing it consist solely in shutting out the bar and refusing the sale of intoxicating drinks.

The purpose of the law was to close such place, or part of a place, as a public resort. This statute creates two offenses, or misdemeanors: The one, of selling intoxicating liquors, and the other, of keeping open the place on Sunday. The plaintiff in error was not arrested for selling, but for keeping open. While selling is evidence of keeping open, yet it is no part of that offense set out in the information.

Nor do I understand the legislative meaning of the word "open" to be and to include "for the purpose of selling intoxicating liquors." The statute does not mention the name "saloon," nor does it, like the Illinois statute, designate it as a "tipping house," but simply as the "place" where intoxicating liquors are, on other days, sold, or exposed for sale.

In *People v. Waldvogel* 49 Mich., 337, the Supreme Court affirmed a conviction on an information charging a like offense under the Michigan statute. On the trial the judge refused to charge. "That if the jury find the defendant was there for the purpose of cleaning out the saloon, and not for \* \* selling liquor, the criminal intent is wanting," and also, "That unless they find that the defendant was in his place of business \* \* for the purpose of selling liquor, they must acquit;" and did charge the jury "That if the defendant kept his saloon open, so that the public could enter if they chose, he would be guilty."

In *People v. Blake*, 52 Mich., 566, and *People v. Roby*, Id., 577, decided in 1884, Justices Sherwood and Cool announced the opinion of the court, holding that, under sec. 2274 of the Rev. Stat., of Michigan, requiring all saloons to be closed on Sunday, "Any saloon keeper must, at his peril, keep closed, and that he has violated the law if his clerk or bar-tender open the saloon without his knowledge or consent."

And in *People v. Minter*, 59 Mich., 557, decided in 1886, in which the opinion of the court was announced by Justice Sherwood, the court affirms the doctrine of these preceding cases, but in more specific terms states:

"That the rule laid down by this court is that the person who engages in the business of carrying on a saloon must, at his peril, see that no necessity exists for keeping the same open by carrying on any other business therein, which would require the doors to be open, or for persons to enter therein." But the trial judge, in that case, had instructed the jury: "That if they found the saloon open for any purpose whatever, then they should find the defendant guilty." And this the Supreme Court held to be error, and reversed the judgment of conviction,

stating that if such construction were given the statute, and the former rule as laid down by the court, it would prevent the keeper from entering and leaving the saloon, himself, for any purpose; which was not the intention of the statute.

In the Michigan cases, however, it is to be remembered that the statute of 1881 defined the word "closed" to apply to back door as well as front, and also stipulated that in such prosecution it is not necessary to prove liquors were sold.

In *Momes v. State*, 78 Georgia, 110, a recent case, the trial court charged the jury: "If it be a tippling house, it must be kept closed during the entire time, and if it be opened for one moment, for any purpose, the law is violated." And the Supreme Court affirmed the charge as correct. This case I cite as one of the recent cases considered by me, but it is an extreme construction of the Georgia statute, is directly at variance with *People v. Minter*, and I do not rely on it as a correct statement of the law, in arriving at my conclusions in this case.

It is clearly not the intention of our statute to prevent a proprietor, or his family living in the building, having access to their apartments through the saloon, or to open for such individual purposes; but the statute does aim to prevent opening such place as a public resort, on Sunday, where patrons and people may freely enter, whether intoxicating liquors be exposed for sale or not. The authorities are uniform that the manner of opening, whether by rear or front door, or if it be unlocked and opened only to those who knock, is immaterial; for, if the public can enter, it is open.

The Sunday law is of similar intent to the midnight closing law, (sec. 8092-29, Rev. Stat., *Smith & Benedict*), which provides against allowing to be open, or remain open, between midnight and six o'clock A. M., any place, other than a regular drug store, where intoxicating liquors are sold, etc. An ordinance of the city of Chicago, which by like provision prohibited saloons being open between midnight and five o'clock A. M., received the following construction, in *Baldwin v. Chicago*, 68 Ill., 418: The cause was tried on an agreed statement of facts, showing that Baldwin kept a restaurant and saloon all in one large room, his main business being to provide meals to boarders and transient customers.

That he also sold liquors, being duly licensed to do so.

That, on the night in question, before twelve o'clock midnight, he closed his bar, by drawing a curtain around it, shutting it out of view, and did not open it or sell any liquor until after five o'clock A. M.; that he kept the place open after midnight, serving meals only.

On these facts the trial court found him guilty, and the Supreme Court affirmed the judgment, saying: "That to our minds it is clear that the terms used (in the ordinance) apply to and include the room in which the business is carried on. The object of the ordinance is manifestly not merely to stop drinking at that hour, but also to compel those who are inclined to collect and tarry at such places, to then depart."

Other statutes of some of the states, containing words of apparent equivalent meaning, prohibiting keeping saloons open on Sunday, have received from their respective courts, a somewhat different construction importing to the words "keeping open a tippling house," "open for the purpose of selling liquors." See *Fant v. People*, 45 Ill., 259; *Koop v. People*, 47 Ill., 327; *Patten v. Centralia*, 47 Ill., 370; *Kroer v. People*, 78 Ill., 294. And yet it is impossible (to my mind) to reconcile the logic of these decisions with that of *Baldwin v. Chicago*, 68 Ill., 418.

The consideration of this question—the construction of this statute, has involved the examination of many decisions of the various states, as to statutes prohibiting keeping open saloons, stores, etc.

In my opinion, if the proprietor of these various kinds of business desire to legally operate them together, and any of them on Sunday, he can only do so (accommodating himself to the law,) by having his saloon, or place for selling intoxicating liquors, in an adjoining, or convenient room, or apartment, which he can close and thereby prevent its occupancy as a resort.

To give this law the construction asked by counsel for plaintiff in error, would authorize every saloon where accompanying meals and lunch are served, to remain open as a resort, selling drinks other than intoxicating, and serving meals and lunch. This would also involve in each prosecution, an inquiry into the question whether such drinks were intoxicating, or not. This certainly was not the meaning of the statute which the legislature enacted.

That such legislation is constitutional is no longer matter of legal controversy, where the legislative purpose is, not to destroy a property right, but, in the exercise of police powers, limiting the freedom of the individual in his personal and property control, for the supposed protection of others, and to promote good order, sobriety, morality and the public welfare. When the legislature keeps

within that domain, its legislative discretion is supreme, and the sole duty of the judiciary is to construe its enactments and administer its laws.

The sole constitutional ground on which such legislation rests is in the legislative police powers, and therefore the legislature has the same constitutional right to regulate by law the observance by the people of Sunday that it has as to election day, holidays, or days of rest, and none other. The question is one for the law-making power, the legislature, to say how far it will limit the right of man to freely pursue his own will and pleasure in his labor, rest and recreation; how and to what extent, during what days or hours, the state will, by general regulations, call the citizen from labor to rest, or designate the time he or his children shall devote to mental culture, to prevent our work and debasement, close or regulate places of entertainment, places where intoxicating drinks are sold, for the purpose of removing temptation from the people to indulge in excesses when they are idle and resting from labor, to prevent intemperance and disturbances of the peace, to lessen the financial burdens of the state in preserving good order, and to promote public welfare. *Bergman v. Cleveland*, 39 Ohio St., 651; *Commonwealth v. Alger*, 7 Cushing, 84; *Soon Hing v. Crowley*, 113 U. S., 703; *Mugler v. Kansas*, 123 U. S., 623; *Powell v. Pennsylvania*, 127 U. S., 678.

The legal presumption is that such was the legislative purpose; and that it was not to destroy a property right, nor to promote any religious view or tenet, nor to enforce an observance of the day as a Christian Sabbath; for, with such purpose it would encroach upon individual rights of conscience, which are securely protected by constitutional provisions. *Bloom v. Richards*, 2 Ohio St., 387; *McGatrick v. Wason*, 4 Ohio St., 566; *Board of Ed. of Cin. v. Minor et al.*, 23 Ohio St., 211.

Judgment of the police court affirmed.

Judge M. F. Wilson, Shay & Cogan, E. G. Hewitt, attorneys for plaintiff in error.

P. J. Corcoran, W. L. Dickson, attorneys for State.

## RIPARIAN RIGHTS.

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[Hamilton Common Pleas, August, 1890.]

### WINIFREDE COAL CO. V. CENTRAL RAILWAY AND BRIDGE CO.

1. The right of access to navigable water of a riparian proprietor on the Ohio river is subordinate to the power of congress over subjects of inter-state commerce.
2. Congressional authority to erect a bridge between Kentucky and Ohio is an exercise of power over inter-state commerce.
3. Hence, a riparian proprietor on the Ohio river cannot enjoin the erection of a pier for such bridge opposite his front but below low water mark authorized by congress and the two states.

The Winifrede Coal Co., owning several hundred feet of landing on the Ohio river, between Ludlow and Lawrence streets, in Cincinnati, down to low water mark, and using the same as a wharf and coal landing, seek to enjoin the Central Bridge and Railway Co. from placing a pier for its bridge between Ohio and Kentucky in the bed of the river, some sixty feet beyond low water mark, but opposite plaintiff's property, on the ground that it will seriously obstruct the access to the landing and diminish its value. The defendant is proceeding to do this under a right to construct a bridge from Newport to Cincinnati, granted by Ohio and Kentucky and by congress, on plans approved by the secretary of war under congressional authority. The Coal Company claims that the Bridge Company must condemn the right thus to obstruct its access; whereas the Bridge Company, although about to condemn in our probate court the right to put one of its piers on plaintiff's landing, denies any responsibility for the consequential injury of this channel pier outside their lines. The case comes up on plaintiff's motion for preliminary injunction.

BATES, J.

The right of access in Ohio is of two kinds.

First: A right to step from one's own property directly to and upon the highway, that is, a right to cross the border, without intervening obstacles, in order to exercise the general right of passage upon the road. This right is not peculiar to Ohio, but is universal; yet even this is subordinate to many partial interruptions proper to a highway, as when gas lamps or electric railway poles monopolize part of the border line and diminish its length.

Second: The further right peculiar to Ohio, the justice of which is universally recognized, while its accordance with law is nearly as universally denied, to prevent the public changing a grade without compensating the abutter for injury caused by it. This right in a grade is founded either on a doctrine that the authorities, by fixing a grade, have partitioned the respective rights of the public and of the abutter in the highway, and can not again change; or on estoppel in that by adopting a grade they authorize an abutter to act on its permanence and impliedly promise him non-interference, and if he, relying thereon, expends money in building upon his lot in conformity with such grade, the estoppel gives him a private property right in the grade, which the public can not sacrifice without first compensating him. Here two elements are necessary to create the right, viz.: The public must act by making a grade, and the abutter must have relied on it to the extent that a change would do him injustice. Neither of these elements exist in the present case.

Furthermore the land highway was once private property and was taken or given out of it; it had no independent existence until the extent of private holdings were limited to create it; and thus the abutter in a sense has paid for his highway. It is obvious that this fact differentiates it from a river where nature and not consent or parting with value creates the way.

But a further and more conclusive consideration remains. The Ohio right of access at its strongest, as a property right applies only to a direct step from the property to the highway, and in no case (except ways of necessity which depend on other principles), implies an easement to cross the land of others. Yet here the plaintiff seeks to extend the access doctrine to a right over intervening property which he does not own, in order to reach the channel where he can exercise his public right of passage. Now, the compact of 1792 gives common jurisdiction to Ohio and Kentucky over the water, yet the Southern boundary of Ohio extends only to low water mark on our shore. *Blanchard v. Porter*, 11 Ohio, 138, 142; *Booth v. Hubbard*, 8 Ohio St., 243. Beyond low water mark the land belongs probably to the State of Kentucky, and not even to opposite proprietors. *Berry v. Snyder*, 3 Bush., 266; *Ravenswood v. Flemings*, 22 W. Va., 52. Now, the existence of an easement of free passage across land in another state must be ascertained by the *lex rei sitae*; our law could neither determine nor enforce it.

II. As our peculiar access law does not apply, the rights of the party must be ascertained by considerations common to all the states. Now, although the right of a riparian proprietor to access has been altogether denied as a private property right, independent of, and other than as a part of his right as a citizen to navigate the channel, see *Gould on Waters*, sec., 123. Yet we may assume its existence as fairly well settled as against private interference. Thus a railroad being constructed along the banks of a stream below high water mark can not intervene



between low water and a proprietor who owns only to high water mark without compensating him. *Railway v. Renick*, 102 U. S., 180. And a riparian who has filled out and constructed a landing to navigable water, can prevent a railroad taking what he had filled. *Railroad v. Schurmier*, 7 Wall., 272, affirming 10 Minn., 82. So a riparian can enjoin an individual putting a private tramway on the water across his front. *Case v. Toftus*, 39 Fed. Rep., 730. Some cases even recognize a right of access as against the public. Such are *Yates v. Milwaukee*, 10 Wall., 497; *Shirley v. Bishop*, 67 Cal., 543; *Myers v. St. Louis*, 82 Mo., 367; *Hickok v. Hine*, 23 Ohio St., 523. But none of these cases involve or impugn the supremacy of the claims of interstate commerce or navigation; while others seem to deny any right against the public. See *Watuppa Reservoir Co. v. Fall River*, 147 Mass., 548, 557, with comments pro and con in 2 *Harvard Law Mag.*, 316, and 3 *id.* 1.

Lord Selborne, in *Lyon v. Fishmongers Co.*, 1 App. Cas., 662, asserts the riparian right of access and says it exists *jure naturae*, because the land has by nature the advantage of a stream, and the law should recognize the fact. Yet such a notion would prevent a man building a house or planting a tree on his own land because it would cut off his neighbor's prospects given by nature. This doctrine of its existence as a right by nature will be found elaborately criticised in 4 *Harvard Law Mag.*, 14, but assuming its existence, independent of the right to navigate, it will be necessary, in order to determine how far the access right is subordinate to the paramount control of congress, to see what principles the navigation cases have settled.

1. It is settled that congress, under its power to regulate navigation and all other matters of commerce between the states, can authorize an inter-state bridge over navigable waters, and determine between the rival and conflicting claims of those who use the bridge as a highway and those who use the river as a highway, which must yield to the other and how far; and neither can resort to the courts, on the ground that the interests of his class are unnecessarily sacrificed, congress being the final arbiter. *Cooley*, Const. Lim., star page 591.

2. It is equally well settled that a riparian owner's private right, at the most, is not in the navigable river as a highway, but only to get to it. And that, consequently, an obstruction not in front of him affects him not in a private right, but as a member of the public. Hence, if an obstruction, authorized by law, is not opposite his front or his wharf, but is above or below it, and impedes the passage of his vessels which load and unload at his wharf, he must submit. He has no greater right to a free river than other members of the public, and holds his rights as they do, subject to congressional control over navigation. Of such a kind are the cases of *Gilman v. Philadelphia*, 3 Wall., 713; followed by *Cardwell v. Bridge Co.*, 113 U. S., 205; *Hamilton v. Vicksburg*, etc. R. R., 119 U. S., 280, and hence the city of Keokuk was held entitled to fill out its streets or wharf them to deep water, and that an adjacent proprietor could not complain. *Barney v. Keokuk*, 94 U. S., 324; *Transportation Co. v. Chicago*, 99 U. S., 635.

3. It is also well settled that if an obstruction, to be put directly opposite to or in front of the riparian owner's line is required by the interests of navigation, he must submit. His right to reach the channel is subject to those chances. Hence, if these interests require a lighthouse, a buoy or even a dyke or levee, he can not demand compensation. For example, in the *Hawkins Point Lighthouse Case*, 39 Fed. Rep., 77,

the plaintiff owned a landing on the river, and also the soil under the river. The United States authorized a lighthouse in the river bed in front of his landing, and upon his submerged soil. He brought ejectment, and the court ruled that both of his rights, viz.: as an owner of the river bed, and as a riparian, claiming unobstructed access, were subject to the paramount right of the United States in favor of navigation.

4. Now, the right of the United States to control in the interests of navigation, is merely a part of the larger power to regulate commerce between the states. It is not specifically mentioned in the federal constitution, and has no independent existence of its own, but is merely an application or subdivision of the larger power which is specifically given. *The Clinton Bridge, 10 Wall, Gilman v. Philadelphia, 3 Wall, 713.* Hence, it follows that all those private riparian rights of access, which I have shown are subsidiary to congressional power over navigation, are necessarily so for the reason that they are also subordinate to the larger power to regulate commerce, of which navigation is but a branch. The right of congress to authorize a bridge over navigable water is an exercise of the power to regulate commerce between the states. *Hamilton v. Vicksburg etc., R. R., 119 U. S., 280.*

Hence the conclusion is inevitable, that congress has the power to authorize the pier of the bridge in the case at bar, and in so doing, neither infringed any legal right of the plaintiff nor diverted the river or its bed from its original public use. A dictum of Justice Bradley, of the United States Supreme Court, seems to recognize this conclusion in *Stockton, Attorney-General v. Baltimore & N. Y. R. R., 32 Fed. Rep., 9;* in that case, congress having authorized a railway bridge from New Jersey to Staten Island, the state of New Jersey, which owned the bed of the river, sought to enjoin it as being the private owner of the soil itself. He said:

"The power to regulate commerce between the states extends not only to the navigable waters of the country and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce, which, in the judgment of congress, may be necessary or expedient."

It follows that the injunction prayed for cannot be granted.

Ramsey, Maxwell & Ramsey, J. B. Foraker, for plaintiff.

Paxton & Warrington, R. W. Nelson, C. B. Simrall, for defendant.

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## BOARDS OF PUBLIC WORKS.

[Franklin Common Pleas, 1890.]

CHARLES E. BONEBRAKE V. WILLIAM WALL AND OTHERS.

The statute, passed April 3, 1890, creating a board of public works, and making certain changes in the government of cities of the first grade of the second class, is constitutional.

PUGH, J.

The plaintiff has applied for an injunction to inhibit the Board of Public Works of the city of Columbus from making a contract with the other defendants, *The Ohio State Journal* and *The Columbus Evening Post*, in regard to the city printing. His contention is, that the statute,

passed April 3, 1890, and stigmatized "the Ripper Law," and which created said board, contravenes several provisions of the constitution of the state.

Some, if not all, of the questions raised and argued here, and additional ones, were made and argued in the *quo warranto* case against the board, which is now pending in the Supreme Court, and which is to be decided this morning by that court. For this reason the area of the discussion will be narrowed; only a few naked propositions will be stated.

1. It was said that this statute violates Section 20, of article 2 of the constitution, which ordains that the general assembly shall, in all cases not provided for by the constitution itself, "fix the terms of office and the compensation of all officers."

The statute does not indeed fix the compensation of the city civil engineer; nor does it fix the term of office or compensation of the sealer of weights and measures of the inspector of buildings, of the inspector of plumbing, and of the other officers created by it. The power and duty to do that are bestowed and imposed upon the board. The power of the legislature to authorize the board to appoint these officers is not challenged. Therefore, the citation of *State v. Wilson*, 29 Ohio St., 347, by defendants' counsel was not pertinent. On page 350 of the report, which was specially relied upon, this provision of the constitution was not touched; it was sec. 27, of the same article, which the court there discussed.

The statute in question is not repugnant to sec. 20 of that article; because the officers created by it, and just mentioned, are not permanent officers of the city government. The Supreme Court has resolved that this section only affects permanent officers of the municipality. *Walker v. Cincinnati*, 21 Ohio St., 14.

2. It was argued that the statute impairs the right of local self-government, because the board of public works was not elected by the people of the city, but was appointed by the mayor thereof. If this was a new question, it would be entitled to the most respectful consideration, and its decision might afford the plaintiff the relief prayed for, but not upon constitutional grounds. The statute doubtless does circumscribe the right of local self-government. But there is no provision of the organic law which guarantees to the people of a city the right of local autonomy.

Section 20 of article 1 of the constitution was appealed to, to sustain this contention. That section declares that the enumeration of rights, in the bill of rights, shall not be construed to impair or deny others retained by the people, and that all powers not delegated remain with the people. But the Supreme Court has decided that this provision does not restrict or limit the powers delegated by the constitution. *State v. Covington*, 29 Ohio St., 102; *State v. Smith*, 44 Ohio St., 348.

By sec. 27, of article 2, express power was conferred upon the legislature to direct, by law, how officers, not provided for by the constitution, should be elected and appointed. It is a sovereign and uncontrollable power, vested in the legislature. Obviously, under this power, the legislature could by law authorize the mayor to appoint the members of the board.

Besides there is a sound legal dogma that the legislature possesses all legislative power, which, either expressly or by implication, is not denied to it. Hence the question is, not whether the constitution authorizes the legislature to enact a specific law, but whether it is pro-

hibited from enacting it. Contrariwise, congress derives all law making power from the United States constitution. It can only exercise power which, either expressly or by fair and reasonable implication, is bestowed upon it.

But further consideration of this argument is needless. The Supreme Court has rendered several decisions upon the subject, and the argument of the plaintiff is out of perspective with all of them. In addition to those already named, there are *State v. Baughman*, 38 Ohio St., 455, and *State v. Pugh*, 43 Ohio St., 98.

3. It was insisted that the statute is void because it conflicts with section 1, article 2 of the constitution—the provision which ordains that the legislative power of the state is vested in the legislature. It was claimed that sec. 7, 14, 26 and 30 of the statute vest in the board of legislative power. Resolutions or ordinances providing for assessments, or for work or material, the estimated cost of which exceeds \$500, are required to originate with the board; no ordinance authorizing any improvement can be passed by the council, except upon the recommendation of the board; a grant of the use of the streets for a street railway or other railroad, or for any other purpose, must be first recommended by the board; and in certain instances the board is authorized to make and levy assessments upon property which abuts upon or is benefitted by certain public improvements. Substantially, these are the provisions of the sections quoted. But not one of them confers legislative power upon the board.

These sections only provide some of the details of the partial system of municipal government created by the statute; they provide some of the public agencies to carry into effect that system.

In *State v. Smith*, *supra*, an act precisely analogous to this was construed by the Supreme Court. It is true the exact question now being considered was not agitated. But inferentially the conclusion of the court there is adverse to the contention of the plaintiff here.

In *Brophy v. Landman*, 28 Ohio St., 542, an act which is identical with the act in question, at least in relation to the provision that certain municipal acts shall be conditioned upon the recommendation of the board, was reviewed. No constitutional question was mooted; but the validity of the act was recognized.

The same comment is predicable of the case of *Bolton v. Cleveland*, 35 Ohio St., 319.

4. It was contended that this act was special in its character, conferring corporate powers, and hence intruded upon sec. 1 of article 13 of the constitution. This section has been construed so often by the Supreme Court—the cases are almost legion—that a case can hardly be conceived that does not come within the influence of some one of the decisions. The statute is obviously a general law, although in fact only one city is affected by it; and it is equally clear that it confers corporate powers. But if it is not a special act, it is not void. Subjecting the statute to the test prescribed by the Supreme Court, for determining whether it is a general or special law, no conclusion is tenable except that it is a general law. Mention of the cases is enough. *State v. Brewster*, 39 Ohio St., 653; *McGill v. State*, 34 Ohio St., 228; *State v. Powers*, 38 Ohio St., 54; *Bronson v. Oberlin*, 41 Ohio St., 476; *State v. Pugh*, 43 Ohio St., 98, 113.

5. There was another insistence of the plaintiffs counsel, based on the alleged indefiniteness and ambiguity of some of the provisions of

the statute, the provisions of other statutes having been, in very general terms, adopted by and made part of it. But there is not enough merit in this contention to call for an extended consideration of it. The statute is not so imperfect that it cannot be executed. By referring to the other statutes, it may be made definite and unambiguous. Instructed and guided by the decisions in *Cochran v. Loring*, 17 Ohio, 409, and in *State ex rel v. Commissioners*, 35 Ohio St., 458, it must be concluded that the statute is not void for ambiguity and uncertainty.

Courts will not declare an act of the legislature void because it is unconstitutional, except in clear cases; the unconstitutionality being established to the exclusion of every reasonable doubt.

For these reasons, the statement of which has been materially abbreviated, the plaintiff's prayer for an injunction is denied.

M. B. Earnhart and E. T. DeLany, for plaintiff.

J. T. Holmes, H. J. Booth and Geo. A. Fairbanks, for defendant.

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## DOW LAW TAXES.

176

[Logan Common Pleas, 1890.]

### BELLE CENTRE (VILLAGE) V. LEVI WELSH.

1. Under sec. 1862, Rev. Stat., it is competent for a village council to prescribe a penalty of \$50.00 for any specified offense, and \$100.00 for a repetition of the offense, although the thing rendered unlawful is in its nature continuous in respect to time.
2. A single sale, otherwise than as permitted by sec. 8 of the Dow Law, is a violation of any ordinance passed by virtue of the authority conferred by sec. 11 of said law.

Motion for leave to file a petition in error.

PRICE, J (at Chambers.)

The defendant, Levi Welsh, makes his motion for leave to file a petition in error, to reverse the judgment of the mayor of Belle Centre in the above entitled cause. The defendant was tried before the mayor of Belle Centre on the fifth day of August, 1890, on a complaint charging him with violating an ordinance of the village "to prohibit ale, beer and porter houses, and other places where intoxicating liquors are sold at retail." He was found guilty of the charge, and adjudged to pay a fine of \$50.00, and the costs of prosecution. He claims there was manifest error in the proceedings before the mayor, and, as before stated, asks leave to file a petition in error. The errors insisted upon by counsel, are:

First—That the ordinance under which the defendant was arrested and tried is invalid.

Second—That the finding and judgment of the mayor was not justified by the evidence.

Is the ordinance invalid? It is not claimed that the ordinance is unconstitutional, but only that the council exceeded its power in prescribing the penalty for its violation. It should be remarked, to begin with, that the complaint against the defendant charged him with violating the ordinance from the fifteenth day of July, 1890, to August 1, 1890. The section of the ordinance which it is claimed renders it invalid reads as follows:

"Sec. 3. Be it further ordained and enacted that whoever violates any of the provisions of this ordinance shall for the first violation thereof, forfeit and pay a fine of fifty dollars, and for the second violation thereof shall forfeit and pay a fine of one hundred dollars; and for the third and each subsequent violation thereof shall forfeit and pay a fine of one hundred dollars, and be imprisoned in the village jail not less than ten days nor more than thirty days."

The two (2) sections of the Revised Statutes granting power to village councils to enforce ordinances, and prescribing the amount of fines, penalties, etc., are as follows:

"Sec. 1861. By-laws and ordinances of municipal corporations may be enforced by the imposition of fines, forfeitures, and penalties, on any person offending against any such by-law or ordinance; and the fine, penalty, or forfeiture may be prescribed in each particular by-law or ordinance, or by a general by-law or ordinance made for that purpose; and the municipal corporation shall have power to provide, in like manner, for the prosecution, recovery, and collection of such fines, penalties, or forfeitures."

"Sec. 1862. Fines, penalties, and forfeitures which do not exceed the sum of fifty dollars for any specified offense, or violation of the by-law or ordinance, or double that sum for each repetition of such offense or violation, or which do not exceed ten dollars for each day where the thing prohibited or rendered unlawful is, in its nature, continuous in respect to time, shall not be deemed unreasonable; but where in any by-law or ordinance a greater fine, penalty, or forfeiture is imposed than as above specified, it shall be lawful for the court or magistrate, in any suit or prosecution for the recovery thereof, to reduce the same to such amount as may be deemed reasonable and proper, and to permit a recovery or render judgment accordingly."

Counsel for the defendant claim, that as he was charged with violating the ordinance from the fifteenth day of July to the first day of August; and that, as the thing sought to be prohibited is, in its nature, continuous in respect to time, the village council exceeded its authority in prescribing a fine of more than \$10.00 per day for its violation; hence when they prescribed a fine of \$50.00 for the first offense, and \$100.00 for the second offense, etc., they exceeded their power and the ordinance is thereby rendered invalid. It may be conceded that if the council exceeded its power in prescribing the amount of the fine the ordinance thereby became invalid as against any one setting up that fact as a defense, as was done by the defendant in this case.

The question is, did council exceed its power in prescribing the amount of the fine. Or did it keep within the limit of its power as granted by sec. 1862 of the Rev. Stat.

In the case of *Brown v. The Village of Van Wert*, 47 O. S., 477, recently decided by the Supreme Court of Ohio, the section fixing the amount of the fine, in the ordinance under which the prosecution arose, is as follows:

"Sec. 2. Any person or persons violating the provisions of this ordinance shall, upon conviction thereof for the first offense, be fined not less than \$25.00, nor more than \$50.00, and for each repetition of said offense such person or persons shall be fined not less than \$50.00, nor more than \$100.00, and in each case the party so convicted shall pay the costs of his prosecution, and shall stand committed until such fine and costs are paid, or secured to be paid within 30 days."

The Supreme Court held that ordinance to be valid. True, the penalty is not precisely the same in the two (2) ordinances; but the principle involved, and which we are now inquiring into, is precisely the same. The VanWert ordinance did fix a fine for the first offense, and one for the second offense, the minimum sum fixed being more than \$10.00. If counsel for the defendant are correct in their view of the law, the Van Wert ordinance was invalid, yet the Supreme Court held

it to be valid. Counsel insist, however, that the question under consideration was not raised in the Van Wert case, hence was not passed upon by the Supreme Court.

This I believe to be correct, so I am willing to look at it as an original question. Treating it as a new question necessitates a construction of sec. 1862 of the Rev. Stat.

When an offense is, in its nature, continuous in respect to time, it is competent for a village council to fix a penalty of \$50.00 for the first offense, and \$100.00 for the second offense, or is it limited to not exceeding \$10.00 per day during the continuance of the offense. In order to be clearly understood, I will again quote part of sec. 1862, Rev. Stat.

'Fines etc., \* \* \* which do not exceed the sum of fifty dollars for any specified offense or violation of the by-law or ordinance, or double that sum for each repetition of such offense or violation, or which do not exceed ten dollars for each day when the thing prohibited or rendered unlawful is, in its nature continuous, in respect to time, shall not be deemed unreasonable, etc. \* \* \*

In my judgment, the obvious meaning of the statute is, that there are two roads open to the council. It may prescribe fines not exceeding \$50.00 for the first offense, or double that sum for the second offense; or it may prescribe fines which do not exceed \$10.00 each day when the thing declared unlawful is, in its nature, continuous. It may adopt either one of the two modes mentioned. It provides that certain fines "shall not be deemed unreasonable," to-wit: Fines of \$50.00 for the first offense; fines not exceeding double that sum for each repetition of the offense; and fines not exceeding \$10.00 each day when the offense is, in its nature, continuous.

The ordinance is not invalid.

This brings us to the second question, was the judgment of the mayor justified by the evidence?

But two witnesses testified for the prosecution. The witness, Frank Pratt, testified in substance that he knew the location of a certain ice house on a certain lot in Belle Centre; that he saw the defendant several times sitting on a stoop in the ice house. That within the time mentioned in the complaint he purchased a half pint of whiskey from the defendant at said place, drank part of it there and carried part away with him; that he had no prescription for said whiskey, and that the defendant drew said whiskey from a whiskey barrel in said ice house.

The witness, Isaac Roebuck, testified to his knowledge of the location of the ice house, and that he was at said place on one occasion and purchased two or three glasses of beer, and that he had no prescription therefor, and on his examination-in-chief he fixed the time as "last Monday two weeks ago," which would bring it within the time laid in the complaint; but on cross-examination he testified that he could not say with certainty that it was "two weeks ago last Monday," and could not say that it was between the fifteenth of July, 1890, and the first day of August, 1890. His cross-examination neutralized his examination-in-chief and left his testimony without any value in the case. So the prosecution only proved a single sale within the time laid in the complaint. Counsel insist that he ought not to have been convicted when only a single sale was proven. This is the question we are now called upon to determine. In *Miller and Gibson v. The State*, 3 Ohio St., 475, the Supreme Court decided: "To convict for a violation of the fourth section, it is necessary to aver in the information, and prove on

the trial, that the place where the liquor was sold, was a place of public resort. And the proof must also show that it was a place where liquors were habitually sold in violation of the act. A single sale does not make the place a nuisance, or the seller a 'keeper,' within the meaning of the act. A series of sales is necessary."

This decision was made under the act of 1854, the fourth section of which is as follows: "That all places where intoxicating liquors are sold in violation of this act, shall be taken, held, and declared to be common nuisances, and all rooms, taverns, eatinghouses, bazaars, restaurants, groceries, coffeehouses, cellars, or other places of public resort, where intoxicating liquors are sold, in violation of this act, shall be shut up and abated as public nuisances, upon the conviction of the keeper thereof, who shall be punished as hereinafter provided."

When the Supreme Court say, in the case above cited, that "a single sale does not make the place a nuisance, or the seller a 'keeper,' within the meaning of the act," it simply means that he is not the "keeper" of a place of public resort; and that a place where only a single sale is made does not thereby become a nuisance so as to authorize its abatement under the eighth section of the act of the 1854.

Section 11 of the Dow law, provides, among other things: "And any municipal corporation shall have full power to regulate, restrain and prohibit ale, beer and porter houses, and other places where intoxicating liquors are sold at retail for any purpose or in any quantity other than is provided for in sec. 8 of this act, as amended March 21, 1887."

The sec. 8 referred to is as follows: "The phrase 'trafficking in intoxicating liquors' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, etc." \* \* \*

A single sale otherwise than as permitted by sec. 8 of the Dow law, is a violation of any ordinance passed by virtue of the authority conferred by sec. 11 of said law.

It is further contended that the defendant was not the "keeper" of the place, because there was no evidence that he was the owner or lessee of such place. There is evidence, however, that he had the custody, care, control, and management of the place and business. From such evidence a presumption arises that he was the "keeper" of the place. If he was acting as a mere clerk, that is a matter of defense for him to set up. No such claim was made upon the trial. I am unable to see any error in the proceedings before the mayor. The motion for leave to file a petition in error is therefore overruled.

James Kernan and John H. Smick, for motion.

Don & McLaughlin, resisting motion.



## INJUNCTION.

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[Franklin Common Pleas, 1890.]

RICHTER BROTHERS V. JOURNEYMEN TAILORS' UNION ET AL.

MILLER MERCHANT TAILORING COMPANY V. SAME.

The court of equity will decline to extend its jurisdiction so as to restrain such torts as libels on business, or character.

PUGH, J.

In the first of the above entitled cases, the plaintiffs obtained from one of the judges of this court a temporary injunction, restraining the defendants from making certain libelous publications, which were alleged to be, or would be, injurious to the business, trade, and profession of the plaintiffs. Divesting the petition of its redundancies and unnecessary verbiage, the gist of the plaintiff's complaint is, that the defendants and others ordered a strike of certain journeymen tailors of this city; that they sought to coerce the plaintiffs to pay their employees wages according to the schedule prepared by them, and to employ only members of The Journeymen Tailors Union; that they unlawfully combined together and formed a conspiracy to injure, break up and destroy their business; that to accomplish said purpose they maliciously compelled the employees of the plaintiffs to cease working for them, and prevented others from working for them. The agencies, the means, by which they did this, are not specified. Whether it was done by moral persuasion, by argument, by reason, or by intimidation and violence, is not shown by either the petition or the evidence. Therefore, all of these allegations of the petition must be laid aside, except perhaps, the one relating to the formation of a conspiracy.

The affidavits reveal a state of facts which sustains the petition in relation to the printing and circulation of the circulars, and they prove that the plaintiffs have lost customers, because the latter had heard that the plaintiffs were employing "scab" and inferior tailors. It was not proved whether the alienated customers derived their information from the circulars, or from the defendants in some other way, or whether they derived it from other sources. It was assumed by counsel for the plaintiff that the source of their information was the circulars.

It is also charged in the petition that in furtherance of the conspiracy, the Union, maliciously and willfully, adopted numerous, false, scurrilous and libelous circular letters, and posters, which it caused to have printed and circulated through this county among their patrons. Two of the circulars are copied into the petition. In substance they state that the plaintiffs cannot give satisfaction on account of the strike; that they employ "scab" and inferior tailors, who are unable to get work when competent Union tailors are at work, and that they (the plaintiffs) are sending their work to other cities to be done there. Then the petition charges that the defendants are threatening and meditating publication, posting and circulating, among plaintiff's patrons, of other false, scurrilous and libelous publications of similar import derogatory to their business. It also charges that they threaten to continue to prevent other tailors from working for the plaintiffs, and threaten to continue their intimidations, and their interference with plaintiff's business. But as there are no facts set out in the petition or proved by evidence, to show that unlawful

means were used to accomplish these ends, and to show what the intimidations consisted of, it is not necessary to notice further these matters.

A motion was made by defendants to dissolve the injunction.

The question, which opens before us, is, has a court of equity jurisdiction to inhibit a libel on a person's business? There were many authorities cited by counsel for plaintiff, but, excepting the English cases, nearly all of them were foreign and irrelevant to this question. Many of them are law, and not equity, cases. I mean these: *Steamship Company v. McKenna*, 30 Fed. Rep., 48; *In re Doolittle & Schannabacher, Strikers*, Central Law Journal, 269; *Moores & Co. v. Bricklayers' Union*, 10 Dec. Re., 665; *Carew v. Rutherford et al.*, 108 Mass., 1; *Baughman v. The Richmond Typographical Union*, 11 Va., 929.

That the plaintiffs have a remedy at law for such a tort as is set out in the petition, and conclusively proved by their evidence, was not, and could not be, challenged by the defendant.

The recent English cases have extended the jurisdiction of equity to cases like the one at bar. It is said by an eminent English author (Pollock) that there is now no positive limits to the injunctive jurisdiction of courts of equity in that country, beyond the court's own judicial view of what is just and convenient. The old boundaries of equity jurisdiction have been partially obliterated there. Infringements of copyright, of trademarks, disturbances of easement, violations of the specific rights of property, in the nature of nuisances, and continuing trespasses are not the only torts which may be enjoined there. By final or interlocutory injunction, their courts of equity restrain the publication of a libel, and in a clear case, the oral utterance of slander, which disparages the business of another. In interlocutory proceedings the jurisdiction is exercised, however, with circumspection and caution. Even the English courts, which have departed from the old land marks, insist that the injunction is only granted because damages would be an inadequate remedy, and because delay would render it impossible, or highly difficult, to do perfect and complete justice at a later stage. In the case of *Mogul Steamship Co. v. McGregor, Gow & Co.*, decided in 1885, and reported in 15 Q. B. D., 476, the court refused to enjoin a course of conduct by defendants, which, it was charged by the plaintiffs, was equivalent to a conspiracy of rival ship-owners to drive their ships out of the Chinese trade. It is obvious from this case that a court of equity, in that country, will not use the writ of injunction to restrain a conspiracy formed for the purpose of libeling and slandering the business of another; there must be something done pursuant to the conspiracy, which threatens to endanger the business.

The jurisdiction of equity over certain trespasses is founded upon specific reasons that have no application or force to a case like the one at bar. The trespass, if a single act, must be irreparable; the injury threatened or done, must be of such a character, that the property injured cannot be restored to its former condition, or that compensation cannot be afforded by damages. If the trespass is continuous in its character, though not destructive, irreparable, then a court of equity entertains jurisdiction, because by an action at law the plaintiff cannot recover damages which constitute a complete and certain relief. 3 Pomeroy's Eq. Juris., sec. 1357.

I have said the recent English cases do sustain the contention of the plaintiffs. But the American courts have refused to follow these English precedents. 3 Pomeroy's Eq. Juris., sec. 1358.

In *Whitehead v. Kitson*, 119 Mass., the Supreme Court of that state said: "The jurisdiction of a court of chancery does not extend to cases of libel or slander, or of false representation, as to the character or qualities of the plaintiff's property, or as to the title thereto, which involved no breach of trust or contract." A number of English cases are mentioned. Then the court continues: "The opinions of Vice Chancellor Malins in *Springhead Spinning Co. v. Riley*, 1 L. R., 6 Eq., 551, in *Dixon v. Holden*, L. R. 7 Eq., 488, and in *Rollins v. Hinks*, L. R. 13 Eq., 355, appear to us to be inconsistent with these authorities and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decision can be supported." The first named case is one of the cases relied upon by plaintiff's counsel in this case.

In *Kid v. Horry*, 28 Fed. Rep., 773, after reviewing all of the English cases, Judge Bradley emphasized the doctrine as follows: "But neither the statute law of this country, nor any well-considered judgment of the courts, has introduced this new branch of equity, into our jurisprudence. The authority of the Supreme Court of Massachusetts in the cases of *Boston Diatite Co. v. Florence*, 114 Mass., 69, and *Whitehead v. Kitson*, 119 Mass., 484, is flatly against it. So, also, are the New York cases, of *New York Juvenile, etc., Soc. v. Roosevelt*, 7 Daly, 188; *Brandeth v. Lance*, 8 Paige, 24; *Mauger v. Dick*, 55 How. Prac., 132. Also the Georgia case of *Caswell v. Central R. Co.*, 50 Ga., 70; and the Missouri case of *Life Ass'n of America v. Boogher*, 3 Mo. Appeal, 173. We do not regard the contrary decision in *Craft v. Richardson*, 59 How. Prac., 356, as sufficient authority to counteract these cases, or to disturb what we consider to be the well-established law on the subject. That law clearly is that the court of chancery will not interfere by injunction, to restrain the publication of a libel; \* \* \*"

The judge, also, convincingly showed that the departure from the old line of English decisions by the recent ones is due to an enlarged jurisdiction conferred by the statute; that libel and slander cases "are peculiarly adapted to and require, trial, by jury; and that as the right to such trial is guaranteed by the organic law in such cases; and as suits in equity are not maintainable, except where the remedy at law is inadequate to meet the ends of justice, a court of equity would not be justified in extending the remedy of injunction to restrain the publication of a libel.

The decision of the Common Pleas of Cuyahoga county in the *New York, Lake Erie & Western Railway Co. v. John Wenger, et al.*—an equity case—was cited by counsel for plaintiffs; but there is a radical difference between that and this case. There a trespass was enjoined. The decision was planted upon the well-settled doctrine of equity as to trespasses. The defendants there combined together and threatened to go upon the plaintiff's premises, and by force, threats, or intimidations, or requests, to prevent its employees from performing their duties as such. That contemplated act was characterized by the court as a threatened trespass. The right of the defendants, off the premises, by reasonable and peaceable means, to ask, to persuade, other men to join them in the strike and abandon the employment of the plaintiffs was not questioned, but was expressly admitted by the court. The case of *Bell & Co. v. The Singer Manufacturing Co.*, 65 Ga., was cited by plaintiff's counsel. But the fundamental fact in that case was the property of the plaintiffs in a patent, so that the case is not opposite. In *The Singer Co. v. The*

Domestic Co., 49 Ga., 70, the contention of the plaintiffs here was passed upon, and the court said: "Courts of equity will not restrain the publication of a libel, nor use the writ of injunction to prevent parties from publishing untruths respecting their wares, when there is no infringement of a property right." "The principle is," said the delivering judge, "that to authorize the writ, there must be an irreparable, expected injury to a property right. It is a perversion of language to say that the complainant has a property right in the truth of the report."

The case of *Life Ass'n of America v. Boogher, supra*, is a novel one. The court held: "An injunction will not lie to restrain the publication of a libel. Courts have no power to extend or abridge the right of every person to freely speak, write or print on any subject. \* \* \* It is an offense against the peace of society that malicious libels should be uttered, even if true. The law does not justify the gratification of malevolent feelings by even true charges calculated to wound the feelings, blast the character, and exasperate, beyond endurance, the passions of their object. The guilt of the libeller is aggravated, almost indefinitely by the falsehood of the accusation; but it is no complete defense in a criminal prosecution, that the defendant has stated no more than he stands ready to prove. In such a case as this petition states, there is a punishment provided by criminal law."

The court further says that the constitution of that state, just as ours does, forbids any instrumentality of the government to limit or restrain the right to freely speak, write, or print on any subject, "except by the fear of the penalty, civil or criminal, which may wait on abuse." The freedom of speech cannot be abridged, but the licentious abuse of the freedom can be punished. The decision in *Mauger v. Dick, supra*, is in harmony with these decisions, namely, that the jurisdiction of a court of equity does not, unless a breach of trust or contract is involved, extend to cases of libel or slander. The representations considered in that case were made in circulars which were published and distributed among the intended customers of the plaintiff.

The court construes the petition, so far as it is sustained by the evidence, to be an application for injunction to restrain the publication of a libel upon the business of the plaintiff, and following these decisions, it is decided that the temporary injunction be, and is now, dissolved.

The complaint in the second of the above entitled cases is, that the defendants composed and printed on circulars and posters, under the heading, "Tailors' Strike", the following false and malicious statements: "The following tailoring firms are scab shops. They should be shunned by all fair-minded citizens. Their present employees are incompetent botches and professional tramps and ex-convicts. Scab shops are Richter Bros., The Ohio Merchant Tailoring Co., G. T. Duval, Ritz & Cochran, M. Burns, Wm. Hegelheimer, Christ. Hertenstein, The Miller Merchant Tailoring Company." The further complaint is, that the defendants placed these posters on the bulletin board near the plaintiff's place of business, and on the walls of buildings, and fences, situated on streets leading to their place of business; that the defendants combined and conspired together to make and publish these libelous papers throughout the city and vicinity; that by means of these posters, they entered into a scheme to intimidate its employees and deter them from making engagements to work for the plaintiff, and have also requested laborers not to engage in the employment of plaintiff; that they have sent out circulars and letters urging workmen not to enter into its employment; that they

have combined to interfere with the plaintiff's business, and, by threats, to prevent persons entering into its employ, or patronizing the plaintiff; that the posters, so placed, are part of their scheme; that they are a nuisance and injury to them; that they are interfering with their profits and are destroying and deteriorating their business; and that they cannot be adequately compensated in damages.

An injunction to restrain the defendants from repeating these acts was prayed for. The defendants resist the application. If the gravamen of this action is defamation, the decision in the first case must rule this. It was argued, however, that this is not that sort of case; that it is a case which is ruled by the decision in the case of *Sherry v. Perkins*, 147, Mass., 212--a case of conspiracy, and of injury done pursuant to the conspiracy. But this case cannot be assimilated to that one. The decision there is limited by the facts of the case. There, the banner which was displayed and carried before the plaintiff's place of business was substantially like the posters here. But in addition to that fact, the display and carrying of the banner caused a large crowd of people to assemble in front of the plaintiff's place of business, when the workmen were leaving their work; some of the workmen were injured and threatened with bodily harm, if they continued to work for plaintiff; some of them were subsequently visited by the strikers and so intimidated and injured, that one of them was confined to his house for some time, and another left his work.

The scheme there, the court said, was to injure the plaintiff's business, "not by defaming it to the public, but by intimidating the workmen from laboring for the plaintiff;" and the acts of the defendant, including the display and carrying of the banner, were parts of the scheme and done pursuant to it. The court did not adjudge that the display of the banner was in itself sufficient to entitle the plaintiff to a writ of injunction; it was all the acts mentioned combined which established the plaintiff's title to the relief. It is true, it was said that the banner was a standing menace; but that was not assigned as a sole reason for the conclusion.

There is no allegation in the petition in this case, that the employees of the plaintiff have been intimidated, or that they have been threatened with violence, or any other injury, or that they have been injured, or that any of them have left, or intend to leave, the employment of the plaintiff in consequence of the acts of the defendant.

The mere circulation and posting of the libelous statements cannot, as matter of law, be construed to produce the effects. The defendant may, lawfully, persuade the workmen of the plaintiff to abandon the employment in which they were engaged, as long as they use only argument or reason, and avoid the use of threats of injury or violence, or any other unlawful acts.

The petition absolutely fails to show any act that was done pursuant to the conspiracy, except the composing and circulation and posting of the circulars. No workman was deterred by the circulars and posters, or by the threats of the defendant, from engaging in work for, or from continuing in the employment of, the plaintiff. No customer failed or refused to patronize the plaintiff on either of these grounds. None of these facts are shown in the petition. No fact or facts, constituting a nuisance in law, or an interference with, or destruction of, the plaintiff's business, or profits, are set out in the petition. Its "glittering generalities," its conclusions of fact and law, cannot be accepted as ultimate facts.

If the injunction should be granted in this case, it would have to be done on one of two grounds—either because the defendants formed the conspiracy mentioned in the petition, and as an overt act, done pursuant to the conspiracy, they composed, posted and distributed, the libelous circulars and posters; or, because the plaintiff is about to be libelled in regard to the kind of employees it has, and because its employees are about to be libelled. But the formation of a conspiracy to libel either does not alone constitute the right to an injunction; the composing and circulation of the posters and circulars only constitute a libel; and the court has no jurisdiction to enjoin the repetition of the libel, as has been perceived by the authorities cited.

The wrongs which the defendants have done is a tort, and the wrong threatened will only be a tort; for these the plaintiff has a remedy at law. The application for injunction is, therefore, refused.

Johnson & Bigger, E. C. Irvin and M. B. Earnhart, attorneys for plaintiffs.

Nash & Lentz, S. C. Luccock and H. A. Williams, attorneys for defendants.

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## CORPORATIONS.

[Superior Court of Cincinnati, February 8, 1890.]

\*CIN., N. O. & T. P. RY. CO. V. CITIZENS' NATIONAL BANK ET AL.

D. was secretary of the plaintiff company from its organization until his death six months thereafter. C. was its president. The full 30,000 shares of its authorized capital stock was subscribed for and certificates for the same signed by the secretary and president, and sealed with the company's seal, were issued at once upon its organization. C. signed certificates in blank and left them with D. for use in transfers. D. fraudulently filled out these blank certificates for shares aggregating four thousand in number in his own name and pledged them with the various defendants as collateral security for his own notes. The stock-books were in such condition that the slightest examination of them would have disclosed the frauds. An annual election took place three months after the organization, but no examination of the secretary's books was made by the president, the directors, or any one for them. The fraud was discovered a day or two after D.'s death. The stock-book was in such a condition that while it clearly showed fraud, two months of patient investigation was required to certainly separate the genuine from the fraudulent certificates. The directors did not announce the fraud until they were able to publish the numbers of the spurious certificates. Pending the investigation, C. was appointed administrator of D., and sought to postpone the sale of the collateral for D.'s notes, and in doing so induced two of the defendants to change their position on the faith of spurious certificates. This action was to compel surrender of spurious certificates for cancellation, with issues raised on cross-petitions under which it was sought by defendants to recover damages from the company for their loss. Held,

1. On the facts that with a few exceptions the certificates held by defendants were spurious.
2. That D. and C., as secretary and president, in signing and sealing certificates, acted simply as ministerial agents, and were not representatives of the company so as to make it liable other than on principles of pure agency.

\*This judgment was reversed by the superior court in general term; opinion 29 B., 15. See also 10 Dec. Re. 614.

3. That the peril of the fact of a surrender of a certificate to validate a new certificate is with the company and not with the purchaser who relies on the certificate duly executed, if the certificate is issued by the secretary in his capacity as secretary in an actual transaction with the company, however fraudulent that transaction.
4. That defendants in dealing with D., however, had to rely on D.'s statement, extrinsic of the certificate that it did evidence an actual transaction between him and the company and the peril of that fact was with them. D.'s extracting the certificates from the company's book, and filling them up and handing them to the defendants were all one act, in no part of which can there be said to be the semblance of a dealing between D. and the company. It was not within the scope of D.'s agency to issue certificates in his own favor to third persons as pledges for his individual loans.
5. That the directors and the president were guilty of negligence with reference to supervision of D.'s books so long continued as to enable him to commit the frauds, and that this was the proximate cause of defendants' losses.
6. That defendants were guilty of a want of care in not making inquiry as to D.'s authority to issue and hold certificates signed by him as secretary; that this inquiry would have disclosed the fraud, and that such want of care constituted contributory negligence, which relieves the company from liability for its own negligence.
7. That silence by the company until it could get definite information as to the extent of the fraud was not a ratification of the spurious stock, but was a reasonable course for the protection of its genuine stockholders.
8. That from the evidence, C. in administering D.'s estate acted for the company; that he induced two of the defendants to change their position to their prejudice; on the faith of the validity of spurious certificates that such action was within the scope of his authority, and renders the company liable for their losses occasioned thereby.
9. That there is an implied warranty of genuineness in the sale of certificates of stock, and that a re-purchase, on C.'s procurement, of spurious stock by one of defendants from its vendee, was not a change of position, because the actual loss is not greater than the damages for breach of warranty for which defendant would have been liable to its vendee had no re-purchase taken place.

## TAFT, J.

This is an action by the plaintiff company to settle finally and in one suit a controversy which arose over its liability to the holders, as pledgees, of certificates fraudulently issued, as it claims, by its secretary, George F. Doughty, and taken by such holders with notice of the fraud. It has made all these holders defendants, requests that they be compelled to set up their claims, if any they have, and upon final hearing, that their certificates may be declared fraudulent and they may be compelled to deliver them up for cancellation. The petition in this case was demurred to and upon reservation, in general term, its form and substance was sustained, 10 Dec Re. 614

The defendants, coming in, raise the real issues of the case on their cross-petitions, in which they claim, first, that the stock held by them is lawful, and ask damages for refusal of the plaintiff to transfer it; and second, in the alternative, that even if the stock is fraudulent, the fraud was occasioned by the negligence of the plaintiff, for which defendants, having advanced money on the certificates in good faith, are entitled to damages.

Replies are filed denying these allegations. There were a number of defendants who were made parties, but whose claim to be recognized as stockholders is really not denied. Theodore Cook, administrator of Doughty, is also a party defendant, as the holder of certain certificates. The real defendants in the action, however, are those who hold certificates which the company has refused to recognize as valid, and to these I shall refer as defendants in this opinion.

The questions to be decided are:

First—Do the certificates which the plaintiff seeks to have delivered up for cancellation as spurious, represent valid stock in the company?

Second—If they do not, were the circumstances attending their issue such as to give the defendants, or any of them, a right of action for damages for the loss suffered by them in lending money on the faith of the certificates as security?

Third—If both the foregoing questions are answered in the negative, did the conduct of the company after it learned all the facts concerning the alleged unauthorized issue of stock, amount to a ratification of the issue?

1. Upon the first question stated above, I can only give in a general way the reasons for my conclusions.

The certificates in question are like all the genuine certificates of the company, and read as follows:

"This is to certify that \_\_\_\_\_ is entitled to \_\_\_\_\_ shares of one hundred dollars each in the capital stock of the Cincinnati, New Orleans & Texas Pacific Railway Company, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate. Witness the seal of the company and the signatures of the president and secretary, at Cincinnati, this \_\_\_\_\_ day of \_\_\_\_\_.

"\_\_\_\_\_, Sec'y.

\_\_\_\_\_, Pres't."

They are filled out and signed by George F. Doughty as secretary. They bear the signature of Theodore Cook as president, with the exception of two which are signed by John Scott, the vice-president.

The certificates, before issue, were bound in two books with stubs, numbered from 1 to 500 in the first, and from 501 to 1,000 in the second. Each certificate bears the same number as its stub.

The company was organized on the eighth of October, 1881, with all of the 30,000 shares of its capital stock subscribed for and paid up. Cook was elected president, and Doughty secretary. It was under the by-laws of the company, and the statute of the state, the duty of the president and secretary to sign and issue certificates of stock for the original subscribers, and upon surrender of any valid certificate for cancellation, to sign and issue new certificates therefor. Doughty acted as secretary from the organization, October 8, 1881, to May 24, 1882, the date of his death. He was provided with a stock ledger, a register of transfers, and the book containing the blank certificates regularly numbered, as above stated. There was no book designed to contain the actual transfers of the stock, but instead of that, each certificate was endorsed with a blank form of assignment to be filled out when surrendered. The register of transfers was a book containing a regularly ruled page with numbers on it to correspond with the numbers of the certificates, and so arranged with reference to each as to permit the book-keeper to show both the certificate from which, and the one into which it was transferred. The stock ledger simply kept a ledger account with each stock owner. Doughty's mode of keeping the certificate book was to mark upon the stub of the new certificate the number of the surrendered certificate, in addition to the date, the name of the transferor and the transferee, and the number of shares. The stub had a place for the receipt of the transferee upon getting the new certificate. Cook gave but little, if any personal attention to the transfers of stock, except to sign the certificates. When he was about to leave the city for a time, he was in the habit of signing a number of certificates in blank leaving them with Doughty as secretary to be filled out when necessary.

It is undisputed that when Doughty died there had been signed by the president and secretary, and removed from the book certificates for 34,000 shares of stock which had not been surrendered or cancelled, although the authorized number was but 30,000. The presumption of validity arising from genuine signatures and the company's seal is so weakened by this undisputed fact, that the question of validity as between the certificates for the entire thirty-four thousand is to be determined only by the preponderance of evidence gathered from the competent testimony.

At the hearing of this case, such entries in the books as had been made while they were in the custody of Doughty, were admitted, on the theory that if the defendants were stockholders, as they claimed to be, then the books were kept by their common agent and were admissible against them. The entries made after Doughty's death were excluded, on the ground that they were made after the controversy at the bar was foreshadowed. Again, certain of the entries were admitted to show the fraudulent act of Doughty with respect to the certificates held by the defendants. Capt. H. H. Tatem, the present secretary of the company, an expert bookkeeper and treasurer of the company during Doughty's incumbency, was put upon the stand by the plaintiff and examined with respect to the books of the company concerning stock. Every figure and letter on every page of the stock books and register of transfers, entered during the time of Doughty, was subjected to the scrutiny of counsel, and nothing either unusual, suspicious or obscure was allowed to pass without question, answer and comment. Capt. Tatem was able to trace from the 154 original certificates issued to subscribers for thirty thousand shares the title of those shares down to the time when he as Doughty's successor began to make the transfers. Some links in the chain of title which he thus described he had to decide upon from facts not appearing on the books, but



all of these have been proven. Counsel for defendants attack the books with great vigor, and see in many entries, which are to me but clerical blunders, grounds for discarding and rejecting all the books as trustworthy evidence. If Doughty committed frauds in issuing certificates for stock, when none were surrendered, as he undoubtedly did, he had no motive but unlawful gain for himself. Therefore, it is reasonable to suppose that his frauds would only be found in certificates, by issuing which he would profit. He might profit either by abstracting from the books certificates running in his own name and disposing of them, or by issuing certificates directly to his vendees. The difficulty in doing either would be to make any entry of origin upon the books, which, upon examination, would conceal the fraud and apparently justify the issue of the spurious certificate.

(The court then discussed the various disputed certificates by number, and found them all spurious except the series 328 to 332 inclusive and Nos. 375 and 376. The court continued.)

Although my conclusion is as stated with respect to all the certificates whose numbers I have given, there is a circumstance in the case which requires me to hold that as against the estate of George F. Doughty, which is the only other claimant for the block of stock represented by No. 90, the holders of 328, 329, 330, 331, 332 and 375, 376 are entitled to that 100 shares. When Doughty issued 328, 329, 330, 331, 332 and 333, he gave as their origin No. 90, which was then, together with 89 and 91, in Epsy, Heidelberg & Company's bank as security for a note of \$25,000.00 given by Doughty and Hermann Klein & Sons. On the seventeenth of May, they paid off the note and divided the stock equally. To do this it had to be surrendered. Klein, who was a joint owner, intended to surrender it, and received two certificates for his 125 shares. Neither 89, nor 90 nor 91, was cancelled, and 547 and 548 issued to Klein for the 125 shares, was not given any origin at all upon the stub. Whether this was because he had already used 90 as the origin of the series of 328-333 or because he was ill and had not time to complete the entry, or because he intended to re-issue them, is a matter of doubt. They were found in his official safe in an envelope marked "George F. Doughty, private." Klein had an interest in all the shares in 89, 90, 91, and allowed Doughty to take them by way of surrender. I am inclined to think that I ought to presume that he intended to do his duty and carry out Klein's purpose, and that the certificate No. 90 was surrendered. (See *In re Bankhead's Trusts*, 2 Kay & Johnson, 560.)

As against the holders of the series 328-333, Doughty would be, and consequently his administrator is estopped to deny that 90 was the source of their certificates, he having once involved them in expenditure on the faith of such fact, and being now in a position to make it true. The result will be that 328, 329, 330, 331 and 332 are now valid certificates. 333 for 30 shares, went equally into 375 and 376. These certificates represent, then, 15 valid shares. 332 has already been found by a judgment in another case, to be valid, so that it needs no place in this finding. Rachel S. Gaff, holds 328 for 10 shares, Mary J. Perin, holds 329 for 10 shares, Heistand & Co., 330 for 20 shares, The German National Bank of Covington, holds 331 for 20 shares, Edward Miller holds 375 and R. A. Holden, 376, representing each 15 valid shares. These defendants are entitled to damages in the amount of the market value of such shares, at the time of the refusal to transfer with interest to the first day of the trial term.

Asto all the other certificates whose numbers were above considered, the finding must be that they are spurious.

We come now to consider the second question in the case, which is whether these false certificates of stock entitle the defendants, who advanced money to Doughty, on the faith of their genuineness, to be compensated for their loss by the plaintiff. A certificate of stock is the written evidence of the contract between the company and its stockholders, by which the latter is entitled to share in the control and profits of the company during its life, and to receive his just proportion of the assets on dissolution. The peculiar characteristic of joint stock companies like the plaintiff, as distinguished from a partnership, is the right of the holder of any interest in it, whether great or small, to transfer it to a stranger without the consent of his co-owners. To facilitate such transfers the company is given power by statute to issue through its president and secretary and over its seal certificates of ownership of its stock to its stockholders, the chief purpose of which is to enable each stockholder to prove to the trading world his title to the shares recited in his certificate. The ease with which, by the use of such certificates, stock may be dealt in, invites investment and thus gives additional value. *Bank v. Lanier*, 11 Wallace, 369. The certificate is a contractual representation made through the stockholders by the company to any member of the pub-

lic who shall rely on the stockholders' rights thus evidenced, and on the faith of it shall advance value. When such a bona fide purchaser calls upon the company to recognize his rights so obtained, and it refuses because the stock evidenced by the certificate has no existence, and the certificate is untrue, his right of action against the company is not the common law action of deceit, based upon an intent by the company to deceive, but it is to recover damages against the company for its refusal to make good the contractual representation, the truth of which it is estopped to deny. As between the company and the purchaser, he is the owner of valid stock by virtue of the contract and representation of the certificate, and no matter what the motive or ground for the mis-statement of the certificate, the company, if it issued it, must respond in damages as if it had refused to recognize valid stock.

This view of the nature of defendant's right of action, under the second cause of action, is sustained by the case *In re Bahia and San Francisco Ry. Co.*, L. R. 3 Q. B., 384. There the plaintiff was the bona fide purchaser for value of certificates of stocks issued by the company on the production and cancellation of other certificates, upon which the original owner's assignment had been forged. The act of the secretary in issuing the new certificates was in good faith. The original owner was restored to her rights as a stockholder, and the purchaser was held entitled to recover from the company the value of the shares when it refused to recognize him as a valid stockholder. The judgment was based by the Court of Queen's Bench solely on the ground that the giving out of the certificates amounted to a statement by the company, intended by the company to be acted upon by purchasers of shares in the market, that the persons in whose names the certificates ran were entitled to the shares, and that as against one who acted on its truth, the company was estopped from denying it. It was not put on the ground of negligence or deceit at all, but simply on the fact of the statement without regard to how it came to be made. It necessarily follows that the obligation created by the certificate is contractual and that recovery on it is not founded on tort.

The case of *The Queen v. Shropshire Union Railway Company*, 7 H. L., 496, cited by counsel for plaintiff to show that the corporation is not estopped by its certificate as against mere pledgees of the certificates who have not taken the legal title by a transfer, does not in the least support the claim made for it. That was a case where a director of a company held shares in trust for the company itself, the registry disclosing no trust, and the director made an equitable pledge of them for an individual debt. The question was whether the equity of the company was superior to the equity of the pledgee, and it was held that it was, because it was prior in time. The act of the company in issuing the certificate of ownership to the director, was only a solemn affirmation that he held the legal title, and could not estop the company as owners of the shares from asserting its equitable rights against one who had not added to his equity the legal title on which he relied. In cases like the one at bar, where the certificate really represents no stock at all, the company can have no equity in false stock to oppose to the right of the defendants to have it make good the statement, if made by it, that the person named is the legal owner of the number of genuine shares given in the certificate.

From what has been said, it follows that if the company issued these false certificates, it must respond in damages to the defendants, who gave value for them if they had no notice, actual or implied of their invalidity. Did the company issue them? Upon this question counsel for defendants contend that the issuance of the certificates was the act of the company in law.

First—Because by law the president and secretary were the corporation for the purpose of issuing stock; that their acts were in fact corporate acts, and no question of agency arises in the case.

Second—Because, if it is a question of agency, Doughty acted within the apparent scope of his authority in putting the certificates into circulation.

Third—Because, even if he violated his authority, the plaintiff's negligence in supervising his books, was such as to estop them from denying his authority to issue such certificates.

In maintaining the first ground, counsel for defendants argue that while corporations must of necessity act by human agency, certain of their agents occupy such a relation to the company that, for practical purposes, they are the company, and that there are really no limits to their authority to represent and bind it. A remark of Justice Miller, in *Pollard v. Vinton*, 105 U. S., 7, and the cases of *Wilson v. Salamanca*, 99 U. S., 499 and *Scotland County v. Thomas*, 94 U. S., 682, are cited as instances of such a vicarious presence of the company. Sec. 3254, Rev. Stat., provides that "Stockholders shall be entitled to receive certificates of their paid-up stock in the company; and the president and secretary of the com-

pany shall, on demand, execute and deliver to a stockholder, a certificate showing the true amount of the stock held by him in the company." It is contended that this section, in accordance with which plaintiffs passed by-laws to the same effect, puts all the power there is in the corporation to issue stock in the president and secretary, and therefore that they are, for the purpose of issuing stock, the corporation, and when they part with a duly signed and sealed certificate, the corporation has issued it. The remark of Justice Miller above referred to is as follows:

"The case of *New York and New Haven Railroad v. Schuyler*, 34 N. Y., is much relied on by counsel, as opposed to this principle. Whatever may be the true rule which characterizes actions of officers of a corporation, who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation, and the parties with whom they deal, and how far courts may yet decide to hold the corporation liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us, it is a question of pure agency, and depends solely on the power confided to the agent.

"In the other case the officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced, by the actions of its officers. And while it may be conceded, that for many purposes, they are agents of the corporation, it is also true that for some purposes they are the corporation, and their acts, as such officers, are its acts."

The case of *Wilson v. Salamanca* was where the township trustee and township clerk were empowered by statute to issue bonds for railroad purposes to a certain amount, and the township was held estopped to plead that the authorized amount had been exceeded by the statement on the face of the bond signed by the clerk and trustee, that the issue was within the limit. This was put upon the ground that the officers here signing were the officially constituted authorities of the township, and in issuing the bonds they were the representatives, and not the agents, of the township.

In the case of *Scotland County v. Thomas* a similar ruling was made. The representative in that case being the county court judges, who, in the words of Justice Bradley, "acted as the representative authority of the county itself, officially invested with all the discretion necessary to be exercised under the change of circumstances brought about by the consolidation in question."

The cases of *Railway Company v. Railway Company*, 9 Exch., 84, and *Lewis v. Mayor of Rochester*, 9 C. B. N. S., 401, also cited upon this point, hold that where a corporation acts under seal it is a corporate act, and not an act by an agent. This grows out of the sanctity with which the corporate seal was guarded and protected in England. I can not think that in this county and state, where the solemnity of a seal is by no means so great, that the mere fact that a seal is used by an officer makes him the corporation. In England the seal is not usually affixed except by the express direction of the governing body of the corporation, and it is protected by safeguards that would seem ridiculous here. See *Mayor v. Bank*, 21 Q. B. D., 168.

The power entrusted to the president and secretary to issue certificates of stock is not of the character to bring those officers of the plaintiff company within the principle established by the three American cases cited. There is no discretion vested in the president and secretary in the discharge of this duty. They are merely to furnish their signatures as evidence of a registry of title to shares. The duty is wholly ministerial. Where an officer is a corporation in the sense spoken of, he may be described as a trustee, rather as an agent, and he will have something of the powers of a trustee. Wide exercise of discretion in the discharge of the duties is the chief characteristic of such a position. Freedom from control by any other officer or agent of the company, and a responsibility only to the whole body of stockholders, or *ces tuis que trust* are likewise found with such power to represent the corporation. Now, not only is there no discretion vested in the president and secretary, with reference to the manner of discharging this duty, but wherever a question of doubt does arise, they are entirely subject to the control of the board of directors. It would hardly be contended that the power to issue certificates given the secretary and president can be exercised in defiance of a resolution of the directors prescribing a certain course to be pursued. The governing body of a corporation in Ohio in whom is vested the power to be the corporation, is the board of directors. In the *Schuyler* case, to which Justice Miller refers, the court of appeals held that to *Schuyler*, as transfer agent, presi-

dent and director, the board of directors had, in fact, delegated all their powers of management over the immense financial interests of the New York and New Haven Railroad Company in New York, and therefore it might very well be that he was the corporation. In the Salamanca Township and Scotland County cases, the clerk and trustee in the one, and the county court judge in the other, had a discretion subject to no control except that of defeat at the next election. Because of the distinction stated, I can not consider the issuing of certificates of stock here an act for which the company can be made liable, except on principles of agency.

Was it within the scope of Doughty's apparent authority to put out certificates in the manner disclosed by the evidence? It is contended by plaintiff's counsel that his authority was subject to a known limitation contained in the words of the certificates themselves, namely: That no new certificates could be issued by him until an outstanding one for the same amount was surrendered, and that as every one dealing in shares was chargeable with notice of this condition precedent to validity in his acts, the peril of the fulfillment of that condition was with those dealing with the secretary, and not with the company. It undoubtedly is true that his authority is to issue new certificates only upon the surrender of old ones, but, considering the nature of a stock certificate, and the use for which the company intends it, the authority of the secretary to issue the certificates must include the power to represent that a surrender has taken place, and the issuing of the certificate is such a representation. The fact of surrender and cancellation is one peculiarly within the knowledge of the secretary and one which even the person to whom the new certificate is issued can rarely have cognizance of, and still less those who purchased from him, relying on the certificate. The general question here raised is one that was the subject of discussion among the judges for many years in the state of New York. In *Aymer v. The North River Bank*, 3 Hill, 262, it arose upon the liability of the principal for an agent under a power of attorney to make promissory notes in the business of the principal, and it was held that the principal was bound by the representation of the agent that the notes in question were in the business of the principal. On some ground not stated, the case was reversed by the court of errors.

In the case of the *Mechanics Bank v. The New York and New Haven Railroad Company*, 13 N. Y., 599, which involved the liability of the defendant company for the fraudulent over-issue of stock by Robert Schuyler, its transfer agent in New York, the company was held not to be liable upon one ground, as stated by Comstock, C. J., that the peril of the fact of surrender was with the person dealing in the stock, repudiating the doctrine of *Aymer v. The Bank*.

In the case of *New York and New Haven Railroad Company v. Schuyler*, 34 N. Y., Judge Davis, delivering the opinion of the court, distinctly differs with Judge Comstock on this point, and restores *Aymer v. The Bank* as authority, holding that the surrender of an old certificate being peculiarly within the knowledge of the agent, was a fact which he is authorized to represent and bind the principal by such representation, and this is the established law of the state.

The plaintiff relies, however, on the principle laid down in several bills of lading cases by the Supreme Court of the United States, and the Common Pleas Court of England. *Grant v. Norway*, 10 C. B., 665; *Pollard v. Vinton*, 105 U. S., 7; *Friedlander v. Ry. Co.*, 130 U. S., 416.

The facts of these cases shortly stated were, that a carrier's agent issued a bill of lading without getting the goods, and a bona fide purchaser for value of the bill sought to hold the carrier for the truth of the statement. It was held that as the agent had no power to issue bills of lading without receiving goods, the principal was not bound.

Notwithstanding the rule in England as to agency with respect to bills of lading laid down in *Grant v. Norway*, we find that in *Shaw v. The Port Philip & Colonial Mining Company*, 13 Q. B. D., 103, the secretary of the defendant having sold to G. shares in the company, issued to G. a certificate stating that he had been registered as the owner of the shares. The secretary owned no shares. The certificate was in the usual and authorized form and sealed with the seal of the company, but the signature of the director required by the rules was a forgery. The plaintiff advanced money on the certificate. There were no shares represented by the certificate. It was held that as the genuineness of the signature and the affixing of the seal in the presence of the director were formalities whose valid performance were peculiarly within the knowledge of the secretary and not easily known to the receiver of the certificate, the secretary was held out as having authority to warrant the genuineness of the signatures and the proper affixing of the seal.

The acts of the secretary in issuing certificates of stock and of the receiving agent in giving bills of lading are not analogous with respect to the point under discussion, for two reasons; first, because a bill of lading and a certificate of stock differ in their nature and purpose; and second, because the delivery of the goods, the fact, the existence of which is necessary to the power to issue a bill of lading is and must be known as well to the consignor as to the receiving agent, while under the custom of purchasing certificates, in vogue in this city as well as elsewhere, *Allen v. The South Boston R. R. Co.*, 150 Mass., 200; *Lowell on the Transfer of Stock*, 112 note, the purchaser has not always the means of knowing whether the certificate for which his was issued was surrendered or not, while such fact is peculiarly within the knowledge of the secretary. Then, too, a certificate of stock is issued chiefly to assure those who will be likely to buy it that it represents real stock, while the bill of lading is primarily only a contract of carriage and is only incidentally evidence of title and the existence of goods. It seems to me, therefore, it is within the apparent authority of the secretary not only to issue new certificates on the surrender of old ones, but also to make the representation that such surrender was made to be implied from the issue of a new certificate.

A certificate of stock is a contract, and the authority of the secretary is only to make the representation of ownership in a contract with some one. If the company is estopped by its certificate, its obligation thereunder is contractual. In order that it should be estopped, then, its certificate must have had life by delivery to its first holder. There must have been an actual transaction between the first holder and the company, a contract by the transfer of which to the bona fide purchaser the right to rely on the representation of the certificate arose in his favor. If there was no contract at all, it is difficult to see how any contractual right to rely on a representation could pass to the assignee of what purported to be a contract of ownership, but was not. Can it be said that the certificates evidenced contracts between Doughty and the company in the case at bar? They were all of them filled out by Doughty and signed by him and Cook. It is immaterial whether his act was embezzlement, forgery, or a fraud not within the common law crimes; in any event, he could not be said, as secretary, to have delivered to himself as an individual, paper, creating thereby a contract relation between him and the company. There was no issue, there was no delivery until he gave these certificates to the defendants. There is a presumption when a contract duly signed is found in circulation that the signor delivered it and so gave it life. But if that fact is untrue, then the contract is a nullity and the peril of that fact is always with the person taking it as genuine. Now, when Doughty delivered these certificates to the defendants, they took the same risk of the fact of delivery as if some one other than the secretary had produce them, because, with them, he was dealing, not as secretary, but as an individual. It would not be contended that if another had stolen from the desk of Doughty a certificate, made out in that other's favor the certificate could bind the company in favor of defendants as bona fide purchasers. How does the case differ when Doughty, without having received the certificates as contracts from the company, offers them to the defendants as such in his individual character? In his delivery to the defendants, he does not even purport to warrant them as valid except as an individual. The statement of the certificate is not a statement of the company unless it was made as a contract with an apparent stockholder by Doughty as secretary and Cook as president.

All then that the defendants had to rely on was Doughty's individual implied representation that the certificates did represent real transactions as against the company. The peril of that fact is with the defendants. Considering the duties which Doughty had to perform, it seems to me that it was not within the apparent scope of his authority as secretary to issue these certificates directly to the defendants as certificates belonging to him.

But it is said, finally, that the directors and the president were negligent in the supervision of their secretary's books and work, and that such negligence, enabling Doughty to commit these frauds, estops the company from denying his authority so to do. Upon the evidence I think that there is no doubt that Cook, the president, and the directors were negligent in not exercising supervision over the issue of stock. The slightest glance through the stock books would have disclosed entry after entry that was suspicious, and very little investigation would have led to the discovery of the fraud.

The company was organized on October 3, 1881. During the three months preceding the annual election in January, 1882, the stock transactions must have been known to be large, but no one was directed to examine the stock books on the re-election of the officers. While Doughty had charge of the stock books,

Cook's duty in connection with the issuing of the stock made it incumbent on him to at least exercise general supervision, and to have a general assurance from personal examination that certificates surrendered were cancelled, and that the books were honestly kept. The duty of supervision is said to be a duty owing by the officers only to the company and its stockholders, and it is contended that negligence of it can not be negligence toward probable purchasers of the stock to whom no such duty is owed. In single cases of negligence, doubtless, this argument is sound, but where the neglect of directors or the president to supervise is chronic, so that the fraudulent acts of the unwatched officer become in fact a course of business of which, by reason of their duty to know his proceedings, they are charged with knowledge, see *Martin v. Webb*, 110 U. S., 7, then negligence of the character referred to may be said to be the cause of the fraud.

In the case of *Railroad Company v. Schuyler*, 34 N. Y., 30, the neglect of the directors to exercise supervision over Schuyler's acts as transfer agent, continued for a period of seven years, and so entirely passive were they, that Schuyler, in fact, ran the company's business during that time. Their negligence was said by Judge Davis to be the proximate cause of the frauds so as to make the company liable.

In *Craft v. The South Boston R. R. Co.*, and *Allen* against the same, 150 Mass., 200, very recently decided by the Supreme Judicial Court of Massachusetts, the treasurer of the company over-issued stock and continued his transactions for four years. Purchasers of fraudulent stock were given judgment against the company on the ground that where one of two innocent parties must suffer loss from a third, that one must bear the loss whose negligence has enabled the third party to commit the fraud.

It seems to me that the tendency of modern decisions is to hold that negligence in the supervision of an agent of a corporation, enabling him to fraudulently assume an appearance of authority to act for it continued for any length of time where the fact of such fraudulent assumption of authority would be apparent to the company upon the exercise of ordinary care by the governing officers of the corporation, makes such negligence the proximate cause of the fraud. I think that the negligence of Cook and the other officers of the plaintiff company enabling Doughty to commit these frauds was sufficiently long continued and of such a character as to be said in law to have enabled Doughty to have committed the frauds and so to render the company liable for them, unless it shall appear that the defendants themselves have not exercised due care.

It is to be observed that while the doctrine of negligence above stated has seemed to grow with the frequency with which such frauds have been committed, there has been no relaxing of the obligation on the part of those dealing with the corporation through its agents to, themselves, exercise ordinary prudence. While, therefore, the company has been negligent, it can not be estopped thereby as against the defendants if they have not themselves acted with due care. They have not acted with due care if there was anything in the transaction which, upon its face, put them upon inquiry with reference to Doughty's authority to issue these certificates to himself. It is quite true that one is apt, in considering this question, to think of all the certificates for four thousand shares issued by Doughty, and not to recollect that only one or two certificates were pledged with each one. Still, we find the Citizens' National Bank holding \$45,000 of stock belonging to Doughty. Mrs. Perin, \$89,500. And Mrs. Gaff, \$48,500. One would think that the fact that Doughty was the secretary, engaged in issuing to himself so much stock, would have prompted inquiry. However this may be, I think, as matter of law, when the form of the certificate was presented to them they were put upon inquiry as to Doughty's authority to issue to himself. It is not that it was illegal for him to issue certificates to himself, but when one is dealing through an agent and has notice that the agent's interest is opposed to that of the principal in the transaction, he must beware that the agent is acting strictly within his authority.

In the case of the *Board of Education v. Sinton*, 41 Ohio St., 504, Sinton bought from Davis negotiable bonds issued by the Board of Education of the village of Westwood, payable in ten years from date. The sale was some seven years after the issue of the bonds. Upon the face of the bonds was the signature of Davis as one of the trustees of the school district affixed seven years before the purchase by Sinton. It happened that at the time of the sale, Davis was treasurer of the board though Sinton did not know it. The Supreme Court commission held that Sinton was not an innocent purchaser of these bonds which had been put into circulation fraudulently because Davis' name upon the bonds should have put him upon inquiry. Now, there was nothing illegal, in Davis buying and owning these bonds, but the fact that the face of the bond disclosed that his power

as a trustee might have given him custody of the bonds in a fiduciary capacity required Sinton to inquire into his right to sell them. This, it seems to me, is a much stronger case than the one at bar, and requires that I shall follow it here.

It is said that inquiry in this case would have done no good, and *Blakesley v. Savings Bank*, 42 Ohio St., 645, is cited to show that where inquiry would be futile it is unnecessary. There the underlying fraud consisted in a large credit upon the books which was fraudulent, but which was apparently valid. It was held that if the depositor of the bank had seen the books, he could not have discovered the fraud. In the case at bar, if inquiry had been made, it should have been made of some one other than Doughty. If it had led to the slightest examination of the books, the fraud must have been discovered. The comparison of any one of the fraudulent certificates with the corresponding stub would have turned a flood of light on Doughty's conduct.

In the case of *Farrington v. South Boston Ry. Co.*, 150 Mass., 406, substantially the same state of facts arose as here. Plaintiff lent money to the treasurer of the defendant and took from him as collateral security a certificate of stock in plaintiff's own name, signed by the treasurer and the president. The certificate was fraudulent, having been filled out and issued by the treasurer over the signature in blank of the president left with him. Field, Judge, says:

"The plaintiff in the case at bar was not a purchaser of stock and he knew that he was dealing with the treasurer of the defendant in his personal capacity as a borrower of money. If the by-laws of the company had provided that certificates of stock should be signed only by the treasurer, and if he were charged with the duty of attending to the transfer of stock and the issuing of certificates, any person lending money to him for his private use, and taking in his own name a certificate of the company's stock as collateral security, would reasonably be required to investigate the title of the treasurer to the certificate delivered, because in issuing such a certificate the treasurer would have a personal interest adverse to that of the corporation. An agent can not properly act for his principal and himself when their interests are adverse, and any person dealing with an agent in a matter affecting his principal, and knowing that the interests of the agent are adverse to those of his principal, ought to be held to the duty of ascertaining that the acts of the agent are authorized by the principal. The difficulty in the present case is, that these considerations are only partially applicable to it. It is on account of the danger that one officer may abuse his power to issue stock certificates, that the by-laws of corporations usually require the certificates to be signed by at least two officers of the corporation. If one of these neglects his duty, or delegates the performance of it to the other, the safeguard intended by this requirement of the by-laws becomes ineffectual, and if one of these officers in issuing a stock certificate has a personal interest adverse to that of the corporation, a person dealing with him and knowing this may well be required to take notice, that the rights of the corporation are not protected in the transaction to the full extent intended by the by-laws.

"The seal of the corporation might well be presumed to be under the control of Reed for the purpose of affixing an impress of it upon the stock certificates, because he was one of the persons who was required to sign certificates of stock, and was the person who had the custody of the certificate and transfer book. The genuine signature of the president of the corporation upon the certificate was the only fact on which the plaintiff had a right to rely, but as the president was not attending personally to the issue of this certificate it was evident to the plaintiff that Reed might possibly be using for one purpose a certificate signed by the president for another."

I am unable to see why the reasoning of the learned judge ought not to have quite as much force against the defendants in this case as it had against the plaintiff there. Here the certificates themselves showed that Doughty had taken part in the issuance of them on his behalf, and he was now using them to secure an individual loan. See also *Moores v. Bank*, 111 U. S., 156.

The main argument of counsel for defendants is, that the secretary, by law, was required both to be a stockholder and to sign certificates of stock. To this it may be replied, that the law does not require the secretary to buy and sell shares by certificates. All that the law requires, is, that he shall have a continuous holding of some stock during his incumbency. Stock certificates are not issued to stockholders except upon their demand. A man may be a stockholder and not hold a certificate. It is not absolutely necessary, then, that the secretary should issue certificates to himself, unless he wishes it. Nor is there any law requiring that a secretary should be the owner of the large blocks of stock which were here pledged to the various defendants. The requirement of the law is satisfied with

the ownership of one share. But even if the secretary must issue himself a certificate, I do not see that this fact ought to affect the equitable principle involved here. Equity does not avoid a transaction in which an agent acts in two capacities, one fiduciary and the other individual, but only holds it voidable. It does not deprive the secretary, in this instance, of his right to have a certificate signed by himself, but it only takes from the certificate disclosing his two capacities in its origin, the evidential force with third persons against the company that a certificate issued to another would have. This inconvenience to the secretary, if it be one, is inherent in the office he holds, and the required form of the certificate.

The principle that one dealing with an agent in a matter, where the agent has an individual interest opposed to that of his principal, is put upon inquiry as to his authority finds its basis in a sound rule of public policy and human nature. It was recognized in courts of equity from their origin. While it may work individual cases of hardships, in the general result, it conduces to security in corporate and business dealings, and when fully realized by the business community will go far to prevent frauds of the character shown at the bar.

From what has been said it will be seen that I can not follow the Titus case in the 61 N. Y., 237, where the facts were exactly as they were at bar, the officer guilty of the fraud having pledged false certificates in his own name with a third person. The court there proceeds on the theory advanced by counsel that this healthful rule of equity and public policy is abrogated by the requirement that the officer committing the fraud was bound to be a stockholder. I have stated why the argument seems to me fallacious. In coming to the conclusion upon this question of notice I but follow the ruling of the circuit court of this county in one of the many cases growing out of these Doughty frauds. *Railway Co. v. Third Nat'l Bank of Urbana*, 1 Circ. Dec., 109, and of the general term of this court in this case, *Railway Company v. Citizens' National Bank*, 10 Dec. Re. 614. It follows from what has been said that however negligent the plaintiff was, the defendants themselves were wanting in due care in not inquiring as to Doughty's right to issue these certificates to himself, and therefore no estoppel arises against the plaintiff to plead Doughty's fraud.

I come now to the last question in the case, and that is whether the company subsequently ratified the Doughty over-issue. Counsel for defendants claim that there was a ratification in two ways, first, by concealing the fact of the over-issue from May 24th until August 1st, and second, by the acts of Theodore Cook, its president, while acting as administrator of George F. Doughty's estate.

It appears very clear that while the slightest examination of the books betrayed the fraud, it was the work of weeks and months for an expert bookkeeper to carefully examine the books and secure extrinsic evidence sufficient to enable him to state the extent of the fraudulent issue and to certainly determine between the genuine and the fraudulent. It was not the duty of the company to make a statement which would seriously injure the value of its genuine stock, when, by waiting a month or two, it could announce the exact truth. Nor am I able to see how any one of the defendants whose transaction was with Doughty in his lifetime was prejudiced by the silence. What steps could the defendants have taken to secure themselves had the truth been known? The estate of Doughty was in gremio legis. No attachments could be levied on the ground that the debts had been fraudulently contracted, for the administrator held the assets for the equal benefit of all the creditors and had eighteen months in which to settle the estate. It does not appear that any of Doughty's creditors could have established an ear mark upon any property or specific fund entitling them to assert a lien on or specific right to the same. It seems to me on the whole that the time taken by the company to ascertain the truth was reasonable, and that no presumption of ratification arises therefrom. Some evidence has been given tending to show that some of the directors, and John Scott, the vice-president, were considering the wisdom of the company's assuming the over-issue, while the result of the investigation was being awaited, but that it never went beyond mere discussion is very clear.

When we come to the effect of Theodore Cook's acts as administrator of Doughty, and the liability of the company, if any, arising therefrom, I think that the claim based on them by defendants may be disposed of in much the same way in which I have treated the claim of ratification by silence. All that Cook did was to induce certain defendants to withhold the sale of their collateral for thirty days, when it turned out that the certificates were fraudulent. Now, if the certificates had been sold, the vendor would have impliedly warranted their validity, and would have been obliged, in law, to rescind and return the money paid. A



change of position which consists of losing an opportunity to dispose of fraudulent stock as genuine does not appeal strongly to a court of equity as the basis of an estoppel.

What has been said applies to all the defendants claiming ratification by Cook's acts except The Third National Bank and the Citizens' National Bank. The Third National Bank permitted Mr. Cook to withdraw Doughty's deposit of \$2,374.33, although at the time that bank held Doughty's note for \$4,000.00 secured by a fraudulent certificate for 50 shares of the stock. This bank parted with something of value, for it gave up a right of setting off the note against the deposit. The note was not due when Doughty died, it is true, and so no legal set-off could arise, but here was a note on one side, and the proceeds of it on the other, which had been secured by fraud of the maker of the note. I have no doubt whatever, that, out of such circumstances, grew an equitable right of set-off to the bank. See *Armstrong v. Warner*, ante 49 O. S., 376.

The Citizens' National Bank, in consequence of a conversation of its president with Cook after Doughty's death, bought from the Troy National Bank a note of Doughty's for \$20,000.00 secured by 250 shares of the fraudulent stock, and from the Covington National Bank a note of Doughty's for \$8,000, secured by 100 shares of the fraudulent stock. The Troy Bank loan had been originally procured for it by the Citizens' Bank. The Citizens' Bank took the loan at seven per cent. discount and turned it over to the Troy Bank at six per cent., netting some fifty dollars on the transaction. In notifying the Troy Bank that the loan had been secured for it and transmitting the note, nothing was said in the letter of the fifty dollars realized by the Citizens' Bank. Mr. Griffith of the Citizens' Bank, says the fifty dollars was brokerage, and that his bank only acted as agent in the matter. He will not say that such a brokerage charge is customary, nor does he explain why, if it was a charge by an agent against its principal, it was not noted in the letter of transmission to the principal. This last circumstance leaves no doubt in my mind that to justify the charge at all, the transaction must be regarded as a purchase by the Citizens' Bank of the loan, and a sale of it to the Troy Bank. Such being the case, the Citizens' Bank would have been bound to make good to the Troy Bank any loss arising from the invalidity of the stock, and is not, by having purchased it from the Troy Bank, in any worse position in law than if the Troy Bank still held the note and loan.

As to the other note for \$8,000.00, and the certificate of 100 shares, purchased from the Covington National Bank, there is no question of the loss arising therefrom. If a ratification by estoppel can arise against the company by reason of Cook's statements, certainly in regard to this note there is a change of position to support it.

There remains to be considered then what Mr. Cook actually said to Mr. Cunningham of the Citizens' National Bank and to Mr. Hearne of the Third National Bank. The plaintiff has brought all these defendants into one action. It has thereby made competent at this hearing, conversations of Mr. Cook at this time upon the general subject with a dozen different persons representing various defendants. It cannot complain then that in weighing the accuracy of Mr. Cook's recollection of a particular conversation, the court is influenced by the numerous contradictions of his recollection of other conversations by equally reputable witnesses. In this light, certainly, the weight of the evidence establishes that Mr. Cook, after he had been appointed administrator of George F. Doughty, went to the Citizens' National Bank in answer to a notice from them that they held for collection a note of Doughty's owned by the Covington National Bank for \$8,000.00, secured by 100 shares of the plaintiff company's stock, examined the note and the collateral, and assured them that the loan was good, that the collateral was ample, and promised a partial payment of twenty per cent. by way of inducing them to buy the loan and delay the sale of the collateral. It is also clear that at that time, Mr. Cook, as president of the company, was fully aware of the over-issue, had every reason to suppose that among the certificates which he then knew Doughty had pledged, were many fraudulent ones, and therefore that the certificate of 100 shares held by the Covington Bank, securing the \$8,000.00 was probably fraudulent. It is also established by the weight of the evidence that Mr. Cook made similar statements of Mr. Hearne of the Third National Bank to induce him to allow the deposit to be withdrawn from his bank. If the plaintiff company is responsible for these statements of Mr. Cook, then I think that it is estopped to deny the validity of these certificates, at least to the extent of compensating the two banks who were induced to change their position.

We come, therefore, finally to the question whether Theodore Cook was the company's agent in inducing the two banks to change their position. In the first

place, Mr. Cook was president of the plaintiff company and was a member of the executive committee of the board of directors. From the beginning to the end of the period of the over-issue episode, Mr. Cook was one of those who shaped the policy of the company. George Doughty's father was his son's executor. He was induced to resign and at the request of a number of the board of directors, Cook took his place, agreeing not to charge anything for his services. Mr. Johnson, general counsel for the company, agreed to render professional services without compensation. On May 29th there was a regular meeting of the board of directors, but the frauds of Doughty were not discovered until after that. The next meeting of the board of directors was held July 1st. In the interval the executive committee, who were composed of Cook, Johnson and Scott, were much engaged in considering Doughty's frauds, and until a meeting of the board that committee certainly represented the company in the matter. In the minutes of the board meeting of July 1st we find the following resolution:

"Whereas it appears that there is a defalcation in the accounts of George P. Doughty, late secretary of the company, and that he has fraudulently issued stock to an extent not ascertained, and whereas it may be necessary from time to time, in order to protect the interests of this company, and save it from loss by reason of said defalcation and over-issue: Therefore, be it resolved, that the entire matter of said defalcation and over-issue be left to the executive committee, with full power to act for the protection of the interests of the company, to borrow money on the faith and credit of the company, to negotiate its promissory note or notes, if the same be necessary, and to do all things requisite in the premises according to their best judgment, and to make such agreements with the sureties upon the official bond of said Doughty and the devisees under his will, or either of them, as may be deemed requisite."

Later in July the board of directors had another meeting, the minutes of which record the following:

"The president presented a communication in regard to the over-issue of stock by the late secretary of the company, Mr. George F. Doughty, of which communication the following is a copy, to-wit: 'Cincinnati, July 19, 1882. To the board of directors of the Cincinnati, New Orleans & Texas Pacific Railway Company: I submit herewith a report showing the assets and liabilities of the estate of George F. Doughty, late secretary of this company, prepared by Mr. R. B. Monroe, under the direction and by the authority of the executive committee. It is believed that this account accurately exhibits the condition of the estate, and its relations to the company. Having accepted the position of administrator at the solicitation of this board, the friends of the deceased, and the legatees under the will, I now desire such action of the board as it may deem proper, by way of instructing and directing me in the management of this trust, so far as the interests of the company are concerned. Very respectfully, Theodore Cook.'"

On December 30, 1882, the minutes show that Cook reported to the board in respect to Doughty's over-issue and the liability of his bondsmen, that although he had made every effort, both as president of the company and as Doughty's administrator, he had not been able to effect a settlement. In attempting to induce Mr. Hearne, of the Third National Bank, to pay the Doughty deposit, Mr. Cook told him that he did not want the collateral security, i. e., these certificates, put upon the market to be sold, because there were many such debts similarly secured, and it would have a very unfavorable effect, as he thought, upon the interests of the road for those certificates to be put upon the market, to be sold at auction, and that if he could get the deposit at the Third National, he could make a ten per cent. payment, and postpone sale until he could get money enough to take them all up. Now, from the circumstances, I must infer that Theodore Cook accepted the administratorship of Doughty at the express request of the governing body of the corporation for the purpose of protecting the interests of the corporation. He regarded himself as under their instruction in the matter, and so stated in writing. His conversation with Hearne is only another evidence that his anxiety not to have the pledged stock sold arose not so much from any particular desire to benefit Doughty's estate, as to protect the interests of the road.

The executive committee was given full power to act in the premises on July 1st, but it had exercised such power for more than a month, and in the exercise of such power Cook was made administrator. The executive committee, under such circumstances, come within Justice Miller's words in *Pollard v. Vinton*, *supra*. They are the corporation.

Now, is it conceivable that Cook was hurrying about the city seeking to postpone sales of these pledges without consultation with his colleagues in the company with reference to one of the very things for which he had been appointed?

Would he have advanced a large sum of money from Doughty's assets at his own risk to certain pressing creditors to secure delay in the sales if he had not been acting for a larger interest than Doughty's estate? I can not think so. The real motive for his conduct was concern for the plaintiff. The real principal in whose behalf he was exercising every energy was the company. I can not consider the imperfect recollections of conversations between the directors and Cook and other circumstances pointed out by the counsel for the plaintiff as of any weight to overcome the plain fact which seems to me to be right on the surface of all the evidence in this part of the case, and that is, that Cook, as Doughty's administrator, was really the agent of the company, the executive committeeman, the president. He thought and hoped and believed, I doubt not, that he would be able to sell Doughty's holdings in the Selma and Mobile Railroad Company at such a price as to take up the notes, and that then the fraudulent certificates could be cancelled and the genuine stock would not be injured. Feeling confident of this, he induced the purchase of the Covington note and certificate by Cunningham for the Citizens' Bank, and the payment of the deposit at the Third, although he must have known that their certificates were probably fraudulent. He acted for the company in its interest, and considering his position as president, director and executive committeeman, I am bound to find that he acted within the general scope of his authority.

For the reason given, the Citizens' Bank will be given judgment for the loss upon the note of Doughty not exceeding the market value of the 100 shares securing it, 30 days from the day of the conversation between Cook and Cunningham, and the Third Nat'l Bank will be given judgment for the amount of the deposit less what has been paid on the note, not exceeding the market value of the stock at the time of withdrawing the deposit. With the exception of the defendants whose names I have given, the decree will be for plaintiff, ordering defendants to deliver up the false certificates for cancellation, and perpetually enjoining them from prosecuting further actions against this plaintiff. As to the order for costs, I shall be glad to hear counsel.

Judson Harmon and Wm. M. Ramsey, for plaintiff.

E. W. Kittredge and John W. Warrington, contra.

#### OPINION ON MOTION FOR A NEW TRIAL.

A motion for new trial having been made, and argued, Judge Taft delivered the following opinion in overruling the motion:

Taft, J.

This is a motion for a new trial. By agreement between counsel, however, only two questions presented on the original hearing are to be considered. They are, first, whether the Citizens' National Bank changed its position to its prejudice with reference to the twenty thousand (20,000) dollar loan and collateral purchase by it from the Troy National Bank, at the instance of Theo. Cook acting for the plaintiff company; and second, whether the certificates signed by John Scott as vice-president, numbered 526 and 527, fraudulently issued by Doughty, entitled their holders to a recovery of damages against the company.

The first question depends for its answer upon two further questions:

First: Was the transaction by which the Troy Bank acquired the twenty (20,000) dollar loan a transaction between the Troy Bank and Doughty through the Citizens' National Bank as its agent, or was it a sale of the Doughty loan by the Citizens' Bank to the Troy Bank; and

Second: If it was a sale by the one bank to the other, did the vendor impliedly warrant the genuineness of the stock?

I have re-examined the evidence on the twenty thousand (20,000) loan transaction, and have given special attention to Mr. Forbes' testimony. I am constrained to say that this has but confirmed my former view, as expressed in deciding the case, that the Citizens' Bank discounted Doughty's note at seven per cent. and sold it to the Troy Bank at six.

The facts are practically not in dispute. They are, first, that the president of the Troy Bank, which was the correspondent of the Citizens' Bank, called on Mr. Forbes to say that he would like to secure for his bank some good loans; second, that Doughty applied to the Citizens' Bank to discount his note for \$20,000.00, secured by a spurious certificate or certificates of stock in the plaintiff company; third, that Mr. Griffith, of the Citizens' Bank, telegraphed to the Troy Bank that he could furnish a loan for \$20,000.00 at six per cent., which offer the Troy Bank accepted; fourth, that the Citizens' Bank thereupon discounted Doughty's loan at

seven per cent., paying Doughty with their cashier's check; fifth, that the loan was transferred to the Troy Bank at a discount of six per cent., the Citizens' Bank making a profit upon the transaction of some fifty dollars, that this profit was credited to interest and discount account on the books of the Citizens' Bank, and that no mention was made to the Troy Bank by the Citizens' Bank that it had made a profit or deducted a brokerage.

There is no ground to criticise the Citizens' Bank or its officers in this transaction. The evidence does not disclose any understanding that the Citizens' Bank should act in the matter as an agent of the Troy Bank in discounting some one else's paper. In the telegram from Mr. Griffith, stating that he could furnish a \$20,000.00 loan to the Troy Bank, there was no implication that the Citizens' Bank would purchase this loan as an agent for the Troy Bank. It might properly have sold to the Troy Bank under the contract contained in the telegraph offer and its acceptance, any loan of \$20,000.00 which it had been itself holding for weeks. Nor does the fact that the Citizens' Bank did not discount Doughty's note until after hearing that the Troy Bank would buy it, affect this conclusion. It is neither infrequent or improper that one should contract to sell an article before closing the contract to buy it. Counsel contend that in construing this transaction between the two banks to be a sale, the court seeks to inflict something in the nature of a penalty upon the Citizens' Bank for making an improper profit out of what was really its agency for the Troy Bank. I cannot admit the correctness of any such view. If the Troy Bank had had a right to consider that the Citizens' Bank was acting as its agent in discounting Doughty's paper, because this was, in fact, the contract between them, it is very clear that an improper charge by the Citizens' Bank would not justify this court in changing the transaction into a sale in order to make the charge a proper one. Nor would the fact that in such a case the Troy Bank might have a right to consider it a sale at its election have any bearing upon the construction which the court should put now upon the real transaction. The Troy Bank has made no election. The transaction must be held to be now what it was when it occurred. This is to be determined from what was said and done by the parties. Everything which was said or done by both was consistent with the theory of a sale. Everything which was done by the Citizens' Bank was inconsistent with any other theory. This result is reached without discrediting a single witness. It is simply a dissent from the legal conclusions of the officers of the Citizens' Bank as to the character of the transaction. Reference in this connection should be made to the case of Gurney et al. v. Wormesly et al., 4 Ellis & Blackburn, 133, where the facts were not dissimilar to those in the case at bar, and the same conclusion was reached by the court of Queen's Bench.

This brings us to the question of implied warranty. The sale was of a note with certificates of stock as collateral. In such a sale, where the security may be sold on default of payment and the cash immediately realized, the character of the collateral is the chief consideration, and credit is generally given upon that. A failure to deliver collateral answering the description, therefore, although the note may be as agreed upon, is a failure to deliver the thing which was contracted for.

In *Gurney v. Wormesly*, supra, a bill of exchange was sold to plaintiff, on which all the signatures were forged except that of the last endorser. It was sought to distinguish the case from a sale of a forged bill because of the genuine endorsement, which gave it some value. The court held, however, that because credit was given to the acceptor's name on the bill, and that was forged, the bill, though it might have validity as a bill against the last endorser, was not the thing agreed to be sold, and the plaintiff could recover the price paid, though the sale had been without recourse.

In a sale without warranty the vendor must furnish the article which answers the description of that which the parties intended to be the subject of the sale.

In America the obligation is described as an implied warranty of identity; in England, as a condition of the principal contract.

On the principle embodied in this rule it would seem to be evident that in a sale of certificates of stock in a corporation, there is an implied warranty that what is delivered is genuine stock. If the certificate is spurious, the thing delivered is but worthless paper. There is a breach of an implied warranty that the thing delivered should be stock.

In section 607 of Benjamin on Sales, (Bennett's edition of 1888), this conclusion is sustained by the following passage:

"Under this head may also properly be included the class of cases in which it has been held that the vendor who sells bills of exchange, notes, shares, certificates and other securities, is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver, as a condition precedent, that which is

genuine, not that which is false, counterfeit or not marketable by the name or denomination used in describing it."

It is claimed by counsel for the Citizens' Bank that the principle thus stated has application only to cases of forgery, and that if the signature is genuine and the seal is in due form, the implied warranty goes no further; but it will be seen that in illustration of the passage quoted the learned author cites and comments on many cases, and that while several of these are cases of forgeries, (as Jones v. Ryde, 5 Taunton, 488; Westropp v. Solomon, 8 C. B., 345; Gurney v. Wormesly, supra), there are cases cited in which the want of genuineness was not in the signatures or the seal. Thus in Young v. Cole, 3 Bingham New Cases, 724, the sale was of four Guatemala bonds. The bonds delivered were bonds which had really been issued by the Guatemalan government, but which were not marketable or valuable, because the government had, after the issue of these bonds, repudiated all bonds which were unstamped, as these were. Both parties to the sale were ignorant of this repudiation. It was held that the price could be recovered. Tyndall, C. J., said that the contract was for real Guatemala bonds, and that the case was just as if the contract had been to sell foreign coin, and the defendant had delivered counters instead. "It is not a question of warranty, but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."

In Gompertz v. Bartlett, 2 Ellis & Blackburn, 849, the sale was of what purported to be a foreign bill on its face, and which seemed therefore to require no stamp under the English stamp laws. It turned out that the bill was really drawn in England, and being unstamped, was worthless. The purchaser was held entitled to recover back the price, because the thing sold was not of the kind described in the sale, i. e., a foreign bill.

In Kennedy v. Panama Mail Company, Law Reports, 2 Q. B., 587, which involved the right of a person to rescind his contract to become a shareholder because of innocent mis-statements in the prospectus which it was claimed made him a subscriber for something different from that really intended by the parties, Justice Blackburn, after discussing the cases which have been cited, and in considering the differences between the shares as represented and the shares subscribed for, says:

"In the present case the prospectus states that the issue of the new shares was authorized by a meeting. Had that been a mistake we think it would have been substantial, as the applicant would not have had shares at all; but that statement was quite accurate, and he got shares in the company."

In the case at bar the certificates sold by the Citizens' Bank to the Troy Bank were spurious, not because they were forged, but because they were never issued by the company. They got into circulation by being abstracted from the books of the company, without delivery or issue to any one. Now, if a burglar had found these certificates regularly signed and sealed, made out in his own favor, in the vault of the company, and put them in circulation, they would acquire no validity by being transferred to a bona fide purchaser for value. They would remain what they were, mere worthless pieces of paper. Is it not evident that as between the innocent vendor and innocent vendee of such certificates, the thing delivered fails to answer the description of the thing intended to be sold as completely as if a burglar had found the certificates in blank and had forged the name of the secretary? I confess I can see no distinction. The certificate in each case is not what it purports to be, because in its inception what was necessary to its existence as a genuine instrument was wanting. Delivery is as essential to a contract as the genuine signature. The absence of either is fatal and makes the instrument a counterfeit. Here, delivery, or something equivalent in law to delivery, was wanting, and the company did not act. In a sale of the spurious certificates issued by Doughty by an innocent vendor to an innocent vendee, both of them believing that the certificates were genuine, there must be an implied warranty of genuineness, and the vendor is liable for its breach. Nor are any of the authorities cited by counsel for the Citizens' Bank, when rightly considered, opposed to this view.

The case of Lambert v. Heath, 15 Meeson & Wellsby, 486, was where the sale was of "Kentish Coast Railway Scrip." The scrip delivered was what had been sold in the market by that name for several months. There was no other scrip of that name in existence. The company had been organized, allotments of stock had been made, money had been deposited under such allotments and scrip certificates had been issued by the secretary to represent them. After several months, during which the certificates had been generally dealt with in the market, the di-

rectors declared the issue of the certificates by the secretary to be in excess of his authority. In a suit to recover on the implied warranty that the secretary had authority to issue the certificates, the court of exchequer decided that the question in the case, which was a question of fact and should have been left to a jury to answer was whether when the parties contracted for a sale of "Kentish Coast Railway Scrip," they meant the scrip then on the market which was delivered; and it was intimated from the bench that the contract had probably been complied with because no other scrip of the kind than that delivered was on the market. The decision of the court in effect was that the parties contracted for the scrip which was being sold on the market without reference to the character of that scrip. So far as the parties were concerned, the scrip was genuine, because it was with reference to that scrip that the sale was made. If in *Lambert v. Heath*, there had been scrip on the market whose issue was authorized, and the scrip delivered was an unauthorized issue, no doubt a different conclusion would have been reached.

*Lambert v. Heath* is exactly analogous to that class of cases which are described as an exception to the rule, that where an article is sold for a particular purpose there is an implied warranty that it will fulfill such purpose. *Benjamin on Sales*, sec. 657 (ed. '84.) The exception is where, while the purpose is known to the vendor the article sold is specifically described by the purchaser that no warranty of its fitness for a purpose can be implied. See *Chanter v. Hopkins*, 4 M. & W., 399; *Oliphant v. Bayley*, 5 Q. B., 288.

The cases of *Otis v. Cullum*, 92 U. S., 447, and *Etna Insurance Company v. Middleport*, 124 U. S., 534, were decided upon exactly the same principle as *Lambert v. Heath*, and are similarly to be explained. There the sale was of municipal bonds, which were afterwards held to be invalid, because of the want of power in the towns to issue them; but both parties to the sale intended that the sale should be of the bonds of those particular issues. The bonds were genuine in the sense that the towns issued them, and there were no others which were genuine. They were the bonds which the vendor intended to sell and which the vendee intended to buy.

The distinction between the cases cited and the one at bar is manifest. Here was genuine stock selling in the market, and also this spurious stock which purported to be genuine. There the only subject-matter to which the contract could apply was delivered. Here genuine stock was in the market and might have been delivered, and both vendor and vendee supposed that the stock delivered was genuine, but it was spurious.

The case of *Harter v. Elstroth*, 111 Ind., 159, cited by counsel for defendant, is an authority only to the point that where stock is issued by a corporation, a vendor does not impliedly warrant that the corporation is anything more than a corporation *de facto*.

In the case of *People's Bank v. Kurtz*, 99 Pa. St., 344, also cited by counsel for defendant, it is held that where the certificates are in the usual form and regular on their face, and are issued by the duly constituted officers of the company, and are sealed with genuine seal of the corporation, the implied warranty of title extends no further.

In the case at bar the certificates, while properly signed by the duly constituted officers, were not issued by them. The ratio decidendi of the *Kurtz* case is that the vendor of the certificates in question there which were fraudulently issued, transferred to the vendee a chose in action giving to the vendee exactly the same remedy and amount of recovery against the company as if the stock had been genuine, and transfer had been refused by the company. It has already been held in this case that no recovery can be had against the railway company on these certificates. This fact makes the *Kurtz* case inapplicable here.

The result is that the *Citizens' Bank* would have been liable to the *Troy Bank* for the money advanced on the *Doughty* loan of \$20,000.00 on the implied warranty of the genuineness of the stock transferred as collateral, and that by its re-purchase of that loan and the stock it did not change its position to its prejudice. In this respect, therefore, the finding of the court already made cannot be disturbed.

The remaining question to be answered concerns certificates 526 and 527. It is contended that as these were signed by *John Scott*, vice-president, they make a stronger case against the company than the other certificates in dispute which were signed by *Theodore Cook* in blank.

On the original hearing I was of opinion that the presumption from the facts was that *Scott* had signed these certificates in blank, just as *Cook* did the others; but an examination of the stubs and dates convinces me otherwise.

The ordinary presumption is against negligence. A signature in blank by John Scott, who only signed two certificates in the entire seven hundred, is against the probabilities, if his signing them when they were filed up in Doughty's favor is consistent with honest conduct on his part.

Now, Doughty had in his possession, at the time 526 and 527 were issued, certificates numbered 376 and 333. These were the certificates to which, on the stubs, he attributes the origin of 526 and 527.

It seems probable, therefore, that when John Scott signed 526 and 527, they were filled up, and that Doughty presented to him certificates surrendered by him to warrant the new issue, and so I find.

Scott was acting as vice-president in the business of the company in signing and consenting to the issue of 526 and 527 to Doughty. He was deceived by the production of certificates Nos. 376 and 333, but his act was intended to be, and in fact was, the act of the company. The certificates represented then a real transaction between Doughty as an individual on one side, and the company by Scott on the other. The statement in the certificate was the statement of the company, and it must respond in damages to those who in good faith and without notice purchased or advanced money on those certificates. But I cannot find that the holders of these certificates, Hiestand & Co., and Mary J. Perrin, were any more without notice than were those who purchased the Cook certificates. These certificates, like those, were signed by Doughty as secretary, and ran in his favor, and under the principle already held in this case, put upon the purchasers the duty of inquiring as to the genuineness of these certificates, and the manner in which they got into circulation. In the case of each of these certificates, 526 and 527, the holders acquired it in connection with fraudulent certificates signed by Cook, pledged for the same loan. No. 256 was pledged with 526, and No. 527 was pledged with No. 471, 329, 499, and 546, all certificates signed by Cook in blank.

I must adhere to my finding already made, that inquiry made by such holders as to all of the certificates pledged for each loan would have led to a discovery of Doughty's frauds, and the fraudulent character of these certificates.

The findings of fact with reference to these certificates, Nos. 526 and 527 will be changed. In my view of the effect of the notice carried in the face of these certificates, the result will not be changed, and the motion for new trial will be overruled.

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## REAL ESTATE BROKERS.

227

[Hamilton Common Pleas, July Term, 1890.]

CHARLES FRANK V. ROSA LEVY ET AL.

1. A real estate broker, as such, has no authority to receive payment of the purchase-money for land sold through his efforts. His duty ends when he has found a purchaser and brought the parties together. Any one paying him, in the absence of express or apparent authority in him to receive the money, pays at his peril.
2. The possession by the broker of a deed for the premises so sold duly executed by the grantor to the purchaser, does not confer on him an apparent authority to receive payment; especially is this true, where the grantor lives near by and can be easily reached.
3. Whether one is agent for another is a question of law to be determined from what took place between the parties at the time of the creation of the claimed agency. An affirmative answer to the question "did you give the papers to your agent" does not estop the party answering from denying the agency. While such an answer made by a business man who understood the full import of the question would be of great weight as determining what did take place between the parties to the claimed agency, yet it is still but a conclusion of law.
3. In this case, no great importance is to be attached to such an answer, considering the parties.

- 4 J. H. L. was a broker for the sale of F.'s land. Having found a purchaser, R. L., a contract was entered into between her and F., the consideration to be in cash. F., however, was to secure a portion of the purchase-money from a building association, and give a mortgage therefor on the property. This was known to all parties. Before L. could obtain the money from the association, title to said property was required to appear in her. The broker secured the deed from F. duly executed and delivered it to S., the attorney for R. L., who was also the attorney for the association. The attorney had already had the mortgage executed by R. L. and had the money with which to pay the consideration on deposit to his credit, the officers of the association and R. L. having given it to him for that purpose. The attorney, without inquiry as to the authority of L. to receive the money, gave L. a check payable "to the order of J. H. L., agent of C. F., and at once deposited the deed and mortgage for record. L. drew the money on the check, and appropriating it to his own use, left the city. Held: In a suit by F. to quiet his title to said property as against R. L. and the association, that the loss must fall on the purchaser, R. L., and that the plaintiff was entitled to a decree.

#### ACTION TO QUIET TITLE.

Charles Frank, a resident of Cincinnati, Ohio, was the owner prior to January, 1890, of a lot of ground in said city. He was sickly and enfeebled in mind and body and his wife attended to his property affairs. Being desirous of selling said lot, Mrs. Frank applied to John H. Loud, a real estate broker in said city, and dealt with him all through the transaction in the name of E. C. Coppin (also a real estate agent in said city, and with whom said Loud was then connected as clerk) knowing him by that name. Loud secured a purchaser in one Rosa Levy, also a resident of said city. The price at which Mrs. Frank held said property was \$6,500. At one of the interviews that Loud had with Mrs. Levy, she proposed to him that if he would get the property for her at from \$5,500 to \$6,000, that she would give him \$50. Following this interview, Loud sought Mrs. Frank and induced her to sell the property for \$5,750. Loud reported this to Mrs. Levy and she paid him the \$50 as agreed. He then arranged a meeting between the parties and a contract of sale was entered into, the consideration being \$5,750 payable in cash. The transaction between Loud and Mrs. Levy was not brought to the attention of Mrs. Frank. Mrs. Levy had on deposit in the Superior Loan and Building Association about \$1,780, and for the purpose of paying the balance of the said purchase-money intended to borrow from said association on said property the sum of \$4,000. Mrs. Levy employed Mr. Enoch L. Stricker to examine the title for her. Mr. Stricker was also the attorney of the building association. Mrs. Levy testified that at the time she employed Mr. Stricker, she told him of her arrangement with Loud, but told him that she had paid Loud only \$25. Mr. Stricker denied that she told him anything about the matter. Before the association would advance anything on the property, it was required that the title appear in Mrs. Levy. After the title had been reported good by Mr. Stricker, a deed was prepared and executed by Mr. Frank and wife (on January 28th) and given to Mr. Loud, who delivered it to Mr. Stricker. Mrs. Levy and her husband had on the morning of that day, and before the delivery of the deed executed the mortgage to the building association and it was in the hands of Mr. Stricker. They had also given to Mr. Stricker, \$1,750 of their own money, and the officers of the association had given him the \$4,000 called for by the mortgage. These sums he had deposited in bank to his own credit. Upon delivery of the deed, Stricker, without inquiry as to his authority, to receive the money, gave to Loud his check for the purchase-money, less the taxes due, drawing the check "to the order of John H. Loud,



agent of Charles Frank," and at once sent the deed and mortgage to the recorder's office for record. Loud drew the money on the check appropriated it to his own use, and left the city.

Loud's absence became known to his employer E. C. Coppin and Mr. Stricker within a day, and on the evening of the thirtieth of January, J. D. Brannan and Alfred Hill, of the Cincinnati bar, and representing respectively, Mr. Coppin and Mr. Stricker, visited the Franks at their home. Mr. Hill, opening the conversation, said that they were the attorneys of the building association from which Mrs. Levy had borrowed some money, and exhibiting the deed and policy of insurance, which had been assigned at the time of the execution of the deed, asked if the "signatures" were genuine. Mr. Frank, owing to his ignorance of the English language, as well as by reason of his enfeebled condition of body and mind, did not seem to comprehend the question, and his daughter said "they mean, is that your name." He said, "Yes, that's my name." Then Mrs. Frank said that they had given the papers to Mr. Coppin to fix the matter up. This astonished Mr. Brannan, and he then (according to his testimony) framed a question in which he asked if they had "given the papers to their agent to deliver and receive the money." To this Mrs. Frank answered, "Yes, that they were all too busy and that they had given him the papers with authority to fix the matter up." The gentlemen then left. They said nothing to the Franks about Loud having absconded. They both testified that they had agreed before they went to see the Franks not to say anything about Loud's departure, and Mr. Brannan testified that he purposely framed the question with the word "agent" in it. Mrs. Frank and her daughter, an intelligent young lady of seventeen years of age, testified that all that was asked about at the interview was the signatures to the papers. Each of the gentlemen made a memorandum of the interview, in order that they might refresh their recollection in case there ever should be any occasion for their doing so.

On the morning of the thirty-first of January, the Franks were first advised of Loud's conduct by Mr. Coppin, who called on them at their home, he establishing the identity of Loud through a photograph.

Mrs. Levy's attorney subsequently tried to induce Mrs. Frank to swear out a warrant for the apprehension of Loud for embezzlement, but she declined to do so, by advice of her counsel, and later brought this action to quiet the title to said property as against Rosa Levy claiming under said deed, and as against the Superior Loan and Building Association claiming under the said mortgage given by Mrs. Levy.

At the trial the fact of the collusion of the defendant with the said Loud against the interests of the plaintiff in the sale, and the payment by her to him of the said \$50 was disclosed for the first time, being brought out on the cross-examination of Mrs. Levy. Based upon this disclosure, the plaintiff asked leave to file a supplemental and amended petition, setting up the fraud and asking to have the contract of sale annulled and rescinded.

EVANS, J.

I do not apprehend there is much disagreement between counsel as to the law controlling the determination of this case.

The questions are chiefly questions of fact to be gathered from the testimony.

I do not think there is any doubt but that Mrs. Katherine Frank was the agent of her husband, the plaintiff, to do what she did do in

connection with this property and that he is bound by her acts. Indeed counsel for plaintiff does not strenuously combat this conclusion. The decision of the case depends upon whether or not John H. Loud was in fact authorized by the plaintiff to deliver the deed for the property to the defendant Levy, and to receive from her the purchase-money therefor, or whether the plaintiff clothed Loud with such an appearance of authority as would lead a reasonable prudent man, using such precautions and inquiry as he must under the circumstances, to believe that he did in fact have such authority. If the testimony warrants an affirmative finding as to either of these propositions, the plaintiff must fail, otherwise he must succeed. Loud was employed by the plaintiff to find a buyer for this property. He brought Levy and the sale was effected, the consideration to be paid in cash. For all that appears the plaintiff was ready, able and willing to at once make a proper deed and receive the purchase-money. But Levy was not prepared to pay; it being stated that she expected to get the money from a building association. Loud seems to have undertaken to see to it that the papers were got in such shape as that Levy could obtain the loan. This was not the business of the plaintiff. It was no concern of his where Levy got the money, so that what Loud did in that behalf was done for Levy rather than for Frank. I think it may fairly be found from the evidence that all the parties understood when Loud got the deed it was primarily for the purpose of assisting Levy to obtain the loan. February 1st had been the time named when she would be ready with the money, so that plaintiff had no reason to anticipate an earlier settlement. She was waiting on the defendant in accordance with the understanding had at Loud's office on the day of sale. Loud had done all for the plaintiff that he had any authority to do as a broker. He had found a purchaser, the terms had been agreed upon, and as soon as they were complied with by the purchaser, then Loud would be entitled to his commission. His efforts to enable Levy to comply with those terms, was a matter between him and her.

There is no evidence of any word of the plaintiff extending the authority of Loud. Nor do I think anything she did or omitted to do gave him such apparent authority as would warrant the payment to him of the money. It is true that to the question of Mr. Brannan, as to whether she had, or rather her husband, had given Loud authority to deliver the deed and receive the money, she had answered "yes, that they were all too busy and they had given him the papers with authority to fix the matter up." If this answer had been made by a business man who understood the full import of the question, it would be of great weight, though it would still be but a conclusion of law. Whether authority was in fact given would depend on what was said and done by the parties. But such an answer by an intelligent man who understood the English language would have a strong bearing on the case as indicating what he understood by what was said and done. But considering the parties here, I can not attach great importance to it.

Upon the whole evidence I am unable to find such authority in Loud either express or apparent as to warrant the payment to him, and especially as the plaintiff lived so near and could have been so easily reached. I do not deem it necessary to pass upon the question of filing the supplemental and amended petition.

Decree for plaintiff.

Porter & Rendigs and Jerome D. Creed, for plaintiff.

Paxton & Warrington and Enoch L. Stricker, for defendants.

## ASSIGNMENTS.

310

[Franklin County Probate Court, October 14, 1890.]

## JAMES A. HALL V. OHIO &amp; WESTERN COAL AND IRON CO. ET AL.

A manufacturing corporation chartered in New York to own property and transact business in Ohio, may, when insolvent, by a deed executed in New York, make a general assignment for the benefit of creditors, which is valid to pass its real and personal property situated in Ohio, to an assignee, notwithstanding the fact that after it was chartered and entered upon its property and business in Ohio, a New York statute was enacted which in terms prohibited such corporations from making such assignments "in contemplation of insolvency."

HEARING on a petition of assignee to sell real estate.

SAFFIN, J.

This is a proceeding by the assignee to sell real estate of the assignor, which is an insolvent corporation created under the laws of the state of New York.

In February, 1889, James A. Hall, presented the deed of assignment of this company to this court, which proceeded to take such action as was necessary to qualify him to proceed as assignee with the administration of the trusts of the assignment. The deed was executed in New York, all, or nearly all of its property was situated in the state of Ohio, its principal business and business office was here. One of the defendants, William D. Lee, who now asserts an interest in the assigned real estate, makes the claim that the assignee has no power to proceed in this court to subject the property of the corporation to sale to pay debts, for the reason that the corporation had no power to make an assignment for the benefit of creditors. Indeed, it is maintained by Lee that the statutes of New York expressly prohibited all New York corporations from making assignment for benefit of creditors. The statute relied upon provides that it shall not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company to any officer or stockholder of said company, directly or indirectly, for the payment of any debt; and that it shall not be lawful to make any transfer or assignment in contemplation of the insolvency of such company to any person or persons whatever; and every such transfer and assignment to such officer, stockholder, or other person, or in trust for them or their benefit, shall be void.

This law has been variously construed by the courts of New York. The earlier cases construed it as not applying to cases of existing insolvency, but to cases of assignment in contemplation of impending insolvency. The later cases inclined to take a different view of the statute and apply it to cases like the present—of existing insolvency. It is enough to say, however, for the purpose of the question now before me, that the New York courts are not in accord upon the true construction of this statute. In the year 1882, this law was repealed; in October, 1883, the Ohio and Western Coal and Iron Company was chartered and immediately thereafter organized, came into Ohio to take possession of its property and enter upon the prosecution of its business, which was mining coal, manufacturing iron, and selling its products. It contracted debts and incurred liabilities in large sums, including a mortgage debt of about three millions of dollars. After all this, and in the year 1884, this repeal-

ing law was itself repealed, thereby reviving the act which is relied upon as governing this case. So that, when the assigning company was organized, and entered upon its property and business in Ohio, there was no law either in New York or Ohio prohibiting the making of assignments by corporations for the benefit of creditors. The common law upon that subject prevailed. The authorities are all one way upon this proposition. At the common law, insolvent corporations may assign all their property to trustees for the benefit of creditors, unless restricted by their charter or some statutory provision.

It is maintained that the insolvent laws of a state constitute a part of all contracts entered into therein; and this proposition seems to be supported by *Bank v. Card*, 7 Ohio, 2d part, 171; approved and followed in *Fuller v. Steiglitz*, 27 Ohio St., 355, 363. It is not necessary that we conclude that creditors acquire a vested right to have insolvent corporations, with whom they have dealings, make assignments of their property for the benefit of creditors.

But this is a feature of the question which bears very strongly upon the one we are next to consider. It is conceded in argument that the statutes of New York can have no extra-territorial effect of their own force. It is only by the operation of the principle of interstate comity that the laws of a state are recognized beyond its territorial limits.

Comity, it seems, is interstate courtesy; it is interstate politeness; it is a disposition between the states to be neighborly; but there is no principle of comity that can give force to the law of another state to the prejudice of the rights of our citizens or in contravention of the policy of our state. It is certainly competent for any state to adopt laws to protect its own property as well as to regulate it, and "no state will suffer the laws of another to interfere with her own; and in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the laws of its own country to that of strangers." *Smith v. McAtee*, 92 Am. Dec., 645; *Story's Con. of Laws*, sec. 28.

It seems to me, and the conviction is quite strong, that to give effect here to the law passed in New York in 1884, taking away from corporations the power to make general assignments, would seriously contravene the policy of our law. The right of corporations, when insolvent, to assign their property for the benefit of creditors, is expressly recognized by our statutes, sec. 6335. It has long been the recognized law of our state that the most equitable and just thing a failing debtor can do is to turn out his property for the benefit of all creditors alike. It was held by the Supreme Court of our state in *Rouse v. The Bank*, 46 Ohio St., 493, that corporations, when insolvent, have no power to make preferences in the disposition of their property. It is true that this case dealt with a domestic corporation, but it is nevertheless an established principle of our law, that corporations as well as natural persons, when in an insolvent condition, should dispose of all their property equally and equitably among their creditors. To prohibit corporations in Ohio from making general assignments would be to leave them and their property a prey to what we call vigilant creditors; that is, creditors could seize the property of the corporation and sacrifice it by judicial sale, little by little, to the serious prejudice of the general creditors. It is well settled that one state can not dissolve and thus close up the affairs of a foreign corporation. 5th Am. Corp. Cas. p. 217 and cases cited. This would be granting, indeed, privileges, and immunities to foreign corporations do-

ing business and owning property in our state which are not accorded to corporations created within it.

It is evident that this assignment, although made in the state of New York, was made in the expectation, and in no other, that it was to be executed and the trusts thereof administered in the state of Ohio.

We are dealing with land situated in Ohio. It was held in *Richardson v. Rogers*, 45 Mich., 591, (cited 78 Am. Dec., 597), that an assignment executed in one state, but with express reference to another, in which it is intended to have its first operation, it is to be treated, in passing upon its validity as if executed in the latter state. It was held, also, in *Warner v. Jaffray*, 96 N. Y., 248, that where a voluntary assignment made for the benefit of creditors was made in New York by a resident of that state, its validity and effect as to property situated in the state of Pennsylvania would have to be governed by the laws of the latter state.

It seems, also, to be well settled as the law of Ohio that in all proceedings for the transfer of title to real estate the law of Ohio is to govern. *McCullough v. Rodrick*, 2 Ohio, 235; *Sortwell v. Jewett*, 9 Ohio, 181, 183. This principle is illustrated by the case of the *American Bible Society v. Marshall*, 15 Ohio St., 537. A testator in Ohio devised lands to the Bible Society, which was a corporation organized under the laws of New York. No capacity was expressly given to it by statute in New York to take real estate by devise. The property devised was situated in Ohio. A general law of New York at the time the Bible Society was incorporated provided that: "No devise of real estate to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." Our Supreme Court held, however, that this statute was operative only to the extent of disabling a corporation from taking by devise real estate situate in the state of New York, and did not affect its power to take by devise real estate in Ohio. In the opinion it is said:

"Now the New York statute of wills operates on property situate on, and controlled by the law of that state. Beyond the limits of that state it can have no effect. It is not to be presumed that the legislature of that state intended to go further; and if it did so intend, the assumption would be nugatory." The court says in conclusion: "There is nothing in the legislation of this state to limit the general capacity of the Bible Society to take, by devise, real estate in Ohio." It appears in this case that the statute of New York under consideration, has been construed by the courts of New York to limit the capacity of New York corporations to take real estate by devise. Yet, this court held that if the law was intended to operate upon real estate situate in any other states the attempt was nugatory. It seems to me that it may as well be contended in this case, that if the statutes of New York were intended to take away from corporations the capacity to make assignments of real estate situate in Ohio, for the benefit of creditors, the attempt was nugatory.

The case of *Ewing v. The Bank*, 43 Ohio St., 31, is relied upon as sustaining the view contended for by Lee. In that case a corporation created under the laws of Ohio was prohibited from taking interest above 8 per cent.; it went into the state of Illinois, where 10 per cent. was lawful, and there made a contract providing for paying interest at the rate of 10 per cent. The contract was sought to be enforced in Ohio. It was held that the company could make no contract, and do no act within or without the state which was prohibited by its charter.

When this case was first presented to me in argument, it seemed to furnish strong support for the proposition contended for by Lee. But I think it is successfully answered by two considerations: First: The contract was sought to be enforced in Ohio. There is a strong intimation in the case, that if an attempt had been made to enforce the contract in Illinois, the conclusion might have been different; but, however that may be, I am satisfied that the question can not be resolved upon the assumption that we are here dealing with contracts. That we must look to the laws of the state creating a corporation, for its powers, is conceded as a general principle. But this rule must always yield to demand of local policy when dealing with foreign corporations.

This deed of assignment can not, in my opinion, be treated as a mere contract resting upon mutual obligations. If it were a contract obligation simply, it would depend, for its validity, among other things, upon the acceptance of the trust named in it. It has been held repeatedly that this is not necessary in order to constitute a trust in favor of the creditors. 39 Am. Dec., 185; 94 Am. Dec., 210; 84 Am. Dec., 559. And this question is settled by our statute, sec. 6335, and following sections. Either the assignor or assignee may file the deed of assignment in the probate court. The instant it is filed it takes effect. What does this mean?

The object of a deed of assignment is to devote the property of the failing debtor to the payment of all his creditors. To take effect: is to pass the property out of the assignor. If the assignee named in the deed does not accept the trust, if he does not give bond and qualify within ten days from the filing of the deed, it is the duty of the court to name some trustee who will accept it and proceed with the administration of the trust. It is a very common principle that a trust will never fail for the want of a trustee. The moment the deed of assignment is filed in the probate court this constitutes a declaration of trust—a dedication of the assignor of all of his property to the use of his creditors.

As counsel well said, instead of this question being controlled by the law of contract, it should be regarded as simply a matter of procedure. It is a proceeding prescribed by our statutes and providing for the distribution of a failing debtor's property for the benefit of all creditors alike. And the right or the power does not exist of either the statutes or the courts of any other state to control or direct mere matters of procedure in the courts of this state looking to the equitable disposition and distribution of the property of a failing person either natural or artificial, for the benefit of his creditors.

I do not see how the statutes of New York can control the proceedings of the courts of this state in administering trusts for the benefit of creditors by assignment any more than they can control such disposition by execution or attachment.

I am not unmindful of the fact that it is the duty of our courts to respect and recognize, and so far as we can consistently with our policy, give effect to the laws of other states; but there is no principle recognized by the law that will require us to give effect to such laws when they clearly contravene or conflict with the established policy of our law or the rights of our citizens.

There is another question that has been discussed in this case, which seems worthy of consideration.

This assignment was made more than a year and a half ago. During all that time Hall, the assignee, has been administering this trust.

He has had the control, management, and disposition of thousands of dollars worth of property; he has, in his representative capacity, made numerous leases of coal land, and of the furnaces, he has been in receipt of rents upon said leases. The party who now assails the assignment has taken no action looking to his removal, or to the setting aside or modifying in any way the action taken by this court to qualify him as assignee. The attack upon the assignee seems to me to be collateral.

When this deed of assignment was filed in this court, and when this court was called upon to say whether it was a proper case in which to qualify the assignee, if the statutes of New York and the decisions of the courts of New York, which have been presented in this hearing, had been before this court, I should have found the statutes to have been differently construed in the state of New York, and it would have been a question within the jurisdiction of this court whether the insolvent company could lawfully make an assignment or not.

Having exercised the jurisdiction, and having proceeded to qualify the assignee, it seems to me that nothing short of a direct proceeding to set aside the action of this court can reach this question. Of course, if the action of this court in qualifying Hall was an absolute nullity by reason of the entire want of jurisdiction in this court, anybody in any court, either by direct or collateral proceeding, could call in question his right to administer this trust. But I conclude that the court was so far invested with jurisdiction in the matter as that the action taken by it is conclusive against any collateral attack or inquiry. I do not, however, rest the question upon this ground.

This question recently came before the court of common pleas of Athens county, in a case in which an attempt was made to have the court hold that the attempted assignment to Hall was void.

The presiding Judge DeSteiguer, in a written opinion held, that a court of equity will consider the deed as at least a declaration of trust and supply a trustee by appointment. "And Hall, having produced this deed, or declaration of trust, in the probate court of Franklin county, and that court having afterwards appointed him. I think he stands here at least with the rights and powers of a trustee, and burdened with the duties and obligations, and having the rights and powers of a trustee for the execution of that trust. In other words, I hold that the deed was at least good as a declaration of trust, and that if Hall can not take directly as the grantee of the deed, yet a court of equity would have appointed a trustee. The action of the probate court of Franklin county, in appointing him as assignee, may be regarded as an appointment of a trustee. I hold, therefore, that this deed of the ninth of February, 1889, of the New York corporation, created a valid trust in behalf of all the creditors of the New York corporation at and from the time of its being filed in the probate court of Franklin county, viz.: from the eleventh of February, 1889, at 8:05 A. M." The judge added:

"But even if it can not be sustained as a declaration of trust, yet the probate court had jurisdiction to adjudicate upon it as a deed, and having done so, it can not be impeached collaterally. It must be set aside by all the creditors, if at all."

Never, since I have presided in this court did a question of greater interest come before me for discussion and disposition, and I have given to the subject that consideration which its importance seemed to demand.

The conclusion I reach is that James A. Hall is both acting and rightful assignee, in insolvency of the property of the Ohio & Western

Coal and Iron Company, in Ohio, and that he is in a position to ask at the hands of this court in this case an order for the sale of the real estate of the company situated in Ohio. The order will be made accordingly.

Powell, Owen, Ricketts & Black, for assignee.

Ewing & Southard, Fairbanks, Smith & Steele and W. E. Steiger, for Wm. D. Lee.

Nash & Lentz, for The Boston Safe Deposit & Trust Co.

## 314

## MASONIC SOCIETIES.

[Franklin Common Pleas, 1890.]

†HERSHISER ET AL. V. WILLIAMS ET AL.

1. The right of a member of a charitable, benevolent, beneficial and social organization, to any aid and assistance furnished by the same, is lost by the termination of his membership, which may be forfeited by misconduct; and upon becoming a member of any such organization, one necessarily subjects himself to its power, as for instance the power of expulsion,—such power having been voluntarily conferred upon it by its members, and such person is presumed to know the nature and character of the disciplinary powers over all its members; and by becoming a member of such organization one does not acquire a severable right to any of its property, but merely the right of a member so long as he remains a member.
2. Whether it is unmasonic conduct for a member of a masonic lodge, being a society not for profit, to become a member of the Cerneau bodies of the Ancient Accepted Scottish Rite, is one into which a court will not inquire, but is left entirely to such lodge or society.
3. A masonic lodge organized for charitable, benevolent, beneficial and social purposes, being bound to aid and assist its members when sick, in want or distress, as well as to aid widows and orphans of its members, is a society not for profit but for masonic purposes.
4. Such a masonic lodge having by its rules power to expel its members for unmasonic conduct, and to determine what constitutes such misconduct can not be restrained by a court from proceeding to expel a member or members for any alleged irregularity by the lodge or its officers in the exercise of its power of expulsion.

UPON DEMURRER to petition.

EVANS, J.

The plaintiffs (being thirty in number), members of Goodale lodge, an incorporation under the laws of Ohio, seek to have the defendants enjoined from proceeding to expel them from the lodge. The petition is demurred to generally and the question now before this court is whether the allegations of the petition, which are properly pleaded and by the demurrer admitted to be true, entitle the plaintiffs to an injunction—that being the only relief sought in this action.

The averments of the petition show that the plaintiffs are charged before the lodge "with unmasonic conduct, alleged to consist in said plaintiffs being members of the Ancient Accepted Scottish Rite of the United States, its territories and dependencies, otherwise known as the Cerneau bodies of the Ancient Accepted Scottish Rite, and soliciting members of said Goodale lodge and members of other Masonic lodges to become members of said Scottish Rite bodies;" and that plaintiffs are about to be and will be expelled from said lodge on said charges unless this court shall interfere.

† A similar conclusion was announced by the circuit court; see opinion, 3 Circ. Dec. 389. The circuit court was affirmed by the supreme court, without report, 53 O. S., 663.



The primary question thus raised goes to the jurisdiction of this court over the subject matter, and this question is devisable into two questions, to-wit: First, Has Goodale lodge the power to expel one or more of its members on the charges above stated? And if it has, then second, has this court jurisdiction to prevent the expulsion by its injunction for all or any of the reasons set forth in the petition?

These two questions, for convenience, are considered together.

The rule is well settled that in joint-stock companies, or in any corporation for profit, no power of expulsion can be exercised unless expressly conferred by the charter or by statute.

"But courts will not interfere at all in the matter of a society where there are known civil or property rights involved, and even where the controversy is concerning such rights, courts will not act unless they see clearly that they are obliged to take such jurisdiction. They will only interfere to protect some civil right, or for the due disposal and administration of property." Niblack on Mutual Benefit Societies, sec. 131.

While the rule is well settled that courts will not enjoin a society, whether incorporated or not, from expelling one or more of its members for conduct detrimental to its welfare, where no civil or property rights are involved, yet it does not follow that courts will prevent such expulsion by injunction, where the society is the owner of property, whether of great or little value. Every society may own property, and the power of civil courts to enjoin the society from proceeding to expel members depends not merely upon whether the society then owns property, or if it does, the value of it, but upon the nature and character of the society, as to which the action of the court is involved. Was the society organized mainly for the purpose of pecuniary gain to its members? Or was its organization not for profit but mainly for social purposes? Associations not for profit may own, and many of them do own, valuable property. They may be religious, fraternal, charitable or benevolent. Those who become members of them are presumed to have joined them with a knowledge of their nature and the law applicable to them, and to have consented that they will be bound by the principles and rules of government, or the policy which they have adopted or may adopt. The property of the society may be derived from dues paid by its members, subscriptions or donations, or from other sources, but the ownership of the property is a mere incident, and not the main object of the society. "A member," says a recent author, "has no severable property right in it, and no right to any proportionable part of it, either during the continuance of his membership or upon his withdrawal. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the society, while it continues to exist, like a pew, the ultimate and dominant property in which is in the corporation or congregation and not in the pew-holder; and when the body ceases to exist those who may then be members become entitled to their proportionate share of the assets." Niblack M. Ben. Soc. par., 15.

In the case of *The State v. Odd Fellows' Grand Lodge*, 8 Mo., appeal 140, the opinion of the court is instructive and pertinent as to the subject under consideration. Beginning on page 154, the court says: "It is quite well settled that such mere voluntary associations are left to enforce their own rules of discipline without any interference from the courts." \* \* \* "In the case of church societies and organizations of Odd Fellows and Free Masons, it is conceived that from the nature of the case, the legislature when granting a charter to each par-

ticular subdivision, church or lodge, recognizes the right of these associations through their proper officers, and in accordance with their established rules, to determine who are and who are not members of the order or society. These organizations exist with ramifications extending frequently throughout the civilized world, before the charter on the particular lodge or church is granted; and in granting the charter to any particular lodge or to any state lodge of Odd Fellows or Masons or to any religious corporation, the legislature necessarily recognizes the established rules and customs which bind these societies together, so far as they are not inconsistent with the laws of the state. Where the organization is mainly for business or pecuniary interest of the members, the courts may look into the reasonableness of a by-law for expelling a member, and it may inquire if it is authorized by the charter; but even in this case, where the condition of membership is that the members shall be all of same particular religious denomination, or of some widespread and well-known society, such as the Masons, the court would not undertake to determine as to this member or that, whether he is in fact a Baptist, a Methodist, a Presbyterian or a Free Mason, but would leave that to be determined by the peculiar rules and the judicial action of the proper officers of such society, entirely regardless of the question whether the charter of the particular religious society, or of the particular Masonic lodge gave in express terms such judicial power to these officers. \* \* \* "It is competent for the Odd Fellows to determine who is an Odd Fellow: and these are questions into which the courts of this country have always refused to enter, holding that when men once associate themselves with others as organized bands, professing certain religious views, or holding themselves out as having certain ethical and social objects, and subject thus to a common disciplinary, they have voluntarily submitted themselves to the disciplining power of the body of which they are members, and it is for that body to know its own. To deny it the power of discerning who constitute its members is to deny the existence of the society, or that there is any meaning in the name which the legislature recognizes when it grants the charter."

In the case of *The People v. Board of Trade of Chicago* (80 Ill., 134) the syllabus is as follows:

First—Courts never interfere to control the enforcement of the by-laws of merely voluntary associations created for the advancement of religious, moral or social principles, or merely for amusement. Such organizations must be left to enforce their rules and regulations by such means as they may adopt for their government.

Second—The board of trade of Chicago, though incorporated under an act of the general assembly, is merely a voluntary organization, which is fully empowered by its charter to govern in such mode as it may deem most advisable and proper, and when it has adopted by-laws and a forum for their enforcement the courts will not interfere to control their action.

Third—So where a member of the board of trade was, under and in pursuance of the by-laws thereof, expelled, the court properly refused to award a writ of mandamus to compel the board to admit him to membership into the organization.

Judge Walker in delivering the opinion of the court, pages 136 and 137, says: "Churches, Masonic bodies, Odd Fellows and temperance lodges are organized under a statutory charter, but we presume that no one would imagine that a court would take cognizance of a case arising in

either of these organizations to compel them to restore to membership a person suspended or expelled. They being organized by voluntary association and not for the transaction of business, but for the purpose of inculcating their precepts and truths; not for pecuniary gain, but for the advancement of morals and the improvement of their members—are left to adopt their own constitution, by-laws and regulations for admitting or expelling their members. \* \* \* In the organization of churches and other bodies referred to, each person on becoming a member, expressly or by implication, pledges himself to stand to and abide by all the rules, edicts and regulations adopted by the organization."

In *Sale v. First Regular Baptist Church*, 62 Iowa, 26, the defendant was a corporation and the plaintiff was a member thereof. She was expelled without notice of charges against her. She appealed to the court for a writ of mandamus to re-instate her. The Supreme Court of Iowa in passing upon her case (page 29) said: "It will be conceded that all members of the church have the right to vote for and select the trustees of the corporation, and it will be conceded that the plaintiff has been deprived of this right by ceasing to be a member of the church. For some alleged offense against the church the plaintiff has been expelled therefrom by the church. This is a purely ecclesiastical question into which we can not inquire. By virtue of her church membership the plaintiff became a member of the corporation entitled only to the rights and privileges of a member of the corporation organized for religious ecclesiastical purposes. The corporation was not organized for pecuniary profit. No such profit can possibly accrue to any member. No property interest or any other valuable civil right has been affected by the action of the church. The plaintiff has not and can not suffer any civil damages whatever."

The doctrine that a society, whether incorporated or not, organized for religious, fraternal or social purposes, has the power to expel one or more of its members for conduct detrimental to it, is fully sustained by the adjudications and is supported by reason. Indeed the doctrine is essentially necessary for the welfare of the society and that it may accomplish the objects for which it was organized. And where the society in the exercise of this power has expelled or is about to expel a member for misconduct, the civil courts will not entertain jurisdiction to prevent the expulsion, or reinstate the expelled member. *Gregg v. Massachusetts Medical Society*, 111 Mass., 185; *Grosvenor v. United Society of Believers*, 118 Mass., 78; *Watson v. Jones*, 13 Wall., 679; *Fitzgerald v. Robinson*, 112 Mass., 371; *Schmidt v. Abraham Lincoln Lodge*, 2d S. W. R., 156; *The State v. Hebrew Society*, 31 La., An., 205; *Niblack M. B. Society*, sec. 133.

Treating of the non-interference of courts with the exercise of the power of expulsion by corporations generally, Mr. High says: "The power which is usually exercised by corporations of expelling, disciplining or disfranchising their members for misconduct is regarded as of a *quasi* judicial nature, with which equity will not ordinarily interfere, while the corporate authorities are acting within the scope of their powers. Where, therefore, members of a medical association or corporation are being tried for alleged misconduct, contrary to their duty as corporators, a court of equity will not interfere by injunction with the act of the corporation, such interference being regarded as not within the jurisdiction of equity." High on Injunction (3d ed.), sec. 1194.

Another recent author says: "The proceedings of a society in expelling members are judicial in their character, and in such proceedings the society performs the functions of a court of limited and special jurisdiction. A court of chancery had no more power over the proceedings of a court of special and limited jurisdiction than over proceedings of courts of general jurisdiction. Where the inferior tribunal has jurisdiction of the subject matter a bill in equity will not lie to correct and restrain alleged irregularities in the pleadings and procedure before it; nor will it lie to enjoin the tribunal from a judicial determination of the matter before it, in order that the court may inquire into the alleged improper constitution of the tribunal." Niblack on M. B. Soc. sec. 85.

The averments of the petition as amended do not show that Goodale lodge is a society for profit, or that the plaintiffs have any severable interest in the property of the lodge. True, it is alleged that the lodge is "charitable, benevolent, beneficial and social organization, and that it is bound to aid and assist its members when they are sick or in want, or in distress, as well as to aid their widows and orphans." The aid and assistance here referred to is an incident to membership upon which it depends. The right of the member to such aid and assistance is lost by the termination of his membership, and the latter he may forfeit by misconduct. The power to determine who are members of this Masonic lodge—the power of expulsion—exists in the lodge itself, and was voluntarily conferred upon it, by its members, each of whom on becoming a member is presumed to have known the nature and character of the lodge, and that it had a disciplinary power over all its members, to which in order to become a member, he must necessarily subject himself, and that by voluntarily becoming a member he expressly, or by implication, pledged himself to stand to and abide by all the rules and regulations for the government of the lodge which it has adopted or may adopt. By thus voluntarily becoming a member of the lodge he acquired, not a severable right to any of its property, but the rights only of a member of the society so long as he continued to be a member. By the implied conditions upon which he became a member, his membership may be terminated by the act of the society when he ceases to be a Mason. Before he became a member he must have known that to be a member he must be a Mason, and if he ceased to be a Mason he would lose his right to be a member, and that the lodge would determine who are Masons and what is unmasonic conduct.

Whether it is unmasonic conduct for a member of the lodge to become a member of the Cerneau bodies of the Ancient Accepted Scottish Rite is a question that is purely masonic, and one into the merits of which this court will not enter.

This court is of the opinion that Goodale lodge, as set forth and described in the petition as amended, is a society, not for profit, but for masonic purposes, and that it has the power to expel one or more of its members for unmasonic conduct, and to determine wherein unmasonic conduct consists; and that this court has no jurisdiction to restrain the lodge from proceeding to expel a member or members for any alleged irregularity by the lodge, or its proper officers, in the exercise of its power of expulsion; and this court is, therefore, of the opinion that the demurrer to the petition as amended should be sustained.

R. A. Harrison, W. J. Gilmore, F. A. Davis and J. H. Collins, for plaintiffs.

J. T. Holmes, J. E. Sater, Barton Smith and Allen Andrews, for defendants.

**NOTE.**—Reference is made to a Note of Recent Decision by the Central Law Journal, as being quite interesting in connection with this case, on the subject of the right of an associated club to expel its members, found in Vol. 81, Central Law Journal, page 202.—[Editor.]

### BILLS OF EXCEPTIONS.

345

[Licking Common Pleas, 1890.]

MCINTYRE v. B. &amp; O. R. R. Co.

In order to correct a bill of exceptions, the fact of the mistake must be established without question.

BUCKINGHAM, J.

The judgment had gone to the circuit court and been affirmed, and after the case had been remanded to the common pleas court for further proceedings, an application was made to Judge Buckingham to correct the bill of exceptions by striking out one paragraph which made one of the vital questions in the case. It was claimed that this paragraph had been inserted in the bill of exception by mistake. Judge Buckingham refused to make the correction, saying that his own memory was not clear upon the subject and that in order to correct the bill of exceptions it would be necessary to establish the fact of the mistake clearly and beyond question, the same as in a suit to correct a mistake in a deed or other contract. On being pressed to decide the question as to how a bill of exceptions would be corrected when a case for such correction would be made, and what the effect would be on the judgment of the higher court, Judge Buckingham declined to answer, contenting himself with resting his opinion on the ground hereinbefore stated.—(Editorial.)

### INTOXICATING LIQUORS.

345

[Muskingum Common Pleas, 1890.]

ANONYMOUS.

Bringing liquor out to a customer violates the law requiring a place to be closed on Sunday, as much as letting the customer in, but the owner may go in for any purpose of necessity or charity, and getting liquor for a man who needs it because sobering up after a debauch, believing in good faith it to be an act of humanity, does not violate the law.

PHILLIPS, J.

Judge Phillips has recently given to the statute requiring saloons to be closed on Sunday, a construction that is, perhaps, new in Ohio. One D. was upon trial for allowing his saloon to be open on Sunday. The evidence showed that the defendant's saloon was in a front room of a building, the remainder of which was used as his family residence; that a door opened from his dining room into his saloon; that at the request of one H., the defendant took him into the dining room, and then went through the door into the saloon and brought out both beer and whisky and gave it H., who then and there drank it. It appeared that said H. was recovering from a drunken debauch, that he was nervous and

"shaky," and that he wanted the liquor "to sober off on." The defendant testified that he believed H. to be in need of a stimulant, and that he gave him the liquor for that reason. There was a conflict of testimony as to whether it was a sale or a gift.

Judge Phillips charged the jury, among other things, as follows:

"The statute says that all places, except regular drug stores, where intoxicating liquors are sold on the business days of the week 'shall be closed' on Sunday; and it further provides, that 'whoever allows any such place to be open or remain open on that day' shall be punished." The first count of the indictment charges a violation of this law.

The gist of this offense is allowing such place to be open on Sunday. The object of the statute is, to stop sales at such places on Sunday; to stop drinking there on that day; and, in order that this may be accomplished, it undertakes effectually to shut off the access of purchasers or drinkers to such place and the liquors kept there, on that day.

The prime object of the law is, to prevent carousing and drinking on Sunday, and to preserve order and quiet on that day. It undertakes to do this by closing saloons, and thereby shutting out those who usually congregate there, and shutting in the intoxicants usually kept there. And he violates the law, who either opens the place and lets the public in, or opens the place and takes the liquor out to be drunk as a beverage, on the premises, and on that day.

Such place may be lawfully opened, for some purposes on Sunday. For example, the proprietor of a saloon may lawfully open it on Sunday to extinguish a fire, to stop a leakage, to expel a thief, to get therefrom an article of clothing or of furniture, and for other like purposes. But if he open it to admit the public, or any portion thereof, or to make therein or therefrom a sale of intoxicating liquor, or to give any person therein or therefrom a drink of intoxicating liquor, merely as a beverage, the object of the statute is thwarted, and the law is violated.

If a saloon keeper should, on Sunday, open his saloon and take therefrom intoxicating liquor to be administered to one suddenly taken sick, or for any such humane purpose, he would not, by such act, violate this law. While such act would be within the strict letter of the law, it would not be within its spirit. The opening of the saloon under such emergency would not thwart the object of the law, and would therefore not be a violation of it.

In this case, if the defendant furnished the liquor to H. as an act of humanity and charity; and if he believed, and had reason to believe, that H. was in a condition that made the administration of such liquor necessary, and immediately necessary, such furnishing of liquor, and the opening of the saloon for that purpose did not violate the law. But if he furnished the liquor merely as a beverage, to be drunk merely for the pleasure of the draught, and without such belief and such motive of charity and humanity as I have spoken of, such act would be unlawful; and allowing the saloon to be open for such purpose would constitute the offense charged in the first count of the indictment."

To a request to charge that there must be a sale, or a purpose to sell, in order to make the opening of the saloon unlawful, the court said: "The selling of intoxicating liquor on Sunday is an offense distinct from, and independent of, the one under consideration, and is not a necessary element of it. The statute in question is directed, not at the business of the whisky seller, but at his place and its contents."—[Editorial.]

## PARTNERSHIP.

376

[Muskingum Common Pleas, 1890.]

L. T. WEIDIG, ADMR., v. L. A. MOORE.

The administrator of a deceased partner can not maintain an action at law, against the surviving partner, to recover money loaned to the firm by the intestate while he was a member of such firm.

PHILLIPS, J.

While John Weidig and L. A. Moore were partners, Weidig loaned money to the firm. His death, in 1886, dissolved the partnership, and his administrator brings this action, at law, to recover from Moore, as surviving partner, one-half of the amount so loaned. The petition alleges that the partnership is solvent; that defendant refuses to account to plaintiff for said money, and avers that the defendant denies that he or the firm received said money. The defendant demurs to the petition.

It is claimed, in support of the demurrer, that this case falls within the rule that one partner cannot sue his co-partner, at law, to recover anything claimed to be due on account of the partnership dealings.

This rule, universally recognized, is not merely technical; it grows out of the legal relations between partners, and rests upon these two principles: First, the primary right of a partner, as against his co-partner or the firm, is an equitable right, and his remedial right is to an accounting. Secondly, the right of one partner to recover from his co-partner a certain sum can arise only from a promise, express or implied.

The former of these two principles arises from the nature of the partnership relation. "All transactions of the firm," says Professor Parsons, "are upon joint account, and present no clear line of cleavage by which can be ascertained the rights of a partner as against his co-partners in each case. No single act stands alone, but each is bound up with all the preceding and subsequent transactions of the firm. Before a partner's standing as a creditor of his co-partners can be ascertained, it is necessary to resolve every transaction into its constituent parts, and establish the position of each partner as debtor, or creditor, in respect to that transaction, and the amount of his debt or credit. A balance taken of the aggregate of these debits and credits will fix the standing of each partner as debtor or creditor of each of his co-partners, and the amount to which he is entitled upon distribution of the common fund, if there is any." Principles of Partnership, 206. The account, when taken is an epitome of the partnership business, and is an adjustment thereof upon the principles governing the partnership relation.

The other principle—that a promise, express or implied, is a prerequisite to such action at law—is based, first, upon the fundamental principle of pleading, that the right to recover a sum certain, at law, can arise only from tort, or from contract; secondly, upon the law of partnership, which imposes no duty upon one partner to pay to another any definite sum in respect to his unascertained interest in the joint business or the joint assets. 5 Wait's Ac. & Def., 149; Pom. Rem., 104.

But where the claim of one partner against his co-partner, or against his firm, is withdrawn from the operation of said rule. (1) by ascertaining that there is an indebtedness, and (2) by creating a promise to pay it, the said rule does not apply, and an action at law may be maintained.

The test as to whether such action may be maintained is: Does the matter involved relate to the partnership business, and require an adjustment of the partnership accounts? If it does, the remedy is in equity; if it does not, an action at law may be maintained.

Where there has been an accounting, between partners, after dissolution, and a balance found due one from the other, an action at law therefor may be maintained. (5 Wait, 151.) When a settlement has been had, and a balance ascertained to be due one partner from another, the reasons for refusing a remedy at law disappear. In the first place, it has been determined that one is debtor to the other, and so there is no necessity for an accounting in equity; and in the next place, upon the ascertainment of a balance, such balance is separated from the partnership affairs, and the law implies a promise to pay it, and this promise may be enforced at law. The weight of reason and of authority is to the effect that a balance so ascertained during the continuance of the partnership, and before dissolution, may be recovered by action at law. Par. on Part., 281.

Mr. Lindley says: "One partner can not sue another at law for work and labor done for the firm, and therefore on account as well of the plaintiff as of the defendant; nor for money lent to the firm of which the plaintiff was himself a member, for the advance only formed an item in the partnership account; nor on a bill or note drawn, accepted, or indorsed in such manner as to bind the firm, for in such case not only must the plaintiff, as one of the firm, have contributed to payment of the instrument, but he ought also to have been a defendant to the action." 2 Lind. Part., 1030.

In Missouri, it has been held that "the executrix of a deceased member of a firm can not recover the amount of a note given by the firm, and assigned to her, or foreclose a mortgage given by another member of the firm to secure the note." *Lindell v. Lee*, 34 Mo., 103.

In Michigan, it is held that "neither a partner nor his assignee can sue the firm, at law, even after its dissolution, for the amount of a note made by the firm to the partner; in such case, the remedy is in equity." 17 Reporter, 369.

The Supreme Court of Iowa says: "The right of a partner to recover from a co-partner, in any form of action, arises only after settlement of all partnership business." *Stanbery v. Cattell*, 55 Ia., 617; 11 Rep., 701.

Lindley says: "The relation of debtor and creditor between the surviving partner and the representative of the deceased partner does not arise until the affairs of the partnership are wound up, and a balance struck. 2 Lind. Part., 1030, n.

I think that the reason of the rule under consideration, and these illustrative cases, show that the case at bar comes within the rule. The enforcement of the plaintiff's claim will involve an investigation of the partnership business. It is a claim against a firm of which the claimant was a member. He may have to contribute to its payment, and should be a party defendant to his own action. The money loaned by the decedent to the firm must go into his account with the firm; and whether the firm is debtor to him, depends upon the state of his account with the firm, and of the defendant's account with the firm. In other words, an account must be taken in order to ascertain whether plaintiff is creditor of the firm, or has any claim against the surviving partner. This can be done only in a court of equity.



It is suggested that the demurrer admits the facts alleged in the petition, that the firm is solvent and that defendant refuses to account. The demurrer admits only what is well pleaded and I think these facts are immaterial in this action. Neither the solvency of the firm, nor the defendant's refusal to account, in any way affects the nature of the plaintiff's claim. Neither fact so pleaded tends to separate the lending of the money from the partnership business, or to dispense with an adjustment of the partnership accounts to determine whether the plaintiff is creditor of the firm. A traverse of either averment would make an immaterial issue; and the plaintiff's remedial right is the same, whether the firm is solvent or insolvent.

The Ohio cases cited by counsel for plaintiff are in harmony with the authorities here referred to, and with the views here expressed.

Demurrer sustained.

Ball & Hofman, for plaintiff.

J. T. Crew, for defendant.

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### LIFE INSURANCE.

400

[Superior Court of Cincinnati, General Term, October, 1890.]

Moore, Hunt and Saylor, JJ.

JOHN FUSS AND ELIZA FUSS V. CHRISTOPH KRONER ET AL.

C. K. and M. K., husband and wife, agreed that a policy should be taken on the life of each for the benefit of the other, and duly made applications for such policies on blanks furnished by the company; the company, without the knowledge or consent of C. K., erased the name of C. K. from the application for insurance on the life of M. K., and inserted in place thereof the words "her children," meaning the children of M. K.—as beneficiaries; the policy was made out in all respects as described in the application, except that it was made for the benefit of the children of M. K. in place of for the benefit of C. K.; the policy was delivered to C. K. who, in ignorance of the change of beneficiary, accepted it and paid premiums for six years: Held, that C. K. was entitled to the insurance money on the policy.

SAYLER, J.

The plaintiffs, John Fuss and Eliza Fuss, bring their action against Christoph Kroner, Wm Kroner, Emma Kroner, Fred Kroner, and Kate Kroner, to recover from Christoph Kroner two-sixth of the amount received by him from the Home Life Insurance Co. under a policy of insurance issued on the life of Margaretta Kroner, the wife of Christoph Kroner, and to subject certain property to the payment of the same. A finding of facts was made by the court below to which no exception is taken, and from which it appears:

That on June 12, 1872, the said Christoph Kroner and Margaretta Kroner, his wife, agreed to take out two policies of life insurance in the Home Life Insurance Co. in the sum of \$1,000 each, the one on the life of Christoph Kroner payable on his death to Margaretta Kroner, and the other on the life of said Margaretta Kroner payable at her death to said Christoph Kroner.

That in accordance with said agreement the said Christoph Kroner made an application to said company for a policy on his life for the benefit of Margaretta Kroner, and such policy was issued.

That at the same time he also made an application in writing to said company for a policy on the life of Margaretta Kroner in the sum of \$1,000 payable at her death to said Christoph Kroner. The application was made on a blank form prepared and furnished by the company, and the name of Christoph Kroner was filed in the blank space for the name of the person for whose benefit the insurance was to be issued, and after the application was signed, it was forwarded from Cincinnati to the main office of the Insurance Company at New York.

The insurance was solicited and the application was obtained by Charles J. Schroeder, a sub-agent of the company employed for the purpose of soliciting insurance, obtain applications, delivering policies and doing other things in connection therewith.

When the application was received at the office of the company in New York—there being a rule of the company at the time forbidding the issuing of a policy of insurance on the life of a wife for the benefit of a husband, the name of Christoph Kroner as beneficiary, was erased, and the words "her children," meaning the children of Margaretta Kroner, were inserted in place thereof, and the policy thereupon made out in all respects as directed in said application, except that said policy was made out for the benefit of the children of Margaretta Kroner who might survive her, share and share alike, instead of for the benefit of Christoph Kroner.

The policy was sent to Cincinnati and was delivered to the defendant Christoph Kroner by the agent Schroeder, who stated to Kroner that the policy was made for his benefit in accordance with the application.

Christoph Kroner could not read English, and believed the said statement of Schroeder to be true, and received the policy and paid the premiums on it.

At about the end of the year, 1888, or the beginning of the year 1889, Schroeder informed Christoph Kroner that the policy was not made out for his benefit, and proposed to Kroner that the policy be changed so as to conform to the original application and make him, Kroner the beneficiary. For that purpose Schroeder sent to the home office of the company for an assignment of the policy, to be signed by Margaretta Kroner, transferring all her interest in said policy to Christoph Kroner; and the company sent an assignment transferring all the interest of Margaretta Kroner in the policy to Christoph Kroner as trustee for the children of Margaretta Kroner who might survive her. Schroeder delivered said assignment to Christoph Kroner to be signed by Margaretta Kroner and stated to Christoph Kroner that said assignment, when signed by his wife, would make him the beneficiary of the policy personally. Christoph Kroner believed such statement, and requested his wife to sign it, but she refused, and finally the name of Margaretta Kroner was at the request of Christoph Kroner affixed to said assignment by their son, the defendant Frederick Kroner, in the presence of Margaretta Kroner.

Margaretta Kroner stated to several witnesses before and after said assignment was signed, that her husband, Christoph Kroner, should at her death himself receive the money under said policy, and pay off the encumbrances of the house and lot owned by said Christoph Kroner and occupied by them as a home with the children of said Margaretta Kroner.

On March 2, 1889, after the death of Margaretta Kroner, the defendant, Christoph Kroner, received \$1,000 from the company on the policy, and signed only his name to a receipt, which had been prepared for his signature, as the trustee of the children of Margaretta Kroner who might

survive her, share and share alike. The money was paid to him by Schroeder, who stated to him at the time, that the money belonged to him absolutely, and Kroner believed such statement and used \$700 in paying off a mortgage on the premises described in the petition. John Fuss, one of the plaintiffs, consented that the \$700 should be so applied.

The plaintiffs, John Fuss and Eliza Fuss, are children of Margaretta Kroner by a former husband, and William, Emma, Fred, and Katie Kroner are her children by Christoph Kroner.

The original agreement between Christoph Kroner and Margaretta Kroner was that the policy on the life of each should be for the benefit of the other. The applications were so made, and the act of the company in changing the beneficiary in the policy issued on the life of Margaretta Kroner was without the consent or knowledge of either party. The policy on the life of Margaretta Kroner was delivered with the statement of the agent that Christoph Kroner was the beneficiary, and he, not being able to read English, believed such statement, and paid all the premiums.

We do not think the children of Margaretta Kroner acquired any rights under the policy by such unauthorized act of the company; as against the rights of Christoph Kroner; neither do we think the fact that Christoph Kroner held the policy from 1872 until 1888, he being ignorant of the terms, and supposing that he was the beneficiary and paying the premiums, will estop him from maintaining his rights as against such children.

The insertion of the names of the children as beneficiaries being unauthorized, they thereby acquired no rights. We do not think that they could acquire rights by lapse of time, as against Christoph Kroner. Under the circumstances of the case, there was no ratification of the terms of the policy making the children the beneficiaries.

Did the children acquire any rights by the assignment of the policy to Christoph Kroner as trustee?

We think not, whatever may have been the form of the assignment. All that was done, if in fact anything was done, was done under the belief that the policy was being assigned to Christoph Kroner, so as to conform to this application, and therefore the rights of Christoph Kroner were not affected. It is very doubtful whether Margaretta Kroner, the person whose life was insured, had any interest in the policy which she could assign, but the view we take of the matter makes it unnecessary to pass on that point.

There is no question of right as between the company and either of the parties. If the controversy were between the children and the company, possibly the company would be precluded from denying that the children were the beneficiaries. But the question is, what are the rights as between Christoph Kroner and the children of Margaretta Kroner. We think there is nothing in the case which precludes Christopher Kroner from maintaining his rights under the original agreement. We think he was entitled to the money under the policy.

The fact that he signed a receipt which recited that he received the money as trustee, we think of no moment. He received what was justly owing to him, and he can not be required to account to other parties for it.

The judgment below is affirmed.

MOORE and HUNT, JJ., concur.

Keam & Keam, attorneys for plaintiffs.

Ernst Rehm, attorney for Christopher Kroner.

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## BENEFICIARY SOCIETIES.

[Hamilton Common Pleas, October Term, 1890.]

MARY THESING V. SUPREME LODGE K. OF A. ET AL.

1. The beneficiary to whom a member of a mutual benevolent order has his death certificate payable, has no vested interest therein when the laws of the order reserve a right to the member to change the direction of the fund.
2. Rules and regulations of the order prescribing the method of changing the beneficiary, or imposing conditions on the right to change, are made for the benefit of the order, and not of the beneficiary, and the order does not guarantee or promise him that it will enforce or will not abrogate such rules. And a new certificate to another beneficiary, made at a member's request without the original beneficiary's consent although the former rules required such consent, will supersede the original certificate.

## INTERPLEADER.

In 1882 Frank Thesing became a member of Branch 60, at Cincinnati, of the Catholic Knights of America, a corporation chartered by the state of Kentucky, in 1880, with power by its charter, section 2, to issue benefit certificates, not exceeding \$2,000, to be paid "at the death of a member to his family or be disposed of as he may direct."

Frank Thesing had his benefit certificate, issued in January, 1883, made payable to his children Lulu and Bernard. At that time the beneficiary could be changed by a member by surrendering his certificate with the consent of the beneficiary endorsed thereon.

On June 29, 1886, Frank Thesing surrendered his certificate without the endorsement of his children's consent, and the society issued a new one to him, payable to his wife Mary, the plaintiff. He died in January, 1890, leaving his wife and two children, aged 10 and 14, surviving. His wife now asks for the amount of the certificate. The society is ready to pay the money, but being afraid to pay either to the wife or children, interpleads them and asks instruction from the court as to the disposition of the fund, and pays the money into court.

The original certificate is payable to the children named "or to the beneficiary or beneficiaries that he may hereafter have a certificate made in favor of, on surrendering this certificate." It also on its face reserves a right in Thesing to substitute another beneficiary "if he so desires, by complying with the laws of the order upon this subject," and also expressly states that it is a contract between the society and the member, and not a contract between it and the beneficiaries named.

Article IX, sec. 7, of the constitution of subordinate branches provides that "each member may enter upon his application the name or names of the member or members of his family, or those to whom he desires his benefit paid, subject to the future disposal of the benefit as a member may thereafter direct in accordance with the laws of this order, and they shall be entered in the benefit certificate according to said direction. A member may at any time, when in good standing, with the consent of his beneficiary endorsed thereon, surrender his benefit certificate, which with directions to whom a new certificate shall be made payable, and a fee of 50 cents, shall be forwarded, etc., to the supreme secretary, who shall thereupon cancel the old certificate and cause a new certificate to be issued to such member payable as he shall have directed.

The above is the language of the constitution as it stood in 1881 and 1883. About July 1, 1885, this was changed so as to omit the words "with consent of his beneficiary endorsed thereon" for the constitution, as printed in 1885, omits them, while that printed in 1889 reinstates the condition.

BATES, J.

It is well settled in ordinary life insurance that a policy is a promise to the beneficiary of which he can not be deprived without his consent. In the beneficial or benevolent orders, however, the contract is with the member, and not with his appointee, and is analagous to any other contract made between two persons, for the benefit of a third person, so that if the two contracting parties rescind the contract the third person's power to enforce it ceases. *Trimble v. Strother*, 25 Ohio St., 378.

The difference between the two forms of insurance is apparent, for the constitutions of the benevolent orders have universally reserved to their members, in some form or other, a right to change the direction of their death benefits. Moreover, there is another essential distinction, in that in ordinary life insurance the connection of the assured with the company begins and ends with the policy, and exists solely for the purposes of that contract. But in the mutual beneficial order membership of a person exists independent of and anterior to the death certificate, and whether he ever receives a certificate or not, he has a right to direct the course of his share in the right to death benefits, and the certificate is a species of testamentary exercise of that right. Hence it seems settled that the interest of a beneficiary under the certificate before death is not a contract relation nor a vested right, but is a mere expectancy, something like that of a legatee while the testator still lives and may revoke his will. Following are the latest cases on the subject. The earlier ones will be found in the excellent treatises of Bacon and of Niblack. *Martin v. Stubbings*, 126 Ill., 387; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind., 189; *Holland v. Taylor*, 111 Ind., 121; *Milner v. Broerman*, 119 Ind., 448; *Titsworth v. Titsworth*, 40 Kansas, 571; *Manning v. A. O. U. W.*, 86 Ky., 136; *Marsh v. American Legion of Honor*, 149 Mass., 512; *Richmond v. Johnson*, 28 Minn., 447; *Barton v. Provident Mut. Relief Ass'n*, 63 N. H., 535; *Knights of Honor v. Watson*, 64 N. H., 517; *Beatty's Appeal*, 122 Pa. St., 428; *Byrne v. Casey*, 70 Tex., 247; *Lamont v. Grand Lodge Iowa Legion of Honor*, 31 Fed. Rep., 177. Hence, in all the above cases a change was allowed in the designation of a beneficiary.

In the present case, the laws of the order when the first certificate issued allowed a change only upon indorsement of consent. In all the beneficial orders, in so far as the reported cases show, there are conditions imposing a certain mode of proceeding for changing beneficiaries. The by-laws or regulations require a distinct routine to be pursued and definite formalities to be observed, such as notice to or attestation of certain officers, or payment of a certain fee, or surrender of the certificate. But all these and similar provisions are made solely for the benefit of the order, and not of the beneficiary. The order does not guarantee to enforce such rules, or agree that it will not change them. Nor are they made to settle disputes between rival claimants. This follows necessarily from the fact that the beneficiary is not a party to the contract, and has no vested right, nor greater interest than has a legatee under a will be-

fore the testator has died. Hence, it is the settled doctrine that the order may waive compliance with the conditions it has imposed.

It is true, the authorities are not agreed whether an intended change of beneficiary attempted to be made by a member in an informal way, or without compliance with the rules of the order, can be effectuated merely by the society's assent after the member's death, where the society has not taken any steps to waive the objection or recognize the change before death. In other words, if the change must be accomplished in the prescribed form unless the society waives it, and if the rights of the beneficiary become vested at the member's death, then it is seriously questioned whether the society can divest such rights by a waiver of informality after death. It is manifest that this dispute of authorities does not arise in the present case, for here the society issued the new certificate to the beneficiary in the manner required by the laws of the order. Hence, although some of the authorities cited below would often not be concurred in to the extent of sustaining a waiver after the member's death, yet they represent and establish the law to the extent of permitting such waiver at the time there is a clear power to waive, to-wit, before death, and a few will be examined to show this.

Thus in *Splawn v. Chew*, 60 Tex., 532, the American Legion of Honor issued a certificate for \$5,000 to Chew, payable to his parents, subject to such future disposal as he should direct. A by-law allowed a change of beneficiary on surrender of the policy and payment of 50 cents. Chew by will devised his certificate to his wife and children, appointing *Splawn* his executor, and the society interpleaded the two claimants. The court held the certificate to be entirely under a member's control, and that the society would waive a compliance with the by-laws.

In *Manning v. A. O. U. W.*, 86 Ky., 136, *Manning* had his certificate made to his brother. He shortly afterwards married. A by-law permitted a change of beneficiary by certifying such intention on the back of the certificate, attested by the recorder, or by a notary public if the recorder could not be reached, and paying 50 cents. But no change was to be valid until reported to the grand recorder and a new certificate issued. *Manning* wrote to his lodge to change the certificate to his wife, but did not enclose the 50 cents. The lodge wrote to him to send this fee, but he was killed before sending it. After the death the lodge issued a new certificate to his wife. The court held that the by-laws was merely for the benefit of the lodge, and the order could waive the rule and the intent of the member could be carried out, and third persons could not complain. That the letter changed the beneficiary if the lodge waived the non-compliance with the by-law, which it did do.

In *Titsworth v. Titsworth*, 40 Kansas, 571, the A. O. U. W. issued a certificate to *Titsworth*, payable to his wife. While on his death bed, in a distant state, he had his nurse write to his lodge to have the beneficiary changed from his wife, then divorced, to his mother. The by-law was the same as in the foregoing case. The nurse indorsed the certificate, signing *Titsworth's* name, and mailed it, and the lodge issued a new certificate, although the indorsement was not signed by *Titsworth* nor made before the recorder or a notary, nor was the 50 cents paid. The court sustained the new certificate, approving the law as laid down *Splawn v. Chew* and *Manning v. A. O. U. W.*, stating that if the society changes the beneficiary, all questions as to whether it was done in accordance with the rules and regulations are concluded, for these are

directory only, and for the protection of the order, and the court limits its former rulings in 37 Kansas, 93.

So in *Grand Lodge A. O. U. W. v. Child*, 70 Mich., 163, the certificate was payable to a lady to whom the member was engaged. She broke off the engagement and he asked for a new certificate payable to his son, but as he had lost the old one he could not indorse or surrender it, and the society therefore refused to issue a new one and he died before completion of further steps. Nevertheless the court effectuated his intention, saying that the by-law was not intended to require impossibilities such as the surrender of a lost certificate, and the fund was awarded to the son.

See also *South Tier Masonic Relief Ass'n. v. Loudenbach*, 5 N. Y. Supp., 901, and the two cases cited below.

From the foregoing principles it clearly follows that the requirement which formerly obtained in the constitution of the Catholic Knights, of an endorsement of consent by the beneficiary to precede a change, gave the beneficiary no additional rights, but was merely adopted by the order for its own protection, doubtless to prevent conflicting claims from rival demandants, and could be altered or waived by the order. By reason of examining this subject with considerable care, owing to a feeling of responsibility as between minor children and a step-mother though said to be living as affectionately as if they were mother and children I have met two cases scarcely a year old decided by the Supreme Courts of Texas and Rhode Island, which are upon the same change in the constitution of this very society, and seem not to be distinguishable from the case at bar.

In *Byrne v. Casey*, 70 Tex., 247, the Catholic Knights, in 1882, issued a certificate to Henry Byrne, payable to his wife Margaret, at a time when the constitution required the beneficiary's consent to a change. The constitution having been altered in July, 1885, by omitting the provision as to consent, Henry Byrne, a year afterwards procured the policy from a person who held it for his wife, and without her knowledge surrendered it and procured a new one payable to the defendant Casey. Henry Byrne having died, his wife and Casey both claimed the fund, and the Society, as in our case, interpleaded and paid the money into court, and the court held that Byrne had the right to act under the new constitution and change the beneficiary, and hence that Casey was entitled to the fund.

So in a case to appear in the next volume of Rhode Island Reports (*Supreme Council of Catholic Knights v. Morrison*, 17 Atlantic Reporter, 57), Patrick Cosgrove's certificate was payable to his wife, and without having her consent indorsed, and without her knowledge, he surrendered it and obtained a new one payable to others, and the latter were held entitled to the fund.

These cases establish the doctrine that the conditions with which a society surrounds a member's right to change a beneficiary, cannot be invoked against the society, nor the member, by the beneficiary. The fund must therefore be awarded to the plaintiff.

Carr, Dengler & Speiser, attorneys for plaintiff.

Louis J. Dolle, *contra*.

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## LARCENY.

[Muskingum Common Pleas, 1890.]

ANONYMOUS.

In Ohio the stealing of a dog may or may not be larceny, depending upon whether the animal is of value.

PHILLIPS, J.

The grand jury came into court and asked to be instructed as to whether the stealing of a dog in Ohio is larceny.

Judge Phillips thereupon instructed the grand jury as follows: "Formerly, our statute defining larceny provided that whoever steals the 'goods or chattels' of another is guilty of larceny. Under the law as it then stood, our Supreme Court held that inasmuch as a dog is neither goods nor chattels, it was not larceny to steal a dog."

"After this decision by the Supreme Court, the legislature changed the statute defining larceny, so as to make it read, 'Whoever steals anything of value is guilty of larceny.' This is the state of the law now. So that the test now as to whether a stealing constitutes larceny is not, as formerly, whether the thing stolen is goods or chattels, but whether the thing stolen is 'of value.'

"In this state of the law, the stealing of a dog may be larceny, or it may not be. If the dog is of value, the theft would be larceny; otherwise, it would not be. We all know that some dogs are the subject of ownership, some render useful services, some are bought and sold; these are indicia of value. So that I may say to you, as matter of law, that a dog may be 'of value,' and so may be the subject of larceny; and I say to you, also, that to steal a dog that has no value is not larceny.

"If it should be proved to you that any person has stolen a dog in this county, if it also appear that the dog stolen was 'of value,' you would be authorized to indict such person for larceny; in the absence of proof of any value, you should not indict."

The decision referred to by Judge Phillips is in *State v. Lymus*, 26 O. S., 400. It was undoubtedly the rule at common law that the stealing of a dog did not constitute larceny; but the later cases incline to a contrary view. See *State v. Brown*, 50 Am. Rep., 81, and cases there cited. Judge Huggins, of the Fayette Common Pleas, has made a holding in harmony with the view taken by Judge Phillips. See *State v. Yates*, 10 Dec. Re., 182.

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## STREET ASSESSMENTS.

[Superior Court of Cincinnati, General Term, 1890.]

\*SOPHIA STRAUSS V. CINCINNATI (CITY) ET AL.

- i. The purpose of the provision of sec. 2264 Rev. Stat., providing for assessments on such property "as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made." is that it shall be designated in advance whether the assessment is to be on the abutting and such adjacent and contiguous or other benefited lots

\*For opinion of the superior court in special term, see 10 Dec. Re., 783.



and lands in the corporation, either in proportion to benefits, or according to value, or by the foot front of the property bounding and abutting upon the improvement.

2. A failure of the common council to determine in advance, under sec. 2271 as amended April 16, 1888 (85 O. L., 339), the value of the lands to be assessed is not such a defect in the proceedings that thereby an assessment, in other respects regular, is not properly made.
3. In proceedings by a municipal corporation under chap. 3, div. 7, tit. XII of the Rev. Stat., to appropriate real estate for opening, widening, etc., streets, etc., no provision is made for a resolution declaring the necessity of such improvement, or for the service of a written or other personal notice on the property owners of an intent on the part of the city to assess the cost of such appropriation on their property; neither such resolution, nor such notice is necessary to the validity of an assessment to pay the costs of such appropriation.

SAYLER, J.

This is an action brought by Sophia Strauss against the city of Cincinnati, Edwin Stevens, comptroller of said city, John Zumstein, treasurer of Hamilton county and Frederick Raine, auditor of Hamilton county, to restrain the city and the comptroller from certifying an assessment to pay the cost and expense of property appropriated to open Ashland street from McMillan street to Myrtle avenue, and an assessment to pay the costs of improving said Ashland street between the points aforesaid, or either of them, to the said auditor, and to restrain the said auditor from placing them, or either of them, upon the tax duplicate, and the said treasurer from collecting, or attempting to collect, the same, or any part thereof, and asking for such other and further relief as the nature of the case and equity may require.

An answer was filed and testimony heard, and thereupon the case was reserved to this court in general term.

From the bill of evidence it appears that on May 6, 1887, the common council of Cincinnati passed an ordinance to condemn property for opening Ashland street from McMillan street north to Myrtle avenue, and providing as follows:

"Sec. 1. Be it ordained by the common council of the city of Cincinnati (two-thirds of all the members elected to each board concurring and declaring the same to be necessary) that its intention is hereby declared to condemn and appropriate to the public use for street purposes for the purpose of opening and extending Ashland street, from McMillan street north to Myrtle avenue, and it thereby condemns and appropriates to such public use for street purposes, for the purpose of opening and extending Ashland street as aforesaid, the following described property to wit: (giving a description by metes and bounds) and the solicitor is hereby authorized and instructed to institute the necessary proceedings and to apply to the court for an inquiry and assessment of the compensation to be paid for such property.

"Sec. 2. The amount so found, together with the costs and expenses of said appropriation and the interest on bonds issued, shall be assessed per front foot upon the lots and lands bounding and abutting upon said Ashland street from the north line of McMillan street to the south line of Myrtle avenue; the said lots and lands so bounding and abutting on Ashland street between said points being the lots and lands which in the opinion of common council will be specially benefited by such appropriation, according to the laws and ordinances on the subject of assessments; assessments therefor to be payable in ten annual installments, and the same collected as provided by law and the assessing ordinance hereafter to be passed.

"And bonds shall be issued in anticipation of such assessment."

Under this ordinance the proper proceedings were instituted in the common pleas court of Hamilton county for an inquiry and assessment of compensation to be paid to the owners of such lands. Isaac Strauss

was then the owner of a portion of the lands so appropriated, and was made a defendant in said proceedings in the court of common pleas, and was paid the sum of \$4,200 for his compensation. Isaac Strauss shortly afterwards died, and by his will devised to the plaintiff a lot fronting one hundred and six feet on the north side of McMillan street and extending back along Ashland street 251 feet, and being lands included in the lands to be assessed under said ordinance.

On October 14, 1887, the board of public affairs of Cincinnati passed an ordinance authorizing bonds to be issued to provide a fund for the immediate payment of the costs and expenses of appropriating said lands.

On November 26, 1887, the board of public affairs of Cincinnati passed an ordinance to assess a special tax to pay the cost and expense of appropriating said lands, providing as follows:

"Section 1. Be it ordained by the board of public affairs of the city of Cincinnati, that there be levied and assessed on each front foot of the several lots and lands bounding and abutting on Ashland street from north line of McMillan street to the south line of Myrtle avenue the sums hereinafter named, for each and every year as specified, to-wit:" (then follows a statement of ten annual installments.)

The ordinance further provides for the payment of the installments by the property holders to the comptroller, and in default of that the comptroller shall certify the same to the county auditor to be placed on the tax duplicate.

Under this ordinance the said lands of plaintiff, being a portion of the lands bounding and abutting on Ashland street as aforesaid, were assessed in the amount of \$2,719.86.

On May 4, 1888, the common council of Cincinnati passed a resolution declaring it necessary to improve Ashland street from McMillan street to Myrtle avenue by grading, setting curbs and crossings, flagging and paving gutters, macadamizing the roadway and constructing the necessary culverts, drains and retaining walls (such improvements being recommended by the board of public affairs) in accordance with the plans and profiles in the office of the engineer of the board of public affairs, and specifications on file in the office of said board; the expense of said improvement to be assessed per front foot upon the property bounding and abutting thereon, according to the law and ordinances on the subject of assessments; the assessments therefor to be payable in ten annual installments.

Notice in writing was given of this resolution to the plaintiff.

On July 18, 1888, an ordinance was passed by the common council to improve Ashland street from McMillan street to Myrtle avenue, and whereby it was ordained that all claims for damages filed with the city clerk under the resolution of May 4, 1888, be judicially inquired into before the improvement shall be made; that the improvement be proceeded with in accordance with said resolution by grading, etc.; that the expense of the improvement, including the damages, if any, assessed in favor of any owner of adjoining lands and interest on bonds, if they be issued, shall be assessed per front foot upon the property abutting thereon according to the laws and ordinances on the subject of assessments; the assessments to be payable in ten annual installments.

Thereupon a publication was made inviting sealed proposals for the improvement as required by law; a resolution to contract was duly passed, the contract duly awarded, the improvement was made and duly accepted.

Thereupon on October 1, 1889, an ordinance was passed by the board of public affairs whereby a special tax was levied and assessed on each front foot of the several lots of land bounding and abutting on Ashland street from McMillan street to Myrtle avenue, payable in ten annual installments, to pay cost and expense of improving Ashland street between the points aforesaid, together with interest on the bonds issued to provide a fund to pay for said improvement, and providing that the owners of the several lots of land so assessed shall pay the assessment to the comptroller in installments, and in default of payment that the comptroller shall certify the same to the county auditor to be placed on the tax duplicate.

Under this ordinance an assessment of \$2,415 was placed on the said lands of the plaintiff.

The plaintiff claims that the assessment to pay the cost of appropriating the lands is void, because the opening of Ashland street was not recommended by the board of improvements prior to the condemnation of the property for the same. It would appear from the bill of evidence that there had been no such recommendation; but the original ordinance has been handed to the court with consent of the parties that it be considered a part of the bill of evidence, and from this it appears that such recommendation was in fact duly made.

The plaintiff further claims that the lots and lands to be assessed to pay the cost of the land condemned and the cost of the improvement of the street were not specifically set forth in the respective assessment ordinances, and that therefore the assessments are void.

Section 2264, Rev. Stat., provides that the cost and expense of the improvement shall be assessed on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits, which may result from the improvement, or according to the value of property assessed, or by the front foot of the property, bounding and abutting upon the improvement as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made.

The ordinances provide that the cost and expense shall be assessed per front foot upon the lots and lands bounding and abutting upon Ashland street from the north line of McMillan street to the south line of Myrtle avenue.

The assessment under sec. 2264 may be on the abutting and such adjacent and contiguous or other benefited lots, or by the foot front on the property bounding and abutting on the improvement; but the council must by ordinance set forth specifically which lots are to be assessed before the improvement is made. See *Kelly v. Cleveland*, 34 Ohio St., 468. In these ordinances the council has specifically set forth the lots to be assessed as the lots bounding and abutting on Ashland street from the north line of McMillan street to the south line of Myrtle avenue. In this respect we think the statute has been complied with. It is true the depth of the lots is not given, but the law fixes the depth. The purpose of the statute is to designate specifically, in advance of the improvement, the lots to be assessed; that is, whether on the abutting and such adjacent and contiguous or other benefited lots, or on the property bounding and abutting on the improvement by the front foot.

It is further claimed that the assessment for the improvement of the street is void because the common council failed to determine in ad-

vance the value of the lands assessed under sec. 2271 passed April 16, 1888 (85 O. L., 339).

This may have been an omission on the part of the council, but we do not think it is such a defect as that thereby the assessment has not been properly made against the plaintiff or the lot or parcel of land sought to be charged.

The plaintiff sets up in her petition the further claim that she had no notice of the passage of the resolution declaring the necessity to improve the street, and further that she had no notice of the intention to levy an assessment on her lands for the improvement on the street, and she therefore claims that that assessment is void.

The testimony shows, however, that she was duly served with notice of the passage of the resolution to improve the street, and we do not understand these points are being insisted on.

The plaintiff further claims that the assessment to pay the cost of the lands appropriated is void, because no resolution declaring the necessity of such improvement was passed by the common council before the appropriation was made.

This court has decided in the case of *Anderson v. City*, *ante* 10 Dec. Re., 794, that the opening, widening or extension of a public street by a municipality is a public improvement within the meaning of Rev. Stat., sec. 2304, and a resolution declaring the necessity of such improvement and a service of notice thereof in the manner provided in this section, and preliminary to the passage of the ordinance of appropriation, are jurisdictional requirements necessary to a valid assessment upon private property under the municipal code as revised in 1880.

We are called upon to review this decision.

The appropriation of lands by a city for opening, widening, etc., street, and for other purposes, is provided for in chap. 3 div. 7, tit. 12 of the Rev. Stat. Sections 2232 and 2233 provide for what purposes appropriation of lands may be made; sec. 2234 provides that no improvement requiring proceedings for the condemnation of private property shall be made without the concurrence of two-thirds of the members of council, and sec. 2235 provides that when it is deemed necessary by a municipal corporation to appropriate private property, as hereinbefore provided, the council shall by resolution, declare such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated: and that on the passage of such resolution the yeas and nays shall be taken and entered on the record of the proceedings. No provision, however, is made in this chapter for written or other personal notice to the abutting land owner of such intent to condemn lands. The other sections of this chapter provide for the manner of proceeding in the condemnation. No provision is made in this chapter for a resolution declaring the necessity of such improvement, or for a written or other personal notice thereof to the abutting land owner.

Chap. 4 of div. 7 tit. 12 provides for assessments by cities etc. and sec. 2363 provides that when a municipal corporation appropriates lands for the purpose of laying off, opening, extending, straightening or widening a street, alley, or other public highway, or is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of such appropriation or acquisition, and of the improvement, or of either, or of any part of either, upon the general tax list, etc.

Section 2264 provides that in the cases provided for in the last section, and in all cases where an improvement of any kind is made of an existing street, alley or other public highway, the council may decline to assess the costs and expenses in the last section mentioned or any part thereof, or the costs and expenses or any part thereof of such improvement, except as hereinafter mentioned, on the general tax list, in which event such costs and expenses, or any part thereof which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits, which may result from the improvement, or according to the value of the property assessed, or by the foot front of the property bounding and abutting upon the improvement, as the council, by ordinance, setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained.

Now it will be noted that there are three distinct subjects covered by these provisions of sec. 2263, 2264, viz.: 1st. Assessments to pay for appropriation of lands. 2d. Assessments to pay for the improvement, for street purposes, of property of which the city is already possessed. 3d. Assessment to pay for the improvement of an existing street, etc.

Improvements by the appropriation of lands and improvements of property already possessed and of existing streets are clearly distinguished.

Judge White, in *Krumberg v. Cincinnati*, 29 Ohio St., 69, being a case in which the original action was brought to collect an assessment to pay for land taken to widen a street, under the municipal code, of 1869, (66 Ohio L., 145), and amendments says *Ib.*, 75: "The word improvement is used in the act in various senses. Its meaning in any given instance will depend upon the subject to which it is applied, and the connection in which it is used. There seems to be no necessary connection between the improvement of a street by appropriating property to widen or extend it, and improving it by grading, paving and macadamizing."

It is claimed that by reason of the provision in sec. 2264, that the assessments shall be made "in the manner and subject to the restrictions herein contained," the provisions of sec. 2304, being in that chapter, become jurisdictional, and that if they are not complied with the assessment is void.

Section 2304 provides that when it is deemed necessary by a city or village to make a public improvement, the council shall declare, by resolution, the necessity of such improvement, and shall give twenty days written notice of its passage to the owners of the property abutting upon the improvement or to the persons in whose names it may be assessed for taxation upon the tax duplicate, who may be residents of the county, and publish the same, etc.

The object of sec. 2304 seems to be to give notice to abutting property holders of a proposed improvement of a street by change of grade, etc., so that they may have an opportunity under sec. 2315 to present claims for damages that would be caused by the proposed improvement and to enable the council to determine under sec. 2316 whether it will proceed with the proposed improvement. This seems to be clear from the fact that written notice is required to be given only to the owners of

property abutting on the improvement; they are the only persons who could be damaged. No notice is required to be given to owners of lands not abutting, although they may be assessed, and no notice is required in case of sewers; obviously for the reason that they could not be damaged by the improvement. We may reason from this as the intent of sec. 2304 is to provide by means of the resolution and notice, prior to the improvement, for the presentation of claims for damages which may be caused by the proposed improvement so that the council may determine whether it will proceed with the improvement, that such resolution and notice are not required by the statute in cases where there could be no damage. There could be no damage to abutting property holders by the appropriation of lands to widen a street. The owner of the condemned lands receives his compensation for the lands in the condemnation proceedings.

The court in the *Krumberg* case, 29 Ohio St., 76, held that a resolution declaring the necessity to widen a street, was not necessary under sec. 563, 66 O. L., 245. It is true that section provides for such resolution when the city proposes to make any improvement "not otherwise specially provided for," and the court say that the appropriation of property is otherwise specially provided for. We are inclined to agree with the court in the case of *Longworth v. Cincinnati*, ante 10 Dec. Re., 683, that this clause was not essential to the decision of the *Krumberg* case; "the court must have reached the same result on the general principle of the construction of statutes, that where there is a general provision which might apply to a particular case, and there is a special provision for that particular case, the special provision must apply, to the exclusion of the general provision."

The appropriation of lands is otherwise specially provided for in chap. 3.

Section 2304 is substantially the same as sec. 563, except the clause "not otherwise specially provided for" contained in sec. 563.

It is claimed, however, that if there is no provision for notice of a proposed assessment to pay the costs of lands appropriated under chap. 3, then the statutes relating to such appropriation are in violation of the 14th amendment of the United States constitution, in that the abutting property owner is not given his day in court to be heard as to the assessment.

Under sec. 5848 abutting property owners may bring their action to enjoin the illegal levy of assessments, or they may recover back illegal assessments, as have been collected.

It is held in the case of *McMillan v. Anderson*, 95 U. S., 37, that where a statute gives a person against whom taxes are assessed a right to enjoin their collection and have their validity judicially determined, there is due process of law.

See also, *Corry v. Campbell* ante 34 O. S., 204; *Davidson v. New Orleans*, 96 U. S., 97; *Spencer v. Merchant*, 125 U. S., 345.

In the case of *Griswold v. Pelton*, 34 Ohio St., 482, the court held: "In an action to enjoin the collection of such an assessment, which is a proper charge against the abutting front of the land, the parties may so frame their pleadings as to enable a court of equity on finding the assessment to be merely irregular and defective, to proceed under sec. 550 to ascertain the amount properly chargeable against the front of the land." See also, *Stephen v. Daniels*, 27 Ohio St., 527.

So it will be seen that the property holder, under such injunction proceedings, is entirely protected; he has his day in court.

If it be true that an assessment to pay the cost of lands appropriated is void for this reason, then it is clear that all assessments for improvements on lands not abutting and all assessments for sewers are void, as no notice as to such assessments is provided for under the letter of sec. 2304; and if we are correct in our opinion that the notice provided for in sec. 2304 is not a notice of the intent of the city to levy an assessment, then all assessments would be void. We hardly think this proposition can be successfully maintained.

If it be claimed that the assessment on lands not abutting and for sewers is saved by the publication of the ordinance, that applies of course, with equal force, to the assessment to pay the costs of lands appropriated.

See case of *Upington v. Oviatt*, 24 Ohio St., 232, in which the court holds that the failure to publish the resolution provided for in sec. 563 (67 O. L., 81) was only an irregularity.

The case of *Railroad Co. v. Wagner*, 43 Ohio St., 75, is clearly not in point, as in that case it was attempted without notice to impose a personal tax on a non-resident land owner to pay the cost of a county ditch, and in default of payment execution to issue to be satisfied out of the general property of such land owner.

We are, therefore, of the opinion that in proceedings to appropriate lands for the opening, widening, etc., of streets, etc., by a municipal corporation, the statutes do not provide for a resolution declaring the necessity of such improvement, or for service of a written, or other, personal notice on the property owner of an intent on the part of the city to assess the cost of such appropriation on their lands, and we are further of the opinion that neither such resolution or notice is necessary to the validity of the assessment.

The evidence shows that the property of the plaintiff has a value of from \$20,000 to \$30,000. We cannot, therefore, say that the two assessments are more than 25 per cent. of the value.

The restraining order heretofore issued in this case will be set aside, and the petition will be dismissed at costs of the plaintiff.

HUNT and MOORE, JJ., concur.

H. D. Peck, for plaintiff.

Hortzman, Hadden, Galvin & Van Horne, for defendant.

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## TAXATION.

433

[Superior Court of Cincinnati, General Term, October, 1890.]

MELVILLE E. INGALLS v. FRANK RATTERMAN, TREASURER.

\*FRANK RATTERMAN, TREASURER, v. MELVILLE E. INGALLS.

Section 2781, Rev. Stat., as amended April 14, 1886, extending the time for which the auditor may make corrections of false tax returns, from four to five years, if made to apply to years preceding its passage, is retroactive and within the inhibition of the constitution; but the act may be construed as having a prospective operation, and is therefore valid. A return for taxation, in which a person fails to list all his personal property which is taxable, is a false return under sec. 2781.

\*\*\* Judgment of superior court in special term, affirmed in this opinion, see ante 10 Dec. Re. 748. The above judgment was affirmed by the Supreme Court; opinion 48 O. S., 468.

SAYLER, J.

We are of the opinion that the object of the legislature in passing the act of April 14, 1886, amending sec. 2781 of the Rev. Stat., was two fold.

First—To extend the time, during which the inquiry and corrections may be made by the county auditor, from four years to five years.

Second—To add, as a penalty, fifty per centum to the amount ascertained by the auditor, for each year, as the true amount of personal property, money, credits, and investments which ought to have been returned or listed, for not exceeding five years next prior to the year in which the inquiries and corrections are made.

We are of opinion that if this act is made to apply to the years preceding its passage, it is retroactive and is within the inhibition of sec. 28, art. 2, of the constitution.

We are of opinion that the objectionable portions of the act, to wit: the addition of one year to the time during which inquiries and corrections can be made, and the imposition of a penalty during each of said years, and the unobjectionable portion, to wit: the inquiry and correction during not exceeding four years prior to the year in which the inquiries and corrections are made, are essentially and inseparably connected in substance, and are so interdependent that the general assembly would not have enacted the one without the other.

We are of opinion that this act may be construed as having prospective operation only, and in order that the constitutionality of the act may be maintained, we hold that it has only prospective operation and is therefore constitutional and valid.

We are of opinion that by the repealing clause of the act of April 14, 1886, sec. 2781 of the Rev. Stat. of 1880, and being sec. 48, chap. 2 of the act of May 11, 1878, was abrogated; and that no rights were saved by operation of sec. 79 of the Rev. Stat.

We are of opinion that a return of personal property, made by a person under sec. 2734 of the Rev. Stat., for taxation, in which the person so making the return fails to list all of his personal property which is taxable, is a false return under sec. 2781.

We are of opinion that the return made by the defendant for taxation on May 30, 1886, was a false return under sec. 2781, and that the correction of the same by the county auditor as shown by the record was authorized.

Since the judgment of the court below was for the amount of the correction of said return under sec. 2781, it will be affirmed.

MOORE and HUNT, JJ., concur.

Wm. L. Avery, Goss & Cohen, for Ratterman.

John W. Warrington, Wm. Worthington and Judson Harmon, for Ingalls.

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## MASTER AND SERVANT.

[Franklin Common Pleas, 1890.]

GEORGE W. RAYBORN V. ALEXANDER G. PATTON.

1. The plaintiff, a prisoner in the penitentiary, being hired, by its managers, to the defendant, a manufacturer in the prison, was not, under the statute, and the contract between the managers and the defendant, a servant of the defendant to whom the latter owed the duty of providing safe machinery, safe tools, and a safe place in which he was to work; because the defendant did not employ, pay or control the plaintiff.
2. The evidence of the plaintiff himself proved that he was guilty of contributory negligence.

PUGH, J., (orally) said :

The question raised by this motion is: Shall the testimony be arrested from the jury and the plaintiff's action be dismissed? At the time the injury, of which plaintiff complains occurred, he was a prisoner in the Ohio Penitentiary. The plaintiff was a workman in one of the machine shops of the defendant in the penitentiary. The gravamen of



his action is the alleged negligence of the defendant. A fan, which was attached to the ceiling of the machine shop of the defendant, in which the plaintiff worked, it is charged, was so carelessly and unskillfully attached to the ceiling that it fell down, and in falling struck and knocked the plaintiff down, injuring him, temporarily and permanently, in the back and hip. The whole theory of the plaintiff's case is that these two parties sustained the relation of master and servant to each other.

The liability of the master to the servant is a prolific source of litigation. Perplexing questions and fine distinctions arise oftener, perhaps, in this class of cases than in any other.

The plaintiff in this case, to sustain his claim for recovery, invokes the well established rule, which makes it the duty of the master to provide for his servant, and keep in repair, safe tools, safe machinery, and safe appliances, and a safe place in which to work. He has no right to expose the life or limbs of his servant by the use, unnecessarily, of dangerous buildings, tools or machinery. This principle is well established.

But this rule has no sort of application to this case, unless at the time the injury occurred, of which complaint is made here, the relation of master and servant subsisted between the defendant and the plaintiff. The terms "master" and "servant" are correlative terms; there can be no master without a servant; nor can there be a servant without a master. Bishop's Non-Contract Law, sec. 599.

This relation of master and servant is constituted, Bishop says "whenever one takes another into his actual service, either generally or for the particular occasion or thing, the former having by law or by agreement, or tacit consent, the right to command, and the latter being under a corresponding duty to obey." *Id.*, sec. 579.

The relation can only be constituted in three ways: First, by law; second, by estoppel; and third, by contract. *Id.* secs. 599 and 600.

The relation exists only by operation of law, when it is incident to the relation of either parent or child, or husband and wife, or whenever it is expressly created by statute. It is never implied, as I understand, from a statute. It must be expressly provided for, when it is claimed that such relation is created by statute. A child, living with and subject to its father's control, is a servant of its father; as, in seduction cases. So a wife, for some purposes, is the servant of her husband.

The relation is created by estoppel whenever one person represents to another person, to whom he owes the duty of honesty and good faith, that a third person is his servant and the other acts upon that representation.

The relation may be created by contract, either express or implied.

It is obvious, in the case at bar, that the relation of master and servant did not, by operation of law, exist between these parties, at the time this injury occurred. It was not a relation that was incident to any other relation that existed between them at that time: nor has there been cited any statute which provided for or created the relationship between them.

There are no elements of estoppel in this case.

The important question is, was the relation created by contract between them? Schouler, in his work on "Domestic Relations," sec. 461, says: "Where one is neither employed, paid nor controlled by another, he is not his servant in the legal sense." There was no privity of contract between these parties shown by the evidence. The only contract

mentioned in the evidence was the contract between the board of managers of the Ohio Penitentiary and the defendant. The plaintiff in this case had no art or part in the making of that contract. By that contract the board of managers hired the plaintiff to the defendant for the purpose of working in one of his machine shops, the defendant agreeing upon his part to furnish the machinery and the materials. The statute expressly provided that this employment of the plaintiff should be under the direction and "immediate control" of the board of managers. The statute denied to the defendant in this case the right and power of "correctory supervision over the plaintiff, and it plainly denied to him under a contract which the law authorized, control over the plaintiff or any other person similarly situated. Revised Statutes, sec. 7436-5.

If, then, as the court concludes, there was no relation of master and servant between the defendant and the plaintiff, either by operation of law, by estoppel or by contract, at the time the injury occurred, the plaintiff cannot recover upon the present petition, and this motion ought to be sustained. What he might do in another case with a petition framed upon a different theory, it is not necessary for the court to now consider. It is fatal to the plaintiff's case, as now prosecuted, that he has not shown authority or control in the defendant over him, or his conduct, or actions, in the service to be rendered.

But there is another ground—a species of corollary of the one just stated—upon which the motion ought to be sustained. The contract under which this plaintiff was hired to the defendant by the board of managers has not been put in evidence. I think that contract and the statute are the places to which we have to resort to find out what the duties of the defendant were. All we know, however, as to the duties of the defendant—aside from the provisions of the statutes—was learned from the testimony of the plaintiff and the defendant, the defendant having been called and put upon the stand by the plaintiff. The evidence shows that the only right and power which was possessed by the defendant that savored of control or supremacy over the plaintiff, was that of directing him what work he was to do, and instructing him therein. But the evidence, also, discloses that the place where he was to do it, and how he was to do it, he being a skilled and experienced mechanic, were left to the control of somebody else, and were not under the control of the defendant in the case.

Then the plaintiff shows by his own testimony touching the rules of the prison, that it was his duty, if he had any complaint to make about the conduct, either of the defendant or any of his agents, or in regard to tools or machinery or defects or dangers therein, to make complaint to the authorities of the penitentiary. There was always present in the workshop a representative of the board, a guard representing it, within sight and access of the prisoners. I think it clearly appears from his own testimony, that if he was placed in a dangerous situation at the time he was working under this fan, it was his duty to notify the guard. He says that he did not notify him, because, from precedents, he thought it would be useless; that the guard would probably send him down to the ducking stool. That, however, did not exonerate him from the performance of his duty. He had opportunity and could have communicated with the superiors of the guard, the deputy warden and warden; but he made no effort to do so, although thirteen hours elapsed after, he knew, as he says, of the alleged dangerous machinery. So that it is demonstrated that he did not perform his duty, and, having failed, he is

not entitled to recover in this case. It is true, his condition cannot be assimilated to that of the ordinary servant who is engaged in voluntary service. He was involuntarily in the work-shop at work; he had no right to leave; he had no right, such as ordinary servants have, to quit the occupation in which he was engaged on the ground that it was dangerous. But he had the right to complain to the officers named, which his testimony shows he did not do. For these reasons, the motion will be sustained and exception may be saved on behalf of the plaintiff.

Freisner & Miles, for plaintiff.

J. T. Holmes and George S. Peters, for defendant.

### DEFECTIVE SIDEWALKS.

453

[Superior Court of Cincinnati, Special Term, December, 1890.]

JAMES COLLINS V. AUGUST SCHMIDT.

It is the primary duty of the city, and not of the abutting lot owners, to see that the sidewalks, as well as the main street, is kept in a safe condition, and in good repair. For failure to do so, if the city has notice of defect in a sidewalk, or, in the exercise of due care, ought have known of such defect, it, and not the abutting land owner, is liable for injuries resulting from such defect, where such defect is not caused by any act of commission by such lot owner.

SAYLER, J.

The plaintiff sued for damages for injuries received by stepping into a sink or depression in the sidewalk in front of the defendant's premises. The case coming on for trial before Judge Sayler and a jury, the question presented was whether an abutting lot owner is liable for injuries resulting to persons from defects in a sidewalk or pavement, which defects are not caused by the acts of such owner. The court held not.

That sidewalks are part and parcel of the streets, and the city council (board of public affairs in Cincinnati) of municipal corporations have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair and free from nuisance. Rev. Stat. sec. 2640.

The municipality provides by ordinance for the construction and repair of all necessary sidewalks, and may require, by the imposition of suitable penalties or otherwise, the owners and occupants of abutting lots and lands to keep the sidewalks in repair, free from snow or any nuisance. Section 2328, Rev. Stat.

In Cincinnati, under this section, the council has only provided, under a penalty for failure to do so, for the owners or occupants keeping the pavements in front of their premises free from snow and ice. Assessments are made upon the abutting lots for the construction of streets, after which the city is at the expense of repairing them. In constructing and repairing sidewalks, the abutting lot owners may do so under the supervision and to the acceptance of the city civil engineer, and on failure of such lot owners to do so, the city does the work and assesses the cost upon such owners.

Lot owners can not repair sidewalks in front of their premises without a permit to do so from the city authorities, and then such repairing

must be done under the supervision and the acceptance of the city civil engineer. It is the primary duty of the city, and not of the abutting lot owners, to see that the sidewalks, as well as the main street, are kept in a safe condition and in good repair. For failure to do so, if the city has notice of a defect in a sidewalk, or in the exercise of due care ought to have known of such defects, it, and not the adjoining lot owner, is liable for injuries resulting from such defect, where such defect is not caused by any act of commission by such lot owner. The owner is no more liable than if the injury happens from a defect in the middle of the street in front of his lot. *Vandyke v. City of Cincinnati, et al.*, 1 Dis., 553, 554; *City of Keokuk v. Independent District of Keokuk* 53 Ia., 352; *Heeney et ux v. Sprogue*, 11 R. I., 456.

Upon these holdings Judge Saylor, upon motion at the conclusion of the plaintiff's evidence, instructed the jury to return a verdict for the defendant.

Chas. L. Lundy; Yaple, Moos & McCabe, for defendants.

## 457

## LEASES.

[Superior Court of Cincinnati, General Term, 1890.]

\**MARIA L. YOUNG v. THOMAS WRIGHTSON.*

1. An agreement for re-valuation at stated periods during a lease for ninety-nine years, by appraisers to be selected by the parties, runs with the estate though assigns are not named, when such intention otherwise appears.
2. When appraisers so selected fail to agree, the refusal of one of the parties to join in a new selection is equivalent to a general refusal to perform such agreement, and the court has jurisdiction, on application of the other party, to ascertain by evidence the true value of the land and fix the rent accordingly.

HARMON, J.

Plaintiff owns the fee and defendant a leasehold for ninety-nine years, from 1838, of a lot on Fourth street, near Main, in this city. The lease, executed between parties from whom plaintiff and defendant respectively derived title, contains the following provision: "It is agreed and understood by and between the said parties that at the end of each and every fifteen years during the continuance of this lease the premises so leased shall be valued by three disinterested men, one to be chosen by each of said parties and the third by the two thus chosen, and six per cent. on the value thus assessed shall be and continue the annual rent thereof for the next succeeding fifteen years, provided that the rent shall at no time be fixed at less than the said sum of \$265 per annum." By a prior covenant the lessees, their heirs and assigns had bound themselves to pay to the lessor his heirs and assigns "the yearly rent or sum of \$262 on the first day of October in each and every year during the continuance of this present demise."

The petition alleges that, the fifteen years during which the rental was last fixed according to the above provision expiring September 30, 1883, appraisers were again duly appointed, but were unable to agree upon a valuation, and so notified the parties; that thereupon plaintiff selected another appraiser and requested defendant to do likewise, but

\*Affirmed without report by Supreme Court, December 9, 1890.

he refused; that the value of said property has greatly increased, and she will suffer great loss unless a just and true valuation is placed upon the same, which value she is ready to show to the court; she therefore prays the court to ascertain and fix the value for the present period of fifteen years, and for general relief.

Many questions are raised, though we think few arise on demurrer to the amended answer on which the case is reserved.

That pleading merely sets out in full the covenants and provisions of the lease, the chain of plaintiff's title, and a valuation by two only of the appraisers. Its general denial therefore reaches no matter of fact, except that of the value of the property, the ascertainment of which is the only object of the action. The only questions we think worthy of notice are: Does the covenant for appraisement run with the land and so apply to defendant? Are its terms met by an attempted appraisement? And if the first question be answered yes, and the second no, can the court grant relief?

It is too plain to admit of argument that the covenant in question is one which is capable of running with the land. *Masury v. Southworth*, 9 Ohio St., 340. But a very ingenious argument is made from the fact that assigns are not mentioned in it, though they are both in *reddendum* clause and in the covenant to pay rent, together with the fact of the rent being fixed for the entire term therein at \$262 per annum, that it was intended by the parties to be merely a personal covenant of the original parties. The lease appears to have been very carelessly drawn as to the use of technical terms. For instance, in the covenant to pay rent the lessees bind themselves their "heirs, executors and administrators" unto the lessor his "heirs and assigns," while the lessor alone covenants with the lessees, their "heirs and assigns" for peaceable possession "on the payment of rents and performance of the covenants herein mentioned." The use of the word assigns is not essential to make a covenant run with the land, if such intention otherwise appear, *Masury v. Southworth*, *supra*, as we think it does here from the very nature of the provision. The presumption is almost conclusive that any covenant respecting the amount of rent in a lease was intended to bind all holders of the leasehold estate. Again, the parties could not have expected to be alive at the end of each period of fifteen years during the continuance of the estate. And the reference in the covenant to pay, and in the provision for re-entry to "such rent as may hereafter be agreed upon" plainly refers, we think, to rent to be agreed upon by agreeing upon persons to fix it, under the clause in question.

Nor can we agree with the learned counsel for defendant in their construction of this provision, viz.: that it was merely intended to have an effort made every fifteen years to re-value the property. Its language is not that parties shall be selected to value the property, but that "it shall be valued" by appraisers selected by the parties. Until it is so valued, the stipulation is not carried out, and the lessor does not get what he bargained for. We agree that no second appraisement is provided for. There can be no second until there is a first.

It is urged that this lease differs from leases like that in *Worthington v. Hewes*, 19 Ohio St., 66, where the covenant is to pay only such rent as may be fixed by appraisement at different periods, so that there can be no rent after the first period for which it is named in its lease, until there is a valuation, whereas under this lease the rent originally named may be collected upon the common covenant if there be no new valuation.

But we think the difference one of degree only, and that it would be just as logical to hold that the parties to a lease like those just referred to, where no provision has been made for a failure of the appraisers to agree, intended that in case of such failure the tenant shall go rent free, as to hold that in this lease the intention was that the tenant should escape any increase of rent in the like contingency. In our opinion, the failure of the appraisers to agree leaves the matter in the same condition as though no appraisers had ever been appointed, and defendant's refusal to join in the appointment of others stands as a simple refusal to comply with this provision of the lease.

In such cases we regard it as clear on principle as well as established by *Lowe v. Brown*, 22 Ohio St., 463, that it is the province of the court to take jurisdiction. The parties have agreed upon the lessor's right to increased rent in case the property is found at certain periods to have increased in value.

The means they have agreed upon to ascertain and determine the fact and extent of such increase have failed, and failed, too, for the reason just stated, because of the fault of defendant. One of the objects of courts of justice is to provide a remedy in such contingencies.

In cases like this that remedy is not the enforcement of the agreement for specific arbitration (*Lowe v. Brown*, *supra*), but the substitution therefor of the court's own judgment upon which, as the arbiter of all their disputes, the parties have agreed as part of the general contract of citizenship.

Demurrer to amended answer sustained and cause remanded for hearing upon the question of value on September 30, 1883, and decree fixing the rent according to the finding.

FORCE and PECK, JJ., concur.

#### 471 ELECTRIC CAR LINE AND TELEPHONE CO.

[Superior Court of Cincinnati, General Term, 1890.]

##### \*CINCINNATI INCLINED PLANE RY. CO. v. CITY AND SUBURBAN TEL. ASS'N.

1. If a right is granted by the legislature to conduct a business, and there is but one mode of conducting the same under the right granted, the person to whom the right is granted may conduct the business in that mode, even if thereby injury is done to others; where, however, in the conduct of the business, one of two modes may be employed, each equally effective, and by one of which the rights of others are not affected, and by the other of which the rights of others are injuriously affected, a court of equity will interfere and restrain the use of the mode by which the rights of others are injuriously affected.
2. The C. & S. T. Assn. having complied with all the requirements of the law and of the ordinances of the city of Cincinnati, relating thereto, in the occupation of the streets, by the erection of its poles and wires, and being rightfully and lawfully in the streets of the city for the purpose of conducting a telephone business; the use of electricity as a motive power by the C. I. P. Ry. Co. under a right granted by the legislature subsequent to the time the C. & S. T. Ass'n acquired its rights as aforesaid, in such manner as to cause injury to the C. & S. T. Ass'n in the use of its telephones, will be restrained, when it appears that the C. I. P. Ry. Co. can use such motive power in another manner, equally effective, and which will do no injury.

\*This judgment was reversed by the Supreme Court; opinion 48 O. S., 390. For opinion in special term, see 10 Dec. Re., 713.

SAYLER, J.

The City and Suburban Telegraph Association was incorporated on July 1, 1873, under the act of 1852, providing for the creation and regulation of incorporated companies, as a telegraph company, the termini of its line to be in the city of Hamilton, in Butler county, and in the city of Cincinnati, in Hamilton county, and the line to pass through the counties of Butler and Hamilton.

Sections 44 to 48 of said act relate to the creation and regulation of magnetic telegraph companies, and sec. 47 provides as follows: "The corporation hereby created is authorized to construct said telegraph line or lines, from point to point, along and upon any of the public roads, by the erection of the necessary fixtures, including posts, piers, and abutments, necessary for the wires, provided that the same shall not incommode the public in the use of said roads or highways."

An act was passed March 31, 1865 (S. & S., 153), providing for the appropriation of lands for the use of any magnetic telegraph company, and giving such company the right to condemn lands for the use of its poles, etc.

Section 5 of said act provides that when any lands authorized by this act and the act to which it is supplementary, to be appropriated to the use of any magnetic telegraph company, are subject to the easement of any street, alley, public way or other like public use, within the limits of any city or incorporated village, the mode of use shall be such as shall be agreed between the municipal authorities of such city or incorporated village and the magnetic telegraph company, and in case they cannot agree, or in case the municipal authorities unreasonably delay to enter into an agreement, then the probate court of the proper county, in a proceeding instituted for that purpose, shall direct in what mode such magnetic telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of such street, alley and public way. Nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of any street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness.

Section 9 of said act provides, among other things, that dispatches by public officers of the state or the United States, on public business, may have preference over all private business, when the public interest requires such preference.

A resolution was adopted on March 12, 1873, by the common council of Cincinnati, and approved on March 14, 1873, by the mayor, whereby permission was granted to The City and Suburban Telegraph Association to erect poles and private telegraph lines in the streets of the city, to be placed under the direction of the city civil engineer. By the terms of this resolution, the right was reserved to the city to occupy the poles with the wires of the fire and police telegraph, free of expense, and for that purpose four inches of the top of each pole was to be reserved. The resolution further provided that the association should file a written acceptance of the terms thereof, and enter into a bond of \$50,000, conditioned to put the streets where the poles are placed in as good condition as before their erection.

The association duly filed a written acceptance and entered into a bond as required by such resolution, and thereupon, under authority of sec. 47 of the act of 1852, and in compliance with the requirements of said resolution, erected poles and telegraph lines in the streets of said city.

The telephone came into use in 1878, and The City and Suburban Telegraph Association became the licensee of The American Bell Telephone Company, with the exclusive right to use all its patents in this city and county; and, as a company organized as a telegraph company may do a telephone business—66 Md., 399, 410; 6 Q. B. D., 244; 62 Wis., 32—the association thereupon commenced to erect telephone wires in the streets of the city under the same authority.

Its right under such authority to erect telephone wires—being telegraph wires—was clear; but that there should be no doubt, sec. 3471 of the Rev. Stat., was passed in 1880, whereby the provisions of the statutes relating to magnetic telegraph companies were made to apply to companies organized to construct telephone wires, and providing that every such company should have the same powers and be subject to the same restrictions as prescribed for magnetic telegraph companies.

Prior to 1885 the defendant in error had erected poles and telephone lines in many of the streets of the city under the direction of the engineer of the board of public affairs; the poles and wires on the streets occupied by the plaintiff in error were erected in 1881 and 1882.

At the time the defendant in error acquired its rights and occupied the streets as aforesaid, the use of the earth for the return current had become and was a

part of the telegraph and telephone system, and the defendant in error adopted that mode of return as the best mode applicable to its purpose, and has continued the use of the earth for its return circuit.

In the erection of its poles, wires, exchanges, and switch-boards, all built on the plan first adopted and in use before 1885, the defendant in error has, and before 1885 had, expended large sums of money.

It is clear from the record that The City and Suburban Telegraph Association complied with all the requirements of the law and of the ordinances of the city relating thereto, in the occupation of the streets by the erecting of its poles and wires, and that it is rightfully and lawfully in the streets of the city for the purpose of conducting a telephone business.

On April 20, 1871, the plaintiff in error, The Cincinnati Inclined Plane Railway Company, was incorporated for the purpose of constructing a railroad, the termini of said railroad to be in the city of Cincinnati and the village of Avondale, in the county of Hamilton, Ohio.

On February 23, 1889, the northern terminus of said road was extended to the village of Glendale in Hamilton county.

This company constructed the inclined plane which afterward became a part of the road operated by it.

Prior to this time, to wit, on August 19, 1864, an ordinance was passed by the common council of Cincinnati fixing the route of a street railroad known as Route No. 8, commencing at the corner of Main and Fifth streets, and extending up and on Main, Orchard, Sycamore, Liberty to Auburn streets, and subject to certain conditions on Auburn street, to the north corporation line, returning on the same line to the corner of Sycamore and Orchard, and thence on Sycamore, and Orchard, and thence on Sycamore, Franklin, Main, Court, Walnut, and Fifth streets to place of beginning.

A number of ordinances amendatory and supplementary of said original ordinance were passed, and said original and amendatory and supplementary ordinances were subject to the provisions of an ordinance prescribing the terms and conditions of street passenger railroads within the city of Cincinnati, passed July 1, 1859, and which provides for laying down rails for running street passenger cars to be drawn by horses or mules.

A portion of this road having been built, was operated by the Mt. Auburn Street Railroad Company.

On December 1, 1871, an ordinance was passed authorizing the extension of the Cincinnati Inclined Plane Railway from the head of Main street to Fifth street market-space, and whereby the inclined plane was connected with the Mt. Auburn Street R. R. tracks; the 4th section of which ordinance provides as follows: "No motive power except horses and mules shall be used on said tracks."

On October 27, 1875, an ordinance was passed authorizing the extension of the Cincinnati Inclined Plane Railway from the inclined plane to the north corporation line at the Zoological Garden; the 3d section of which ordinance provides: "No motive power except horses and mules shall be used on said tracks."

On March 30, 1877, (74 O. L. 66), an act was passed providing that any inclined plane railway company heretofore, or that may hereafter be, organized under the act of May 1, 1852, shall have power to hold, lease, or purchase and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains and operates its inclined plane; provided, that no other motive power than animals shall be used on the public highways occupied by such street railway without the consent of the board of public works in any city having such a board, and the common council, or the public authority or company having charge, or owning any other highway in which such street railroad may be laid, etc.

On June 19, 1877, George A. Smith, Joseph Stacy Hill and James M. Doherty executed a lease to the Cincinnati Inclined Plane Railway Company, whereby all and singular the street railroad then owned by said Smith, Hill and Doherty, known as the Mt. Auburn Street Railroad in Cincinnati (known also as Route No. 8), was leased perpetually to said lessee.

On September 24, 1885, a resolution was passed by the board of public works as follows:

"Resolved, that the board of public works, acting under the authority of an act passed March 30, 1877, entitled an act relating to inclined plane railway companies organized under the act of May 1, 1852, entitled an act to provide for the creation and regulation of incorporated companies in the state of Ohio, 74 O. L., 66, hereby consents to the use either of electricity, cable or compressed air, as a



motive power by the Cincinnati Inclined Plane Railway Company, upon the highways in which the street railroads connected with its inclined plane, and held and operated by it, are laid, on the following conditions, viz.: That the said company shall enter into a bond with the city of Cincinnati in the sum of \$25,000, with sureties satisfactory to this board, conditioned to hold the city harmless from any damages to persons or property arising out of the use of such motive power."

On October 10, 1888, the railway company, reciting the resolution of September 24, 1885, notified the board of public affairs that it had decided to use electricity as a motive power on its road, and requested a permit to erect poles, wires, etc., necessary to operate and maintain an electric road.

On October 24, 1888, the board passed a resolution granting such permit on condition, among others, that the poles be made of iron of the size and pattern, and the wires be strung in the manner, as shown on the plans submitted to the board and thereby approved, the work to be done to the satisfaction of the engineer of the board.

Under this permit the railway company erected the poles, wires, etc., necessary to operate what is known as a single trolley electric road, that is, a system by which the electricity passes over a single wire strung over the track, through the trolley to the motor, and thence onto the tracks, and using the tracks and earth as a return circuit, being known as the Sprague system of electric railways; this system is now being used by said railway company.

On March 23, 1889, a resolution was passed by the county commissioners of Hamilton county authorizing said railway company to use and occupy the Carthage turnpike with double tracks and with necessary appendages and appurtenances of an overhead electric street railroad system, and on which turnpike said railway company is now constructing a double track line to Carthage.

A resolution was passed April 3, 1889, by the county commissioners, providing that all telegraph and telephone poles found to be so placed as to interfere with the safe passage of the cars shall be changed to the curb line.

The road of the plaintiff in error is double track throughout, with switches at the inclined plane for the purpose of running the cars on either track.

By reason of induction from the wires of the railway company strung overhead, and conduction from the return current in the rail and earth, great damage is being continuously done to the defendant in error in its use of its telephones located along the lines of the railway company, and in the use of telephones where the connecting lines run parallel for any distance with the lines of the railway. Over two hundred lines have been affected in a greater or less degree, and in some cases the telephones have been rendered almost useless.

There is also danger of damage resulting to the defendant in error by the accidental contact of its lines with the lines of the railway company, and whereby property of the defendant in error may be destroyed.

On March 12, 1889, and before the railway company had put its electric plant in position, Capt. G. N. Stone, the general manager of the telegraph association, addressed a letter to the railway company, in which Capt. Stone calls the attention of the railway company to the fact that by the use of the rails for the return current on the street railway, telephone service is seriously interfered with, while an overhead metallic circuit, properly constructed, affects it very little.

On April 11, 1889, Capt. Stone addressed another letter to the railway company, from which it appears that he had had a conversation with the general manager of the railway company on March 14th, in which the manager of the railway company had stated in substance that by their contract with the Sprague Electric Company, it was agreed that the latter would construct the proposed electric street railway in such a manner as not to interfere with the operation of existing telephone or telegraph systems—and in which letter Capt. Stone stated that the directors of the telegraph association were apprehensive that the Sprague Electric Company would not be able to carry out that provision of its contract, and stating that they would be compelled to oppose the operation of any electric street railroad system in this city that would materially interfere with the operation of their telephone lines.

On April 18, 1889, Mr. Littell, the general manager of the railway company, wrote a letter to Capt. Stone, in which he states that the fears of Capt. Stone that their system will interfere with the telephone service are groundless; that Mr. Sprague was putting in his improved system here, never before used in any city; the improvements were to overcome the objectionable features experienced in other places; that it was not their intention to interfere with the telephone system in the least.

These letters were followed by a series of letters running to July 16, 1889. The railway company began running its cars in June, 1889. It is clear, therefore, that the telegraph association did not sleep on its rights, and estoppel can not be claimed.

The occupation of the street by the telegraph association under sec. 47 of the act of 1852 is not a permissive occupation in the sense that the association occupies the street by sufferance. Under this section there is a grant to the telegraph association to occupy the street. It is not even necessary to obtain the consent of the municipal or other body, but the mode of occupation shall be such as shall be agreed upon between the municipal authorities and the company, and if they can not agree, or in case the municipal authority unreasonably delays to enter into any agreement, then the probate court shall direct the mode of occupation under sec. 5 of the act of 1885.

The right, therefore, of the telegraph association to occupy the street is absolute, provided only that its occupation of the streets by posts, piers and abutments shall not incommode the public in the use of the street.

That the streets and roads were originally intended for travel is probably true, but it is well settled that it is within the power of the legislature to grant the right to occupy the streets for such other purposes as may be of general convenience—the right of abutting land owners being protected. *Attorney-General v. C. G. L. & C. Co.*, 18 Ohio St., 262; *Kumler v. Silsbee*, 38 Ohio St., 445; *Elliott on Roads and Streets*, 14.

It is true the statute does not provide that telegraph companies may use the earth for its return circuit. But the use of the earth for a return circuit for telegraph lines was so universal as to become part of the system, as much as the use of poles, etc., and such use certainly does not incommode the public.

The disturbance by induction and conduction may be effectually prevented by the use on the part of the railway company of a metallic circuit in place of the rail and earth as a return circuit.

But can the railway be required to use such metallic circuit?

The resolution of the board of public affairs of 1885, whereby consent was given to the railway company to use electricity as a motive power, does not specify any form, or manner, or system of use.

It is claimed, however, the railway company adopted the single trolley system, and submitted to the board plans showing that system, and that the board, by the resolution of October 24, 1888, approved the plans, and gave permit to erect the poles, wires, etc., according to that system.

But the act of 1877 only gives authority to the board of public affairs to consent to the use of a motive power other than animals, and not that it may consent to any particular system of such power. The board gave its consent in 1885, and thereby fulfilled the law.

Section 47 of the act of 1852 gave to the telegraph association the unqualified right to occupy the streets, providing, by its posts, etc., it did not incommode the public. It did so occupy the streets, and is there by virtue of the right so granted. The act of 1877 will not be construed as giving, by implication, to the board of public affairs, the power, by its consent, to destroy the right acquired by the telegraph association under section 47, or to greatly damage the telegraph association in its use of its rights so acquired.

Judge Day, in *Hickok v. Hine*, 23 Ohio St., 523, says, p. 530:

"Powers in derogation of the rights of individuals or of the public, conferred in general terms upon corporations or public officers, must be construed with some degree of strictness. Where the legislature has power to require one public easement to yield to another, more important, the intention to grant such power must appear by express words, or by necessary implication. Such implication can arise only when requisite to the exercise of the power expressly granted, and it can be extended no further than the necessity of the case requires." Citing 4 Cush., 63, and 5 Allen, 221.

In the case of *Metropolitan Asylum District v. Hill*, 6 Appeal Cases, 193, Lord Blackburn says (*Ib.*, p. 208): "It is clear that the burthen lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words or by necessary implication, such an intention appears."

When a right is granted by the legislature to conduct a business, and there is but one mode of conducting the same under the right granted, probably the person to whom the right is granted may conduct the business in that mode. *even*

if thereby injury is done to others. The Directors, etc., of the Hammersmith & City R. W. Co. v. Brand et al., L. R. 4 H. L., 171, 202.

Such seems to be the holding of the court in the case of Parrot v. The C., H. & D. R. Co., 10 Ohio St., 624. Yet even in that case the court held the company liable in damages to the plaintiff for an obstruction of the street, substantially affecting his use of the street as an appurtenance to his premises.

When, however, a grant is given by the legislature to a person to conduct a business, and in the conduct of the business one of two modes may be employed, each equally effective, and by one of which the rights of others are not affected, and by the other of which the rights of others are injuriously affected, a court of equity will interfere and enjoin the use of the mode by which the rights of others are injuriously affected. *Hickok v. Hine*, 23 O. St., 523; *Gas L. & C. Co. v. Vestry*, etc., 15 Q. B. D., 1; *Geddis v. Proprietors*, etc., 3 App. Cases, 430; *Att'y-Gen'l v. Gas L. & C. Co.*, 7 Ch. Div. 217; *Att'y-Gen'l v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch. App., 146; *Coats v. The C. R. W. Co.*, 1 Russell & Mylne, 181; *The Queen v. Bradford Nav. Co.*, 6 Best & Smith, 631, 652; *Appeal of Pittsburgh Junction R. Co.*, 112 Pa. St., 512, 531; *Wood on Nuisance* sec., 754.

Injunction is a proper remedy. *Crawford v. Rambo*, 44 Ohio St., 279, 287; *Imperial G. L. & C. Co. v. Broadbent*, 7 H. L. C., 600, 610; *Reinhardt v. Mentasti*, 42 Ch. Div., 685, 690; *Att'y-Gen'l v. Cambridge C. G. Co.*, L. R. 4 Ch. App., 71, 80, 81.

It is claimed that this doctrine can only apply to a nuisance, and that an act done under a grant from the legislature cannot be deemed a nuisance, citing *Parrot v. The C., H. & D. R. Co.*, 10 Ohio St., 523, 624; yet the court held, in the case of *Hickok v. Hine*, 23 Ohio St., 528, that a bridge which was proposed to be built under authority granted by the legislature, would be a nuisance if built in a certain way. The act conferred power to build the bridge (*Ib.*, 530); it was proposed to build the bridge in a manner which would be a nuisance (*Ib.*, 528), and the court by injunction prevented the erection of the bridge in the manner proposed, it appearing that it could be erected in a manner—with a draw—which would not be a nuisance (*Ib.*, 530).

We take the rule to be that where a specific power is granted to do a certain thing, and that there is but one way to do it, then under the 10 Ohio St., case it can not be considered a nuisance; but when it can be done in two ways, one causing no injury and the other causing injury, then, under the 23 Ohio St. case, it would be considered a nuisance if done in the way which would cause the injury.

Judge Hitchcock, in the case of *Cooper v. Hall*, 5 Ohio, 320, 323, says: "What, then, are we to understand by the term nuisance? Perhaps it is as well defined in 3 Petersdorf's Com. Law., 550, as in any of the books. It is there said that 'the term nuisance signifies any thing that causes hurt, inconvenience, annoyance, or damage.'" And this definition was adopted by Judge Gholson, in *Col. Gas Co. v. Freeland*, 12 Ohio St., 392, 397.

If that which does hurt, etc., is specifically authorized by a grant of the legislature, it may not be deemed a nuisance under 10 Ohio St.; but if the legislature makes a grant of a right, and in the prosecution of that right the thing which causes hurt may be used but is not necessary to be used to effect the object of the grant, then that thing which causes hurt will be deemed a nuisance if attempted to be used.

The defendant uses the Sprague system—that is, the system by which the rails and the earth form the return circuit.

Is there any other system which will not cause the hurt, and which can be used with equal efficacy?

It is clear that the double trolley system—that is, a system in which a metallic circuit is used in place of the rails and the earth—would prevent the disturbance; but it is claimed that the double trolley system cannot be used with the same efficacy as the single trolley.

Much testimony of experts and practical men was taken on this point, and it seems to us to be established by the evidence that the double trolley system can be used with efficacy equal to the single trolley system on roads having double tracks.

The trial judge, in reviewing the evidence, says: "Mr. Short, who is a skilled mechanic engaged in a company which bears his name, and which erects both the single and double trolley systems, says that he recommends the single trolley for single tracks and the double trolley for double tracks. He seems the only witness on either side that is free from suspicion of bias."

Judge Brown, in deciding *The Cumberland Telephone and Telegraph Co. case*, in the U. S. circuit court, and being one of the best considered cases handed

to us, in considering the availability of the double trolley system, says: "Indeed, it is only where the roads make use of a double track that the double trolley can be made a success."

In our city we certainly have a double trolley road which is a success, the road having a double track.

If the railway company should be required to change its system, it would be subjected to an expense of from \$3,000 to \$5,000. But Lord Chancellor Hatherly said, in the case of the Attorney-General v. Colney Hatch Lunatic Asylum, L. R., 4 Ch. App., 158: "It is only a question of expense, and this court is not in the habit of listening to any argument on the ground of expense when it restrains the doing of a wrong."

Judge Brown, in The Cumberland Telephone and Telegraph Co. case, says: "If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing itself or the public to any great inconvenience or a large expense, we think it would be its duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction."

The disturbance by conduction and induction may also be prevented by the use of a metallic circuit by the telegraph association. To change its system by the adoption of a metallic circuit in place of the ground for its return current would require an additional wire on each of its lines, new switch boards, the exchanges to be remodeled—all at an expense equal to the cost of the original plant.

The McCluer device could be adopted by the telegraph association at a less expense, but that only prevents the disturbance arising from conduction.

But if we are correct in our view of the rights of the parties, the defendant in error can not be called on to change its system.

The danger of destruction of property by the accidental contact of the lines of the telegraph association with the lines of the railway company can be prevented by the use of the double trolley by the railway company, as in the event of a wire falling on the two wires of the double trolley, a circuit will be formed between the two trolley wires which will burn off the falling wire and do no further damage.

A majority of the court think the equity of the case is with the defendant in error; that it is entitled to an injunction to restrain the plaintiff in error from the use of electricity as a motive power in the manner now used, and that the decree of the court below should be affirmed.

MOORE, J., concurs; HUNT, J., dissents.

E. A. Ferguson and Gov. John S. Wise, attorneys for plaintiffs in error.

Judge H. D. Peck and A. F. Perry, *contra*.

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HUNT, Pres. J., (Dissenting Opinion.)

It is assumed that the parties to this action are in the lawful exercise of their franchises, and, therefore, their respective rights and obligations in that regard need not be considered. It is only important that the relations they sustained toward each other should be determined.

It must be conceded, too, that a telephone company is a telegraph company, and that, under the right to construct and operate telegraphs, the defendant in error was empowered to establish a telephone service. Sec. 3471 R. S., makes the provision of the chapter relating to telegraph companies expressly applicable to telephone companies, and the court, under almost similar legislation in the case of Chesapeake & Potomac Telephone Co. v. B. & O. Tel. Co. of Baltimore, 66 Md., 399, says: "This latter act is supposed to have been passed in order to remove all possible doubt as to the authority, under the general incorporation law, for incorporating telephone companies. But it is clear, if we take the term 'telegraph' to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, that term is comprehensive enough to embrace the telephone. And that the telephone is so embraced within the definition of the telegraph has been expressly decided in England after the most careful analysis and comparison of the different instrumentalities, and the manner of using them in the two systems."

There was an elaborate discussion of the subject in the case of Att'y-Gen. v. Edison Tel. Co., 6 Q. B. Div., 244. The idea has been aptly expressed by saying that the telegraph communicates its messages by marks, that is to say, graphs, and the telephone by sound, that is to say, phones. In a legal sense, both methods are embraced under the general designation of telegraph.

It can not well be claimed that telegraph companies are upon the highway by virtue of rights acquired under its original acquisition or dedication, and it can as well be asserted that the erection of a telephone line upon a highway is an additional servitude. *Smith v. Cent'l Dist. Print'g & Tel. Co.*, 1 Circ. Dec., 475; *Sup. Court of Ap'ls of Va.* (recently announced); *The B'd of Trade Tel. Co. v. Barnett*, 107 Ill., 507; *Willis v. Erie Tel. & Tel. Co.*, 34 N. W. Rep., 337; *Atl. & Pac. Tel. Co. v. C.*, R. I. & P. R. R. Co., 6 Bissell, 158.

It is true that the Supreme Court of Massachusetts in *Pierce v. Drew*, 136 Mass., 75, and the Supreme Court of Missouri in *Julia Building Ass'n v. Bell Telephone Co.*, 88 Mo., 258, are exceptional in holding such use not an additional burden. There was, however, a dissenting opinion in the former case by two of the bench (Allens, JJ.), and in the latter case *Henry, C. J.*, and *Sherwood, J.*, dissented on the ground that a street is not necessary to the construction or operation of a telephone, and that while the mode of using a street may and must change, from time to time, as the wants of commerce or of the public may require, yet the additional use must be consistent with and germane to that for which it was originally dedicated or condemned.

In the case of *B'd of Trade Tel. Co. v. Barnett*, supra, Mr. Justice Scott, p. 514, declares the doctrine that the use of the highway for the erection of poles on which to place their wires, is a new and additional burden upon the fee, not contemplated in the assessment of damages, in case the easement was obtained by condemnation, or had in view by the land owner in the case of dedication for ordinary highway purposes.

*Elliott on Roads and Streets*, p. 534, in discussing the question, says that by the older authorities it was held that the owner of the soil had a right above and under the ground, except only "the right of passage for the king and the people." It was afterward held that the public right included the incidental right of preparing the way for travel and in keeping it in repair. Then, as necessity seemed to demand, this right was enlarged, and it was held that the owner in dedicating the way, or the authorities in establishing it, must be presumed to have contemplated its use for improved means of travel. This, as a matter of fact, is, in most cases, a very violent presumption; but to presume that the use of our highways by telegraph or telephone companies was contemplated when they were established, does still more violence to the facts. Such a use bears a very remote analogy to their use for passage or repassage, \* \* \* and so far from facilitating travel, they rather impede it and interfere with the ordinary use of the way. The truth is, the opposite doctrine is founded upon expediency rather than upon principle.

In some of the cases where the construction of a steam railroad is held to be an additional burden, the same subject is discussed and the principle recognized, and notably in the decisions respecting the New York elevated railways.

In the case of *W. U. Tel. Co. v. Mayor of New York*, 38 Fed. Rep., 559. *Wallace, J.*, in passing upon the right of the municipality to compel a telegraph company to place its wires under ground, in the exercise of police powers, insisted that the grant is no more invaded where the regulation requires the wires to be placed in conduits under the ground, than it would be if they were required to be placed in conduits under the surface of the street; and when this becomes necessary for the comfort and safety of the community, such a regulation is as legitimate as one would be prescribing that the poles should be of uniform or designated height, or should be located at given distances apart or at designated places along the street.

The defendant in error was organized in 1873 as a magnetic telegraph company to conduct a telegraph business on lines within the city of Cincinnati and to points in Butler county, Ohio, under legislation which has since been incorporated in chapter 4, title 2, R. S. O., relating to magnetic telegraph companies. Sec. 3454 R. S., which provides for the construction of telegraph lines, expressly declares that the erection of the necessary fixtures shall not incommode the public in the use of the road, and sec. 3461 by legislative enactment limits the discretion of the probate court in certain proceedings looking to the mode in which telegraph lines shall be constructed along streets, alleys, or public ways, so that the public shall not be incommoded in the use of the streets. The word "incommode" has been defined to mean the causing of trouble or inconvenience, and certainly the legislature intended that such uses of the telegraph lines should in no way interfere with the public convenience.

The superior court of Cincinnati, in *Roth v. W. U. Tel. Co.*, held in terms that a telegraph pole is certainly not consistent with the use of a highway as a highway. It is an obstruction so far as it occupies the street. A street railway

stands on a different footing, because it has been held to be no obstruction to the streets and in furtherance of the use of the street.

It may be claimed with safety that the construction and maintenance of a telegraph or telephone line upon a highway is a new and additional burden upon the fee, to which, when the highway was established, it was not contemplated that it should be subjected.

If then, too, by express statutory enactment the telegraph company must arrange its fixtures necessary for its wires so as not to inconvenience the public in the use of the streets and public ways, it certainly can not be claimed that equity should be invoked to restrain the use of the electric-motor power for the propulsion of cars in a street railway constructed under a legislative grant, and under direction of the municipal or local authorities, especially if such use is in furtherance of the purpose for which the highway was originally acquired or dedicated.

The parties who originally purchased the franchise and property of the Mt. Auburn R. R. Co. leased the Mt. Auburn R. R. perpetually on June 19, 1877, to the Cincinnati Inclined Plane R. R. Co. The board of public works, on September 24, 1855, passed a resolution consenting to the use by the plaintiff in error, either by electricity, cable, or compressed air as a motor power "upon the highways in which the street railroads connected with its inclined plane and held and operated by it are laid," on condition that plaintiff in error give bond in the sum of twenty-five thousand dollars to hold the city harmless from any damages to any person or property arising out of the use of such motor power. This bond was approved and filed with the proper authorities.

The board of public affairs, on October 24, 1888, (p. 1190, Ex., 21, Record), gave the plaintiff in error permission to erect along the entire length of its road the poles and wires and appliances necessary to operate and maintain its entire line, from Fifth and Walnut streets to the Zoological Garden, as an electric road, in accordance with plans and specifications submitted to the board. This permission is important, and was in the following words: "Resolved, That the permission asked for by the Cincinnati Inclined Plane Ry. Co. in its application made to this board on the tenth day of October, 1888, under act in 74 Ohio L., 66, to erect along the entire road the poles, wires, and appliances necessary to operate and maintain its entire line, from Fifth and Walnut streets to the Zoological Garden, as an electric road, and to change and relay the track and improve the curves and switches from Liberty street to the Zoological Garden, so as to better adapt them to the running cars by electricity, be and the same is hereby granted, on the following conditions: First. The poles to be made of iron, of the size and pattern, and the wires to be strung in the manner as shown in the plan submitted to this board and hereby approved. Second. The form and style of rail used in relaying tracks to be subject to the approval of the engineer of this board."

The stockholders of the plaintiff in error, on February 23, 1890, extended the northern terminus to Glendale, in Hamilton county, Ohio, and certified the same to the secretary of the state as directed under sec. 3306 Rev. Stat.

The county commissioners of Hamilton county, on March 23, 1880, by resolution, granted the application of the Cincinnati Inclined Plane Ry. Co., for the use and occupancy by double tracks, and with necessary appendages and appurtenances of an overhead electric railroad system, on the Carthage turnpike at or near its intersection with Ludlow avenue, and running thence upon and along the Carthage turnpike to its northern terminus at or near the county fair grounds, at Carthage, so as to enable the said company to permit continuous, rapid, and safe transportation between Fountain Square, in Cincinnati, and the village of Carthage, in this county.

Provision 10 of this grant, which was accepted March 26, 1889, by the Cincinnati Inclined Plane Ry. Co., provided for the removal by the county commissioners of any and all telegraph and telephone poles which might interfere with the operation of the electric road. This provision, however, was modified by the action of the county commissioners on April 23, 1889, so that the telegraph and telephone poles should be located at the curb line. The proceedings show that the representatives of the plaintiff in error were present and assented to the modification. It may not be important to the discussion, but the record fails to disclose that any permission was ever given by the county commissioners, or any local authority, looking to the occupancy of the Carthage turnpike by the Cincinnati & Suburban Telegraph Association for the purpose of its poles and wires. The action of the county commissioners in granting the use to the plaintiff in error had in view their removal altogether if there should be interference with the operation of the electric road under the grant.

If, then, the plaintiff in error had a right to the use of the highway and the Carthage turnpike for the purposes of a street railway—and one with electricity as the motive power—then whatever is fairly within the contemplation of the grant, and necessary to its beneficial enjoyment, is within the legal operation of the instrument or proceeding by which it is effected. This is especially true if the grant is in furtherance of a use for which the highway and the Carthage turnpike were acquired or dedicated, as against either a permissive occupancy or a use which is uniformly regarded and recognized as an additional servitude on the highways.

It has been repeatedly decided that a street railway is in furtherance of public travel; and to this end the Supreme Court of Ohio, in the case of Cincinnati & Spring Grove Ave. St. Ry. Co. v. Village of Cumminsville, 14 Ohio St., 523—Ranney, J.—declares that the use of such highway for the purpose of carrying passengers over the same, in this particular manner, differs in nothing from the exercise of the common right of carrying them by coaches and omnibus; and everything needing a grant, or the further authority of law, is the right to place and maintain in the highway the necessary conveniences for the new description of carriages. \* \* \* It does not exclude or seriously interfere with the original modes in which the highway was used, but simply adds another in furtherance of the same general object."

The superior court of Cincinnati in general term in the case of Clement v. Cincinnati, 9 Dec. Re., 688, in holding that a street railway does not cease to be such because a grip car is substituted for horses as the motive power, says: "The progress of invention among a people famous for fertility in that regard, especially with respect to transportation, the growth and change of location, of population, and the teachings of experience, are apt to make such modifications necessary to accomplish what was intended in the creation of agencies of this kind."

The court, in Pelton v. East Cleveland R. R. Co., 10 Dec. Re., 545, Cuyahoga common pleas, lays down the doctrine that it is the nature of the use, not the motive power, which determines whether the road belongs to one class or the other. When a road is laid in a street, on the surface of a street because it is a street, and to facilitate the use of the street by the public, it is a street railroad, whatever the means used to propel cars over it.

The circuit court in the case of The Mt. Adams & Eden Park Incline Plane Ry. Co. v. Winslow, 2 Circ. Dec., 240, in considering the right to construct and operate an electric system of motive power on all the lines of street railroads owned and operated by the street railway, used this language: "The tracks of the street railways continue in the condition in which they have been in for several years past: the only addition or change which has been made to adapt it to the use of the electric motor being the poles and wires referred to. If the street so long in use is not an invasion of the rights of the defendants, though the same must in the nature of things be some obstruction to the highway, but largely compensated in a populous city by the advantages of this mode of travel, it is difficult to see why the mere placing of a pole of this size on the margin of the sidewalk at once and necessarily gives to the owner of the adjacent premises the right to prevent it or have it removed."

But it (the public highway) was acquired that the public might travel over the same on foot or horseback, or in vehicles of various kinds, as we have before stated. We think it the law of this state that the use of cars drawn by horses on rails permanently placed in the roadway is not to be considered of itself an unlawful or improper change of the use of the highway, or as imposing an additional burden upon the adjacent land; and if this be so, then the use of it in substantially the same manner, but with a different motive power, would not alter the case. It is still a mode of travel over the highway. 2 Dillon on Municipal Corporations, sec. 722; J. C. & B. R. Co. v. J. C. & H. R. Co., 20 N. J. Eq., 61; Hinchman et al. v. Patterson H. R. Co., 17 N. J. Eq., 75; Att'y-Gen'l v. Metropolitan R. R. Co., 125 Mass., 515; Hiss et ux. v. B. & H. Pass. Ry. Co., 52 Md., 242.

If the general assembly had intended to abridge the use of the public highway for public travel by any legislation relating to telegraph companies, such language has neither been used nor can it be inferred from any reasonable interpretation. Hickok v. Hine, 23 Ohio St., 523, is cited to the effect that where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, or by necessary implication; and such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. In that case the court expressly declared that the rivers

of the state, to the extent that they are in fact navigable, are public highways, and Grand river having been declared to be a public highway in this sense, the commissioners of Lake county were not authorized to obstruct the navigation of a river under a legislative grant of power merely for the building of a bridge across the river, when the bridge can be reasonably constructed so as not to destroy the navigability of the river. The principle was recognized that here were two highways, both in furtherance of travel, and that the legislature would hardly contemplate the destruction of the one under a grant to construct a bridge which could just as well be constructed without injury to the other. The distinction is apparent, and it can hardly be claimed that the same principle would apply to a grant in furtherance of the public use of the highway and one which, under the very statute under which it is created, is made subordinate to public convenience.

In *Bingham v. Doane*, 9 Ohio, 165, the court held that the grant of a privilege to construct a wharf or dock in a public highway, did not authorize the erection of a warehouse. The contention arose whether the defendant was entitled to build a warehouse within certain limits set apart for a road. The act of congress conveyed certain land to the state of Ohio as a tract wherein "to locate a road," while the legislature directed the commissioner to locate and survey the road one hundred and twenty feet wide between the points indicated. Under these circumstances, said Lane, J., we shall look for some strongly decisive act of the state before we admit their intention to devote it to any other use; . . . but no intention in expression and no power given to affect the line of the road, or contract the right of the public to it as a public highway. The point of termination is a navigable river. A wharf is the extension of the road into the river. A dock is a place for vessels, either excavated from the land, or surrounded by wharves. Both, in this situation, are subservient to the public, by facilitating the transit of passengers and burdens between the land and the water, and thus both contribute to the object sought for by the establishment of a highway. It is therefore expressly forbidden by law directing the wharf to be so constructed, that the road shall in no respect be incommoded in consequence. It will be seen that the court employs the very word which is incorporated into the statute relating to telegraphs, and that the court refused to amplify the grant beyond the purpose expressed in the original acquisition or dedication.

Any claim to a vested right on the part of the defendant in error, either because it acquired its right-of-way and constructed its plant on the faith of the statute of the state granting it the necessary powers, or because of a large expenditure of money in its equipment and operation, cannot successfully be maintained. This would be in effect a claim, as has been stated, that by virtue of the grants, it acquired, before the plaintiff in error had a right to use electricity in the propulsion of its cars, a vested interest in the telephone system as it now operates with a grounded circuit, and that not even the legislature could take away from it or injure this franchise on the faith of which it has expended so much capital and labor.

This is answered by secs. 1 and 2, art. 12, of the state constitution, that provides that corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed.

It is the duty of the state to provide either by itself, or through such agencies as it may select, public highways for the development of the resources of the state and for public convenience, and it would be within the power of the legislature even to compel the defendant in error, if it wished to continue in the telephone business, to so change or modify its system as to permit the public use of the highway of another corporation under a proper grant; and that, too, without any right of action against such corporation.

This principle was expressed by Johnson, J., in the case of *Ry. Co. v. Ry. Co.*, 30 Ohio St., 604, "in that new channels of trade and commerce and highways for public travel are essential to the growth and development of the state, and for the convenience and comfort of its people, and the power of the state to provide them is one of these sovereign powers held in trust for the public welfare which it has no right to grant away or surrender. . . . Public policy demands that the performance of this continuing duty and the inherent power to perform it, shall not be prevented, impaired or abridged by its own grants."

"Our constitution and laws are in harmony with this principle. It is against public policy to grant exclusive privileges or franchises for public purposes." If the road first constructed has a vested property in the right to operate a railroad at that point, then it has an exclusive privilege in public uses. By parity of reasoning, if the defendant in error has a vested right by reason of priority of time in the use of the grounded circuit, then it has an exclusive privilege as against all



other electrical appliances, which must depend upon the grounded circuit for the return current of electricity.

It will thus be found that the courts will not encourage any claim in the direction of amplifying, or even protecting what are termed vested rights under legislative grant, but which on closer analysis will often be found to be only privileges granted within constitutional and statutory reservations and limitations, and always subject to legislative control.

In the case last cited, it was held that when one railway company condemned a right-of-way across the track of another, that other can not recover for an injury to its franchise as a railroad, nor for the increased expense entailed upon it in obeying the laws of the state with reference to railroad crossings. If this decision rests upon the principle that the right of travel across a railroad is the same as the right of railroads to cross canals, rivers, and common highways, and is as important a public use as the right of transit along them, it may be questioned since no compensation is provided by law for telephone companies, and no property of it is taken, whether any right of action exists at all, even though prior in part of time and right. *Ry. Co. v. Ry. Co.*, 30 Ohio St., 604; *Commonwealth v. Temple*, 14 Gray, 70; *Ry. v. Gardner*, 45 Ohio St., 309.

If then, the two corporations are legally upon the highway, the whole contention arises from the fact that both employ the grounded circuit of electricity. It is admitted by every one, observes the court in special term, that if the telephone company were to make every one of its lines a complete metallic circuit, with the return wire parallel with the outgoing wire, the disturbance both from induction and earth leakage would be completely removed, while it is practically concluded, although there was some slight evidence to the contrary, that if instead of a single trolley wire and an earth return, two trolley wires were used, one for the positive and the other for the negative current, the difficulties would be as completely obviated as if the telephone company used a metallic circuit. The evidence shows that the expense occasioned by any such change would be much greater in the latter case, and after all the difficulty practically would be ended by determining at whose expense the proposed changes should be made. It appears that these evils do exist to the serious detriment of the telephone service, and it likewise appears from the evidence that they are not insurmountable.

The legal question involved in this case would be settled by determining how far a person making a lawful and careful use of his own property, or of a franchise granted to him by the proper municipal or local authorities, is liable for injury incidentally caused another.

It is the accepted rule that so far as persons operating under legislative grants are concerned that something more than mere incidental damages to another must be proved; something, in fact, in the nature of an abuse of the franchise, or an invasion of legal rights, to entitle the party to the extraordinary relief afforded by an injunction.

It is urged that the court in *Reinhardt v. Mentasti*, 42 Ch. Div., 685, announced that the application of the principle governing the jurisdiction of the court in cases of nuisances, does not depend on the question whether the defendant is using his own reasonably or otherwise. The real question, says Kekewich, J., is, does he injure his neighbors? There must be the invasion of some legal right to justify the intervention of a court of equity, and it is sufficient to say that the Supreme Court of Ohio, in *Parrot v. C., H. & D. R. R. Co.*, 10 Ohio St., 624, expressly decided that nothing which is authorized by competent authority is a nuisance per se. Nor are the authorities confined to our state. They are constant and uniform. *Davis v. The Mayor*, 14 N. Y., 506; *Transportation Co. v. Chicago*, 99 U. S., 635.

The case of *B. & P. R. R. Co. v. Fifth Baptist Church*, 108 U. S. Rep., 317, involved the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship, but Mr. Justice Field, in announcing the opinion of the court, held to the doctrine that a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of the cars in *damnum absque injuria*.

In no sense can a street railway be regarded as an obstruction to the highway. It is permitted because it relieves the pressure of local business and local travel,

and is in furtherance of the very object for which the highway was acquired. The use of a street for a street railway is a proper use, and therefore a legal use. It is true that they may be constructed for private gain, but they none the less subservise a public good. The principle that a railroad is not a public nuisance, and no right of action can arise against the company unless through negligence or improper management, is generally recognized. *Chicago, Q. & B. R. R. Co. v. McGinnis*, 79 Ill., 269; *Moses et al. v. Pitts., Ft. W. & Chic. R. R. Co.*, 21 Ill., 516; *Chapman v. Al. & S. A. R. R. Co.*, 10 Barb., 360; *Carson v. Central R. R. Co.*, 35 Cal., 325; *Porter v. North Mo. R. R. Co.*, 33 Mo., 128. The principle that it could not be a nuisance in the condition in which the state allowed it to remain, seems unquestionable. It is a legal solecism to call that a public nuisance which is maintained by competent authority. *Harris v. Thompson*, 9 Barb., 350; *D., H. & W. R. R. Co. v. The Commonwealth*, 73 Penn. St., 29. The nuisance, whether it be public or private, must be found in the subsequent misconduct or mismanagement of the railroad company, and not in their acceptance of the permission to occupy the highway. *G. R. & I. R. R. Co. v. Heisel*, 38 Mich., 62.

The proposition involved in this case is novel in some respects, and has not been adjudicated in the courts of last resort. The weight of authority in the federal and state courts, where similar bills have been exhibited, is against the intervention by a court of equity. The decision of the court of appeals of New York, in *Watervliet T. & R. R. Co. v. Hudson River Tel. Co.*, is entitled to consideration. In the opinion delivered by Andrew, J., the court says: "The evidence strongly preponderates, in support of the contention of the defendant, that the single trolley system for the propulsion of street cars by electricity is the best in use," having regard to mechanical, electrical and financial considerations. (Opinion, Landon, J., general term.)

"The use of a grounded circuit is not necessary to a telephone system. The substitution of a metallic current, such as is used in long distance telephone lines, will, it is admitted, prevent any material disturbance from the operation of the defendants' road by the single trolley system. There is no dispute that the substitution by the plaintiff of the metallic for the earth circuit is practicable, but the change would involve a large outlay, and on the other hand the testimony of the experts is that besides obviating the disturbance caused by the defendant's road, the change would promote the general efficiency of the telephone service. It is sufficiently obvious from this summary statement that the question presented in this case involves very important public and private interests. The plaintiff is but one of a large number of telephone companies which, under the general permission of the statute for the incorporation of telegraph companies, have erected poles and strung their wires in the streets and villages of the state. The claim that under this permissory grant they can exclude the use of the streets by electric railways, whereon the use of this agent interferes with the use of the telephone, although the municipality may consent and the public interest will be promoted to the other uses to which the streets are sought to be subjected, needs but to be stated to induce hesitation. We have examined with care the questions involved in this case, and we are compelled to say that we entertain very grave doubts whether, upon the facts stated in the complaint and affidavits, any cause of action exists in favor of the plaintiff, and whether the plaintiff has any remedy for the injury of which it complains, except through a re-adjustment of its methods to meet the new condition created by the use of electricity by the defendant under the system it has adopted."

It is but proper to state that the court did not dispose of the case upon its merits in that proceeding. It was simply held that the granting of an injunction pendente lite rests in the sound discretion of the court of original jurisdiction, and that this discretion is reviewable only by the general term. But, even then, *Finch and Peckham, JJ.*, pronounced for a reversal of the orders.

In *Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.*, U. S. C. C., M. D. Tenn., the court, in a well prepared opinion, said: "The substance of all the cases we have met with in our examination of this question—and we have cited but a small traction of them—is that when a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. *Hoyt v. Jeffers*, 30 Mich., 131.

"The principal use of the streets is to accommodate the traveling public, and whatever rights the telephone company have must be held to be in subordination to the right of travel. They must so conduct their business as not to interfere with ordinary travel, and they must submit to any necessary inconvenience resulting from the ordinary travel passing over the street. They take their right subject to this burden. This principle applies not only to the mode of travel at the time the telephone was built and their rights acquired, but applies as well to any new or improved modes of travel which have been or may hereafter be invented and applied generally in aid of travel in the streets." *Wisconsin Telephone Co. v. Eau Claire St. Ry.*, Circuit Court, Eau Claire county.

The telephone is a very delicate and sensitive instrument. The current of electricity by which it is operated has been likened to the soft breathings of the new born infant; and in its use of the grounded circuit it must necessarily be disturbed more or less by any flow of current from neighboring electrical enterprises, whether they be currents of arc lights, incandescent lights, power plants, electric railways, or any other electrical enterprises. The electrical field is immeasurable. It is that power in nature, like the wind, which bloweth where it listeth, and we hear the sound thereof, but we can not tell whence it cometh and whither it goeth. Human intelligence has not yet comprehended the phenomena and the laws of the electric fluid.

The evidence in the case establishes beyond a doubt the fact that since the plaintiff in error began the operation of its line by electricity, in June, 1889, to the time of the original hearing of this cause, the usefulness of the telephone among its line of electric railway has been impaired; nor can it be denied that the plaintiff in error is engaged in the lawful carrying of passengers, upon the public highway. The board of public affairs, it is true, defined no system of electricity, but certainly the mode of propulsion is in accordance with plans approved by the board of public improvements, for, while the present electro-motive power is adopted, and was constructed under the direction of the engineer of the board, the testimony is conflicting as to the merits of the respective systems of electro-motive power. Yet it is in evidence that out of 124 electric railways on November 1, 1889, but six were double trolleys, and they were nearly all failures (Lockwood's testimony, pages 284-9; also, Thompson and Sprague), while the testimony certainly discloses that the single trolley system is in use on nine-tenths of the electric railways in the United States.

The chancellor must address himself to the bill as exhibited, and to conditions as they exist, but it can not be forgotten that electricity is in its infancy. If the equity rule of the court can be successfully invoked against the use of the grounded circuit for electric motive power in the public highways, it can as well be invoked against all other forms of electrical energy which, in the progress of science and invention, may employ the grounded circuit for the return current of electricity.

If in the case of *Attorney-General v. Colney Hatch Lunatic Asylum*, 4 L. R. Ch. Ap., 153, Hatherly, L. C., said that the court was not in the habit of listening to any argument on the ground of expense when it restrains the doing of a wrong, so in this case equity will first determine whether there is a wrong to be restrained before the comparative expenses of any change from the single to the double trolley system, or from the grounded to the metallic circuit, can be considered. Equity regards right as the supreme duty.

It is very evident, then, from a consideration of the authorities, that the prayer of the plaintiff below can neither be entertained on the maxim "*sic utere tuo alienum non laedas*," nor on the ground that when two modes of conducting business may be employed equity will enjoin the use of that mode by which the rights of others are injuriously affected.

The judgment of the court in special term should be reversed, and the injunction refused, upon the following grounds:

1. That the plaintiff in error is in the lawful use and occupancy of highways under a grant which is in furtherance of the purposes for which the highways were acquired and dedicated.
2. That the plaintiff in error is making use of the grant in a manner contemplated by the statute itself, and by the municipal or local authorities in control of the highways, and that such occupation and use can not be considered as a nuisance *per se*.
3. That the record does not disclose that the plaintiff in error, in the exercise of such grant, has unnecessarily invaded or disregarded any of the legal rights of the defendant in error.

4. That the damages of which the defendant in error complains are not the direct consequence of construction of the electric street railway under the electro-motor system in use at the filing of the bill, but are damages incidental to the lawful operation of the road, and are, therefore, *damnum absque injuria*.

5. That it is the duty of the state to provide, either by itself or through such agencies as it may select, public highways for public convenience, and that it is against public policy to grant privileges or franchises which are, in effect, exclusive, or which interfere with a legal and recognized public use of such public highways.

## 10

## REPLEVIN.

[Greene Common Pleas, 1890.]

## XENIA TWINE &amp; CORDAGE CO. V. THE HOOVEN &amp; ALLISON CO.

1. Where a defendant in replevin undertakes in a second action to re-replevy the property taken from him, though he make the affidavit required by statute, the truth of the allegation that the property was not taken on process issued against him may be inquired into on motion.
2. Where a writ of replevin is wrongfully and improperly obtained, the property being in the possession of the office, the court may recall and set aside the writ and order a redelivery.

SMITH, J.

In this action plaintiff seeks to recover from the defendant the possession of 190 bales of sisal, and having filed the affidavit required by statute, and a petition in replevin, the writ was issued by the clerk of this court and delivered to the sheriff who, by virtue of the command of said writ, obtained possession of about sixty-three bales of the sisal in the petition described. The plaintiff being ready to execute the bond required by statute, and thereby obtain possession of said sixty-three bales of sisal, defendant filed a motion in this action for an order restraining the sheriff from delivering said sisal to said plaintiff, for the reason that defendant had theretofore on the same day obtained possession of said sisal from said plaintiff by virtue of a writ of replevin in another action pending in this court, wherein said defendant is plaintiff and plaintiff herein is defendant. A temporary restraining order was granted until said motion could be heard. Upon the hearing, from the testimony of the sheriff the above fact stated as the ground of the motion was clearly established. It plainly appears from the pleadings in the two actions that both parties claim a general ownership in the sisal in controversy, and that this action is to re-replevy the sisal replevied in the first action. Prior to March 10, 1837, property was replevied and re-replevied without end until the courts would be called upon to enjoin further proceedings to prevent a multiplicity of suits. To avoid such proceedings the statute was amended March 10, 1837, providing that the affidavit should also allege that the property sought to be replevied was not taken on process issued against the plaintiff, etc., since which time it has been well settled in Ohio, that where no change occurs in the rights of the parties except that produced by the first replevin itself, the defendant cannot replevy the property from the plaintiff. *Williams v. West*, 2 Ohio St., 83, 89; *Smith v. McGregor*, 10 Ohio St., 461; *Lugenbeal v. Lemert*, 42 Ohio St., 1, 8.

The action of replevin is regulated by statute, and the statutory provisions expressly preclude the idea that property can be re-replevied in the absence of new intervening rights. A writ of replevin cannot issue without the proper affidavit. The statute provides that such affidavit shall not only describe the property, allege plaintiff's ownership therein, whether general or special and defendant's wrongful detention, but shall also allege that said property was not taken on process issued against plaintiff (or if so taken that the same is exempt, etc.).

In view of the fact that the provisions of the statute have remained substantially the same since 1837, and the decisions of the Supreme Court—one in 1853—above cited, it is difficult to explain the bringing of this action.

Unless the party making the affidavit was ignorant of its contents, and the attorney bringing the action ignorant of the facts, I fail to see how this action could have been brought.

But having brought the action and obtained the issuance of the writ, the sheriff being now in possession of a part of the property, it is claimed that under the statute the sheriff cannot do otherwise than deliver the property to the plaintiff upon the execution of a bond.

It is also claimed that the court cannot inquire into the truth of the allegation that the property was not taken on process, or that if the court will look to such allegation, that plaintiff should also be permitted to establish the truth of the other allegations, to-wit: his ownership and defendant's wrongful detention. A court would certainly not undertake to determine on motion a question of ownership. Such question does not arise on this motion. For the purpose of this application the truth of the other facts stated in the affidavit may be assumed. And yet an affidavit alleging that plaintiff was the owner of the property, and that defendant wrongfully detained the same, without alleging that it was not taken on process issued against plaintiff, would not entitle plaintiff to have the writ issued.

Had plaintiff stated in his affidavit, that the property had been taken on a writ of replevin issued against him, he could not have obtained the issuance of the writ in this action, or if issued it would have been wrongfully issued. If then a writ of replevin is issued though obtained through the ignorance of the party making the affidavit as to its contents, the writ is no less wrongfully issued and an abuse of the process of the court. The fact that a party will through ignorance or otherwise make an affidavit as to an existing state of facts, which are untrue, would place him in no better position than if the untruth of such facts appears in the affidavit itself.

If it be true that a court cannot inquire into the truth of the allegation that the property was not taken on process, there would be no way to prevent a re-replevin of property by a defendant who would fraudulently and falsely make such affidavit, notwithstanding he would obtain the issuance of the writ improperly, and contrary to the provisions of the statute under which he claimed.

If such affidavit is made by one ignorant of its contents, he would acquire no greater rights under the writ of replevin than if he falsely and knowingly made the affidavit. It is claimed that an injunction will not be granted unless the injury is irreparable, and that, as in this case, it will be necessary for plaintiff to execute a bond in double the amount of the appraised value of the property before he can obtain possession, defendant cannot be injured. This is a general rule of courts of equity

as applied to injunctions. But this same objection could be made with equal force where the same property had been replevied and re-replevied, indefinitely as well as in the tenth action as in the second.

An examination of the authorities will disclose the fact that courts of equity will enjoin an officer for the purpose of preventing a multiplicity of suits, between the same parties and concerning the same subject-matter.

3 Pomeroy's Equity Jurisprudence, sec. 1345 and 1371; 6 Waits Actions and Defenses, p. 36, sec. 4.

But a determination of this question does not depend upon the equitable jurisdiction of the court over an officer, and its power to restrain or enjoin, for a court has full power and control over its own process in the hands of its ministerial officers.

The clerk and the sheriff are merely ministerial officers of the court—the one issues its process under seal of the court, the other executes it. A court has the same power to recall a writ and set it aside that it has to issue the writ, otherwise after a court has issued process it loses entire control over it, though in the hands of its own officers and though wrongfully obtained.

Had the writ issued in this case in the absence of any affidavit whatever, the claim that the court should not interfere because the injury would not be irreparable could be as strongly urged as in this case. And yet the replevin act itself provided that where the writ is issued without an affidavit it shall be set aside at the cost of the clerk who as well as the plaintiff shall be liable in damages to the party injured, sec. 5831, Rev. Stat.

Where a material and essential allegation in the affidavit is shown to be absolutely false, the party can certainly stand in no better position than if he had made no affidavit whatever.

A court is not so powerless that in a case where a party has either fraudulently or ignorantly obtained the issuance of its process, that it cannot recall it and set it aside. This writ, yet in the hands of the sheriff, is in the control of the court, to be executed or not in obedience to the orders of the court, and having been wrongfully and improperly obtained should be set aside. The plaintiff in this action, if entitled to the sisal in controversy, has his remedy in the first action of replevin; the bond takes the place of the property, and is held by the sheriff in its stead.

The writ of replevin in this action will be recalled and set aside, and the sisal in the hands of the sheriff redelivered to the defendant.

The costs made on the writ of replevin and upon this motion are adjudged against plaintiff.

Charles Darlington, for the motion.

J. E. Hawes, *contra*.

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## MISCONDUCT OF JUROR.

17

[Hamilton Common Pleas, December, 1890.]

## STATE OF OHIO V. ELIZABETH CARTER.

Where the juror's misconduct consists of declarations and utterances of opinions about matters on trial, made outside of court during the pendency of the trial, and where this action implies a strong disposition for or against one side or the other, be the evidence what it may; or where it indicates a state of mind or feeling as would cause him to give a deaf or unwilling ear to evidence or argument opposing his predilection, a verdict in accord with such prejudice will be set aside.

SHRODER, J.

In this case the jury, on November 15, 1890, found the defendant guilty of murder in the first degree. Within three days thereafter a motion for a new trial was filed; and on November 26th an amendment to the motion was filed, upon the additional ground of misconduct of one of the jury, Wm. Stephenson. Neither the defendant, nor her counsel was aware of the alleged misconduct before November 25th; and the filing of this amendment was unavoidably delayed to November 26th, beyond the limitation of three days after the verdict was rendered as fixed by sec. 7350, Rev. Stat.

The juror, Stephenson, is now deceased, and has resided at Groesbeck, in this county. His name was drawn from the jury wheel. He was duly summoned and accepted, after examination, as satisfactory to both parties. The examination of witnesses for the state began on November 6th, and continued until November 10th, when that of defendant's was commenced and continued on the eleventh and twelfth of November.

Evidence for the state was offered in rebuttal on November 12th and 13th. The argument occupied Thursday and Friday, November 13th and 14th, until 4 o'clock, when the charge of the court was delivered to the jury. The jury retired for deliberation and remained together until Saturday morning, November 15th, when it found and returned the verdict of guilty. At each separation of the jury during the trial the court admonished them not to converse with nor suffer themselves to be addressed by any other person on any subject of the trial, and not to form or express an opinion thereon until the case was finally submitted to them.

During the first week of the trial (November 6th, 7th, and 8th) the juror, Stephenson, appeared desirous of having conversations about the trial. He was, however, repelled and warned of the impropriety of his behavior. On such occasions he would respond that he thought his talking about the case "would not make any difference."

On each day of the second week of the trial, while the defendant's evidence was being offered, he publicly made declarations and gave opinions concerning the defendant and her fate, as he believed it would be. These declarations were made in the street car, and in the dining and bar rooms of the Keller House, twenty-fifth ward, where he was lodging during the week.

On Monday, November 10th, in conversation with Mr. Greese, he said: "I think they will hang that woman. She is a big, brazen nigger, and she poisoned her husband. She ought to hang, because she poisoned her husband. We will certainly hang her."

Between this Monday and the following Thursday, he engaged in talking about the trial with several persons, among whom were Adolph Brown, Andrew Vansickle, Edward Babylon and Arthur Doty. In these talks he frequently said "She ought to be hung."

On Tuesday or Wednesday night, November 11th or 12th, to Doty he said among other things, that "She looked like a very wicked woman, she sat up before the jury as brazen-faced as the very devil himself; that she was charged with poisoning her husband, and she ought to be hung."

On these evenings, in the hearing of Babylon, he said that he "was on a jury on a murder trial—a big nigger woman. She was a wicked-looking nigger; she sat up there as brazen-faced as the devil, and she ought to be hung. She was charged with poisoning the man she lived with."

On a subsequent evening he informed Babylon that the evidence was about all in; he guessed they would hang her. At another evening he was observed speaking about the case with other persons.

In the early part of this last week (November 10th or 11th) he remarked to Vansickle: "Lizzie Carter, the brazen thing, was a big nigger; she ought to be hung." On another evening he was overheard telling certain strangers that "this big Liz Carter sat up there as brazen as she could be; surely she would be hung."

On Friday morning, November 14th, before opening of court and before defendant's counsel had finished his argument, the juror stated to Theodore Stout that "we will have to hang her."

During the deliberations of the jury he took no active part in the discussions and appeared restive under his enforced confinement in the jury room.

This is not a case of misconduct of a party or of one in his behalf; nor of any influence exerted or attempted by strangers to the cause upon a juror by communication to him of facts or of opinions. There was no intermeddling with the jury. The evidence proves the case of a juror voluntarily making declarations and giving opinions, such as have been here detailed.

For such misconduct, a juror would undoubtedly deserve exemplary punishment. As a ground for a new trial in a criminal action the misconduct must materially and injuriously affect the substantial rights of the defendant. Rev. Stat., sec. 7350.

It was the substantial right of this defendant to have the questions of facts touching her guilt or innocence, both heard and decided by a jury of twelve unprejudiced and impartial men.

Absence of prejudice is not only a qualification precedent to the acceptance of a juror, but its maintenance throughout the trial is also essential to the continuance of the juror's qualification. To lose it during the course of proceeding would incapacitate a juror from fairly hearing the evidence and properly exercising his reason and judgment.

In the State v. Cucual, 31 N. J. Law, 249-258, the court said that a verdict will be set aside on account of misconduct of a jury where it is such "as might affect them from the proper exercise of their functions."

In Commonwealth v. Roby, 12 Pick, 520, Shaw, C. J., used this language: "The result of the authorities, is, where there is an irregularity which may effect the impartiality of the proceedings; \* \* \* or where the jury have been exposed to the effect of such influence; \* \* \* there, inasmuch as there can be no certainty that the verdict had not been improperly influenced, the proper and appropriate mode of correc-



tion or relief is by undoing that which is improperly and may have been corruptly done; or where the irregularity consists in doing that which may disqualify the jurors for the proper deliberation and exercise of their reason and judgment; \* \* \* because no reliance can be placed upon its purity and correctness." See *Pettibone v. Phelps*, 13 Conn., 445-451; *McIlvaine v. Wilkins*, 12 N. H., 474-477.

Numerous cases are reported in which the verdicts were not vacated, although the jurors were guilty of misconduct in expressing opinions about the trial or cause. These opinions were generally upon the effect of the evidence, or upon the credibility of witnesses, and were expressed under circumstances which satisfied the court that the opinions were neither fixed, nor founded upon unchangeable impressions, and under circumstances which divested the misconduct of suspicion of bias or corruption. The following citations will sufficiently furnish instances of such rulings: *McIlvaine v. Wilkins*, 12 N. H., 474-477; *Chalmers v. Whittemore*, 22 Minn., 305-307; *Harrison v. Price*, 22 Ind., 166-168; *Stockwell v. C. & D. R. R.*, 43 Iowa, 470-475; *Taylor v. California Stage Co.*, 6 Cal., 229-230; *Pettibone v. Phelps*, 13 Conn., 445, 451-452; *Foster v. Brooks*, 6 Ga., 287-298; *Jackson v. Smith*, 21 Wis., 26; *State v. Cucual*, 31 N. J. L., 249-258.

If the juror's acts, implied a strong disposition for or against one side or the other, let the evidence be what it will, or if they betrayed such a state of mind or feeling as would cause him to give a deaf or even unwilling ear to evidence which might oppose his predilection, they would discover an unfair and partial juror; and the verdict in accord with such prejudice would in justice be vacated. (*McCausland v. Crawford*, 1 Yeates, (Pa.) 378.)

It is noticeable that Stephenson's utterances related neither to the evidence nor any portion of it, nor to the impression which any witness may have made upon his mind. His remarks were characterized by their intense personality in respect to this defendant, and were uniformly directed to her personal appearance, her personal conduct and to her doom.

Whenever he took occasion to refer to her, his description of her, was couched in offensive terms. And not the least striking feature of his misconduct is the daily reiteration of his views. His declarations, made repeatedly and publicly, indicate an obstinacy and excite a suspicion that he was harboring a feeling against this defendant which may have been father to the oft-divulged thought that she would be hung. Again the adverse impression his mind received from the defendant's demeanor during the trial argues an unfriendly personal disposition towards her. To say nothing of his ignoring the fact that hers was an enforced attendance at the trial, it is no more than just to remark that her conduct, as a party in court, did not warrant any animadversion from any fair-minded observer.

Another view of the bad effect which might be made by the expressing of opinions upon matters in controversy, will be found in the words of the United States Circuit Court in *Poole v. Chicago Railroad*, 2 McCrary, 251-253: "Now the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory or judgment, they are too apt to stand by their own public declaration in defiance of evidence.

This pride of opinion and consistency belongs to human nature." The inference that Stephenson was so prejudiced against this defendant as to be incapacitated from giving her side an impartial hearing, is in a measure supported by his action during the jury's deliberation. While it may be true that other jurors were equally as fixed and quick in their decision of guilty, after entering upon their deliberations, yet their decision is not shown to be attributable to anything but the natural result of the exercise of reason and judgment. In Stephenson we find a loquacious man, who, from the beginning to the end of the jury's deliberations, sat in persistent reticence, taking only a silent, passive interest in the discussions; a course inconsistent with his ways outside of the court, and explicable only by a fact consistent with them, which is, that his mind was so prejudiced against the defendant as to have been impervious to the influence not only of the evidence and argument in her favor made in open court, but also to whatever may have been advanced for her in the deliberations of the jury.

In *Martin v. State*, 25 Ga., 494-513, a juror said of the defendant, "He is a bad man anyhow." The court in its reasoning supplied as a corollary the unexpressed sentiment as being in the juror's mind, of "let him be punished;" and thought this misconduct was ground for a new trial.

In *U. S. v. Fries* (for treason), 8 Dallas, 515-517, a juror, after he had been summoned, declared several times to several persons "that he was not safe at home for these people (meaning the insurgents,) that they ought all to be hung, and particularly that Fries must be hung." Iredell, J., favored a new trial, Peters dissenting but acquiescing. A new trial was granted. Two years thereafter the same court, in *Hollingsworth v. Duane*, 1 Wallace, sr., 176, referring to the Fries case, said: "In a case of life, and where such a strong and pointed prejudgment of it had been given by one of the jurors, on the very issues and against the party, and after he was summoned, and which was unknown at the trial, I should have been strongly in favor of a new trial \* \* \* unless indeed there had existed no manner or shadow of doubt of his guilt upon the law and the evidence."

The condition set forth at the close of this comment will find very little support from the authorities.

It is clear that this defendant was by Stephenson's misconduct and prejudice deprived of a fair trial before an impartial jury of twelve men. The fairness of eleven of the jury would not fulfill the requirements of the law. Not only is she entitled to the protection of having twelve unprejudiced men pass upon the question of her guilt, but the state has not the right to have the penalty fixed by law pronounced upon her life unless she is found guilty by the fair judgment of twelve, not eleven impartial jurors.

This conclusion makes it unnecessary to pass upon the other ground urged, that the verdict was contrary to the evidence and the law. The verdict ought to set aside and a new trial granted. It is so ordered.

E. Potter Dustin, for defendant.

D. Thew Wright, for the state.

## VACATION OF JUDGMENTS.

28

[Allen Common Pleas, 1890.]

## FREDERICK WILLIAM FOX V. LIMA NATIONAL BANK.

1. Proceedings in the court of common pleas to vacate, or modify a judgment or order, during the term at which such judgment or order was entered, must be by motion under the same title and in the cause in which such judgment or order was entered. The causes enumerated in section 5354 apply only to proceedings to vacate or modify a judgment or order, after the term at which such judgment or order was entered.
2. The mode of proceeding to vacate a judgment, order or decree, under the first cause enumerated in section 5354, is controlled by section 5309, which authorizes the filing of a petition in an independent action, and not in the action in which the judgment, order or decree was entered; while proceeding under the second and third ground of section 5354, are controlled by sections 5355 and 5357 respectively, and must be by motion, under the same title and in the original action in which such judgment or order was entered.
3. Proceedings to vacate or modify a judgment or order under the fourth, fifth, sixth, seventh, eighth, ninth and tenth grounds of section 5354 are controlled by section 5358, and must be by petition filed under the same title, and in the same action in which such judgment or order was entered.
4. The filing of a petition pending the term at which the judgment complained of was rendered, charging that the plaintiff's name had been forged to the note and warrant of attorney upon which judgment had been entered, in which fraud is not charged in the procuring of the judgment, and asking that the judgment be vacated and set aside, and that the defendant be perpetually enjoined from enforcing such judgment, is the bringing of an action, and is not a proceeding which is authorized by section 5354 of the Revised Statutes of Ohio.

RICHIE, J.

The plaintiff, on November 18, 1890, filed his petition in the court of common pleas of Allen county, against the defendant, in which he averred that on the tenth day of November, at the November term, 1890, of the court of common pleas of Allen county, Ohio, the defendant recovered a judgment against the plaintiff for \$101.15 and costs; and that on the same day, the defendant Bank caused an execution to be issued on said judgment, to the sheriff of Auglaize county, which execution was, by said sheriff, on the eleventh day of November, 1890, levied upon certain goods and chattels, and also upon certain lands and tenements belonging to the plaintiff herein.

The petition further avers that said judgment was based upon a certain promissory note, with power of attorney attached, purporting to have been signed by one W. J. Klauer, and the plaintiff, which was then past due. The plaintiff further averred that he had not signed said note, but that his name had been forged thereto, and denied his liability thereon. Plaintiff further averred that he had not been served with a summons in said action on said pretended note, and that he had no notice thereof prior to the rendition of said judgment; and that said sheriff is about to sell said property, so levied upon, and will sell the same to the great and irreparable injury of the plaintiff, unless he is, by order of this court, restrained from so doing; and that he, plaintiff, has no adequate remedy at law.

The prayer of said petition is as follows:

"Wherefore said plaintiff prays the court that said judgment may be vacated, cancelled, set aside, and held for naught; that the defendant

may be forever restrained and enjoined from in any manner selling or disposing of the property of the plaintiff; and for all proper relief."

A motion was filed in this case for a temporary injunction, the defendant entered its appearance herein, and the cause was submitted to the court upon the testimony, upon said motion; and before argument, it was agreed that the defendant should file its answer to said petition herein, which was done, and that the cause should be submitted to the court as upon final hearing.

The answer filed by the defendant admits:

1. Defendant's corporate existence.
2. The procuring said judgment.
3. The issuing and levy of execution.

4. That the judgment was upon said note by virtue of the power of attorney, and that defendant is proceeding to collect said judgment.

And denies each and every other averment in the petition.

Upon argument the plaintiff contended that this is a proceeding under fourth sub-division of sec. 5354 of the Rev. Stat. of Ohio for the opening up of the original action in which said judgment was rendered; while the defendant's contention was that this is an original action—a civil action, in equity, for an injunction, restraining the defendant in this action, from enforcing the judgment obtained in the original action, by a sale of the property so levied upon.

It is well settled as the law of this state, that a party who desires a judgment or order vacated, or modified, during the term at which such judgment was rendered or order entered, must apply to the court in which such cause is pending, or entry made, by filing a motion therefor, and giving to the adverse party notice of such motion. Such motion must be filed *in the action* in which the entry sought to be vacated or modified, was made, in that number and *under the same title*.

The causes for which a judgment, or order, may be vacated or modified, at a term *subsequent* to the judgment term, are enumerated in sec. 5354. The first ground is controlled by sec. 5309, and is a civil action for a new trial, "where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which" the verdict, report, or decision was rendered, or made; the application may be made by petition, *filed as in other cases*, not later than the second term after the discovery; whereupon a summons shall issue, and be returnable and served, or publication made as prescribed in section five thousand and fifty \* \* \* and the "*case*" shall be placed on the trial docket, \* \* \* and trial had, "*as in other cases*;" and the time is limited by this section to one year from the final judgment. The object of this section is to bring the matter within the jurisdiction of the court, when without such provision, "control over the subject-matter would have been lost." *Moore v. Coates*, 35 Ohio St., 177.

Under this first ground as controlled by sec. 5309, the allegations of the petition are denied, without answer, and a trial is had as in other cases, by the court, to determine whether or not a new trial ought to be granted.

The second ground is where service has been made by publication, and is controlled by sec. 5355, which limits the proceeding within five years, and requires the giving of a notice by the applicant, to the adverse party, of his intention to make the application, "and file a full answer to the petition" [this *must* mean the petition in the original case] and

satisfy the court that he had no actual notice of the action in time to appear in court and **make** a defense.

This certainly would be a proceeding in the original action, in the same number, and under the same title; and could not be in a new number, and different title.

The third ground is "for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order." Section 5357 controls the proceedings upon this ground, limits the proceedings to the "first three days of the succeeding term," and provides that they shall be by motion, upon reasonable notice to the adverse party.

The proceedings under the fourth, fifth, sixth, seventh, eighth, ninth and tenth grounds, enumerated in sec. 5354, are controlled by sec. 5358, and must be by petition, "*verified by affidavit.*" The provisions of this section differ from those of sec. 5309, which controls proceedings under the first grounds of sec. 5354. In sec. 5309 the petition is "*filed as in other cases,*" which only requires a verification upon belief; while sec. 5358 says the petition must be "*verified by affidavit,*" without the qualification "*as in other cases.*"

Under sec. 5309 the mode of obtaining service is the same as in other cases of commencement of actions, and the trial shall be had "*as in other cases;*" while under sec. 5358 a summons shall be issued and served "*as in the commencement of an action;*" in other words, "a summons shall be issued and served in these proceedings," in the same manner that it is done "in the commencement of other actions." Under this section the court does not proceed to trial "as in other cases," as under sec. 5309; but as directed in sec. 5359, "the court must first try and decide upon the grounds to vacate, or modify a judgment, or order;" and sec. 5360 further provides, that, a judgment shall not be vacated "until it is adjudged that there is a valid defense to the action;" or if the plaintiff seeks its vacation, "that there is a valid cause of action."

Under these sections the court must first pass upon the grounds for vacating, and then, if the cause in which the judgment, or order, is sought to be vacated, or modified, is a cause triable to a jury, the issues are to be made up and submitted to a jury, see *Frazier v. Williams*, 24 Ohio St., 625; *Watson v. Paine*, 25 Ohio St., 340; *Bank v. Slemmons*, 24 Ohio St., 143-150, unless a jury is waived. But if the cause is not triable to a jury, the merits of the cause of action, or of the defense set up, must be tried by the court, and not until then can the court make a final order, either affirming, vacating, or modifying the judgment or order, sought to be vacated or modified. *Watson v. Paine*, 25 Ohio St., 340.

If it is intended that the petition to be filed under these sections, shall take a new number, bear a new title and not be filed in the original cases, with the original number, and under the same title, why does not sec. 5358 require the plaintiff, when he seeks to vacate or modify a judgment, or order, to set forth his cause of action in his petition for vacation, as well as to require that, "if the party applying was defendant," he shall set up "the defense to the action."

If the petition to vacate, or modify is to be filed in the original action, in that case the petition already on file, sets forth the cause of action; and if the proceedings are by the defendant he should set up his

"defense to the action"—the original, I assume—as made by the petition then on file in that action.

It will be observed that sec. 5358, uses the language, "*The proceedings to vacate*;" and not, *an action to vacate*.

It is difficult to see a reason why proceedings to vacate a judgment, or order, when by motion during the term at which the entry was made, should be in the same action in which the entry was made, and when by petition, at a *subsequent* term, they should be in a different action, and under a different title.

Can the objection be maintained that the cause is not on the docket, and that the proceeding would be in a case not before the court, when sec. 5358 expressly provides for just such an emergency, and directs how to bring a cause, which has been disposed of, upon the docket again, and before the court for re-trial, by providing that a summons shall be issued and served in the same manner as if a new action was being commenced; if the proceeding was upon the second or third grounds named in sec. 5354, the same object would be attained upon motion, after notice to the adverse party, and after the judgment term. These views are supported by the opinion of Judge Day, in the case of *Coates v. The Chillicothe Bank*, 23 Ohio St. 415, where on page 431 he says, in speaking of the sections now under consideration: "The power thus conferred, then, is only that of further proceedings, for the causes enumerated, in an action after judgment; and are, therefore, merely special proceedings *in* an action, and are not an original action, or the 'civil action' provided by the code. When, therefore, the power conferred by these sections, to break into an action after judgment, and obtain further proceedings therein, is all that is invoked by a proceeding, such proceeding can not be regarded as a civil action."

If the plaintiff desired to have the judgment complained of set aside, vacated, or modified, his application therefor should have been by motion, filed in the original case in which that judgment was rendered; for the right to have such judgment vacated upon petition therefor, exists only after the term at which such judgment was rendered, under sec. 5354.

The petition filed herein by the plaintiff, does not state such facts as would authorize the court in conditionally opening up the judgment after the term at which it was rendered, under sec. 5354. It is claimed in argument that the proceeding is within the fourth ground of that section, which provides, that a judgment or final order may be vacated, after the term at which it was rendered, "for fraud practiced by the successful party in obtaining judgment or order."

The grounds relied upon in plaintiff's petition are, that the note was forged; that the plaintiff did not sign the note, and was not, for that reason, liable thereon; and that he had not signed the warrant of attorney attached to the note, and therefore he had not authorized a confession of judgment on the note, and therefore the court had no jurisdiction to enter judgment against him. But there is no fraud charged against the defendant in obtaining the judgment, and does not come within the fourth ground of sec. 5354.

The petition does, however, state facts sufficient to warrant the court in perpetually enjoining the defendant from enforcing said judgment against the plaintiff, and is therefore a civil action, and properly brought in this court. *Long v. Mulford*, 17 Ohio St., 484; *Coates v. Chillicothe*

Bank, *supra*, 415; Darst v. Phillips, 41 Ohio St., 514, and is properly for final decision here.

This, then, is an action in equity, and to authorize the court to grant the relief prayed for, the proof must clearly show that the plaintiff's name had been forged to the note with warrant of attorney attached. This the testimony fails to do, even by a preponderance. It shows that the injunction must be denied and the petition dismissed at plaintiff's costs.

Layton, Stueve & Anderson, for the plaintiff.

Cable & Parmenter, for the defendant.

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### TRUST FUNDS.

31

[Superior Court of Cincinnati, November, 1890.]

FREDERICK B. LOTZE, ADMR. ET AL. V. LEOPOLD HOERNER.

1. A party claiming a priority on the funds of an insolvent estate, should clearly show that he is entitled thereto; on general principles the fund should be distributed *pro rata* among all creditors.
2. A trust fund may be followed so long as the fund has been kept separate and apart from the assets of the trustee; when the fund becomes indistinguishably mingled with the assets of the trustee, the relation of debtor and creditor arises.
3. W. executes a power of attorney to an individual in Europe to collect certain money and to pay the same over to a certain bank in Europe, with instructions to the bank to account for the same to S.; the money is collected, paid over to the bank, and accounted for by the bank to S., either by sending a draft or by giving S. credit with the amount, with the notice of the credit. *Held*: That the relation of debtor and creditor, and not that of trustee and *cestui que trust*, arises between S. and W.

SAYLER, J.

Adolphus Seineke and Leopold Hoerner, partners doing business under the firm name of A. Seineke, Jr., were engaged in business in Cincinnati; in their business they made collections of inheritances and other moneys in Europe; received moneys to be remitted to parties in Europe; sold drafts against moneys collected and in the hands of their correspondents in Europe and moneys sent to their correspondents; received deposits and issued time certificates therefor, some bearing interest and others not; received deposits on which checks were drawn, furnishing their regular depositors with blank check books; sold passages on steamship lines.

They advertised their business as "Bankers, Foreign Exchange and Passage Office, N. W. cor. 8th and Vine streets, Cincinnati, Ohio."

A. Seineke, Jr., deposited their own funds and moneys received by them on collections to their own credit in common accounts in the Franklin Bank of Cincinnati and in the bank of Knauth, Nachod & Kuehne, of New York, excepting such money as they kept in their cash drawer. These bank accounts were running accounts, to which deposits were made and on which checks were drawn from day to day.

They employed agents at various points in Ohio and through the west to solicit business, and furnished them with blank forms of powers of attorneys used in making collections.

Collections in Europe were made under authority of powers of attorney executed by the claimants. These powers of attorney were drawn on blanks furnished by A. Seineke, Jr., and gave the attorneys in fact full and complete power to act with reference to the collection; and they contain stipulations as follows:

"Finally, I instruct the said attorney in fact, and make it his duty to remit or pay over all moneys received by virtue of this power of attorney to \_\_\_\_\_, with notice that these moneys are to be accounted for to the firm of A. Seineke, Jr., in Cincinnati, Ohio, on [with] notice to said firm."

The attorneys in fact appointed under these powers were individuals residing in Europe; and the blank shown above was filled with the name of some banker in Europe.

At the head of the power was printed the card: "A. Seineke, Jr., European Bank & Exchange Business, Cincinnati, Ohio."

The powers of attorney were printed in the German language.

On such powers moneys were collected in Europe by the attorneys in fact, who would pay the same over to the designated bankers in Europe, who would account for them to A. Seineke, Jr., either by sending a draft for the amount to them, or by giving them credit for the amount and reporting such credit to them.

The firm did not apply each fund collected in settlement of the particular obligation arising from the collection, but the drafts received by A. Seineke, Jr. on collections made were placed in bank to their own credit on their account, and the entries were made in their books giving credit to the parties for the amount collected and charging them with the expenses and commission, and showing the balance owing; and settlements were made in the course of business, and after notice sent, by checks drawn on their accounts in the bank in the same manner as settlements were made of their other obligations.

On notice being received by A. Seineke, Jr., from a corresponding bank in Europe that money collected under such power had been paid to it and credited to A. Seineke, Jr., a credit for the amount was given on the books of A. Seineke, Jr., to the party for whom the money was collected and charges made for expenses and commissions; and thereupon notice sent to the party and settlement made in the course of business.

It appears that when the power of attorney was executed at some place other than at the office of A. Seineke, Jr., in Cincinnati, the same was executed in blank as to the name of the attorney in fact and as to the name of the European banker, and was sent to A. Seineke, Jr., who filled in such blanks with the names of such parties as they desired to act.

Such was the usual course of business.

Quite an extensive business was carried on by A. Seineke, Jr., for several years, the greater part of the business being however, in making collections under such powers.

Adolphus Seineke died on February 24, 1890. His surviving partner, Leopold Hoerner, continued to carry on the business until March 3, 1870, when Julius Lang was appointed receiver, in this proceeding, and the assets of the firm as found at that time in the hands of Hoerner, passed into the hands of the receiver.

It appears that the firm had been conducting its business largely on credit and on borrowed capital, and at the time of the death of Seineke and subsequently was insolvent, the assets amounting to less than \$10,-



000, and the debts amounting to over \$40,000; of the debts, large sums, over \$10,000 were owing for moneys collected on powers of attorney in Europe and for moneys received here and credited, to be remitted to parties in Europe, and otherwise collected for other parties and not paid over.

Barnard Kamman deposited \$120, with the firm, and received a certificate therefor, the amount to bear interest.

Henry Kamman deposited \$300 with the firm and received a certificate therefor, the amount to bear interest.

Joseph Gehring deposited \$2,800 with the firm, and received a certificate therefor, the amount to bear interest.

Sophia Munding executed a power of attorney in form above stated to collect moneys in Germany. C. Laiblin, the banker in Germany, who it seems received the money, credited A. Seineke, Jr., with \$644.53, the sum received, and so instructed A. Seineke, Jr., and thereupon, it seems, A. Seineke, Jr., credited the amount to Sophia Munding and charged \$35.88 against it, leaving \$606.60 owing to her. No money was received by A. Seineke, Jr.

Louise Gallenkamp and Henrietta Wilhelme executed a power of attorney in form stated above in blank as to the attorney in fact. The name of Alex. Simon was filled in the blank for the name of the banker in Europe to whom the money should be paid by the attorney in fact, and was sent to him by A. Seineke, Jr., and he filled in the name of the attorney in fact. The attorney collected \$355.40, and paid the same to Alex. Simon, who thereupon accounted for the same by sending a draft for that amount to A. Seineke, Jr. The draft was received by A. Seineke, Jr., on January 22, 1890, and deposited to their credit on their own account in the Franklin bank on that date, and Louise Gallenkamp and Henrietta Wilhelme were credited with the amount on the books of A. Seineke, Jr., and charged with commission and expense, leaving a balance of \$363 to their credit.

G. A. Heichell executed a blank power of attorney of the form stated for the purpose of having his inheritance in Augsburg collected; under such power the money was collected by the attorney in fact and the European bank to which the money had been paid under the power accounted for the money to A. Seineke, Jr., by sending them a draft for 1,445.85 marks, or \$343.43. This draft was received by A. Seineke, Jr., on February 10, 1890, and by them indorsed and deposited to their credit on their own account in the New York bank on February 12, 1890. It appears that on February 13, 1890, \$400 was transferred by A. Seineke, Jr., from the New York bank to the Franklin bank.

Anna Gadomsky, Jacob Gadomsky, William Brauch and Anna Maria Brauch executed a power of attorney on the form stated above to an individual in Germany to collect certain moneys; under the power the attorney in fact made the collection and paid the moneys over to Reverchon & Co., bankers in Germany named in the power.

C. N. Nielson executed a power of attorney on the form stated above to an individual in Germany to collect certain moneys. Under the power the attorney in fact made the collection and paid the moneys over to Reverchon & Co., bankers in Germany named in the power.

Reverchon & Co. accounted to A. S. Seineke, Jr., for the moneys so received from the collections made under the powers executed by Gadomsky et al., and Nielson by sending a draft for \$700 to A. Seineke, Jr., said draft including both amounts. The draft was drawn on S. Kuhn

& Sons, of date February 4, 1890, and was received by A. Seineke, Jr., on February 17, 1890, and by them deposited to their own credit on their account in the Franklin bank on that date with other moneys.

Credit was given on books of A. Seineke, Jr., to Gadomsky et al. for the amount of the collections made for them, which less the charges made for expense and commission, amounted to \$483.70.

Credit was given on the books of A. Seineke, Jr., to Nielson, for the amount of the collection made for him, which, less the charges for expenses and commissions, amounted to \$159.90.

Louis Wehrman, Curator, etc., of Washington, Missouri, executed a power of attorney on the blank form above stated to collect certain moneys in Germany, and sent it to A. Seineke, Jr. A. Seineke, Jr., had an agent at Washington, who was furnished with their blanks, and the business was advertised there. The power was to an individual in Germany who acting under it collected the money and paid the same over to Westerkamp & Son, the bankers in Germany named in the power. Westerkamp & Son accounted for the same to A. Seineke, Jr., by instructing Knauth, Nachod & Kuehne, of New York to give credit to A. Seineke, Jr., for \$1,634.90, and in accordance with such instructions Knauth, Nachod & Kuehne did give credit for that amount to A. Seineke, Jr., on February 17, 1890, and thereupon so instructed A. Seineke, Jr. An entry was made on the books of Seineke, Jr., on February 17th, showing \$1,634.90 received for Wehrman against which \$— expenses and commissions was charged leaving \$1,500.40 to the credit of Wehrman. At the time the New York bank gave the credit for \$1,634.90, the account of A. Seineke, Jr., was overdrawn \$11.30. After that credit was given, two other credits amounting to \$131.50 were given to A. Seineke, Jr., on their account in that bank. After February 17th, A. Seineke, Jr., drew various checks against their account with that bank for various purposes, partly in payment of private debts, leaving on March 1st, \$1,046.07 in that bank, and on March 1st a check for \$1,000 was drawn and deposited in the Franklin bank for collection, but the New York bank refused to pay the check. On March 3rd a check was drawn for \$46.07 to balance the account, they not knowing that the \$1,000 check had not been paid. This check for \$46.07 was also placed in the Franklin bank. On March 8th the receiver being informed that the \$1,000 check had not been paid, drew a check for \$1,000 on the New York bank, which was paid.

Zimmerman & Co. sent to A. Seineke, Jr., by checks to the order of A. Seineke, Jr., the following sums to be remitted to parties in Europe, viz.:

February 19, 1890, \$4.90.

February 21, 1890, \$24.40.

February 27, 1890, \$19.60.

The checks were indorsed by A. Seineke, Jr., and deposited respectively on the days received to the credit of A. Seineke, Jr., in their account in the Franklin bank, and the amounts were not remitted.

Jos. Arnold deposited \$5.10, with A. Seineke, Jr., on March 3, 1890, to be remitted to a party in Europe and a receipt was given for the same. It was not remitted, and seems to have been on hand in kind when the receiver took possession of the assets.

Fred. G. Schultz, Banker of Stuttgart, Germany, sent to A. Seineke, Jr. a draft of date February 18, 1890, for \$299.00, drawn on Schultz & Ruckgaber, of New York, payable to the order of A. Seineke, Jr. The

draft was received by A. Seineke, Jr. on the first or second of March, 1890, and was indorsed in blank by the surviving partner, and held until the receiver was appointed. On March 4th, the receiver deposited the draft in the Franklin bank and collected the money. The draft was sent with a letter directing A. Seineke, Jr. to pay the said sum of \$299.00 to Vincent Sayer.

The money was not paid to Sayer, and remains in the hands of the receiver. On Mr. Schultz learning that the money had not been paid to Sayer, as directed, he at once made good the amount to Sayer by paying to him that amount.

It appears that the account of A. Seineke, Jr., with the Franklin bank from February 15, 1890, it not being necessary to go back further, stood as follows:

February 15th, a balance of.....	\$ 823 51
February 17th, deposit.....	2,179 17
February 19th, " .....	17 00
February 21st, " .....	36 16
February 25th, " .....	813 83
February 27th, " .....	154 85
March 1st, " .....	1,310 58
March 4th, " .....	504 62

Against which were drawn checks, as follows:

February 17th, check.....	\$366 75
February 17th, " .....	212 35
February 20th, " .....	118 66
February 27th, " .....	392 81
February 27th, " .....	587 50
February 28th, " .....	997 40

Of the deposit of March 1st, the \$1,000 check drawn on the New York bank forms a part, and as that check was not paid, that drops out.

The balance of this account was received by the receiver, to which must be added the \$1,000 received March 8th on the check on the N. Y. bank, making \$2,664.25.

The receiver has received other assets amounting to a few thousand dollars.

These parties make application to the court for orders directing the receiver to pay their respective claims in full out of the moneys so received out of the bank accounts as preferred claims.

These parties entrusted their business with A. Seineke, Jr., having full faith in the firm, and fully believed that their collections would be made and that they would receive the net proceeds of the collections, or that the money paid over to A. Seineke, Jr. either on deposit or to be remitted to parties in Europe would be repaid to them or remitted. If by reason of the failure of A. Seineke, Jr. they lose their moneys, it is certainly hard. But it must be borne in mind that other parties also dealt with A. Seineke, Jr., with the utmost good faith in the firm, and the assets which have come into the hands of the receiver is a balance remaining of the funds arising out of many transactions.

On money being collected by attorneys in fact in Europe and paid into the banks in Europe designated in the powers of attorneys, such banks accounted to A. Seineke, Jr., for the same either by sending drafts or by giving them credit for the amount, and notifying them of such credit; such manner of accounting by giving credit seems to be provided for in the power, as it stipulates that the bank there shall account to A. Seineke, Jr. on or with notice to the firm. Notice would only be necessary in cases where the bank accounts by giving credit.

I think a party claiming a priority should show clearly that he is entitled thereto. On general principles the fund should be distributed *pro rata* among all creditors.

The case of Reeves et al. v. The State Bank of Ohio, 8 Ohio St., 465, is one in which the Commercial Bank of Toledo received for collection from the plaintiffs a draft for \$500, payable in New York, and for the same purpose forwarded the draft to its correspondent in New York, The American Exchange Bank. The American Exchange Bank collected the money on November 21, 1854, and placed the amount to the credit of said Commercial Bank of Toledo. On November 27, 1854, the Commercial Bank committed an act of insolvency, and by reason thereof its assets passed to the State Bank of Ohio, the defendant. At the time of the failure of the Commercial Bank there was a balance in the American Exchange Bank to the credit of said Commercial Bank of \$10,537.45, and in January, 1855, \$4,800 of said balance was paid over by said American Exchange Bank to the defendant; \$1,340.08, had been collected by the defendant from paper belonging to the American Exchange Bank in the Commercial Bank for collection at the time of its failure; the remainder of the said balance in the American Exchange Bank was involved in litigation, and was retained by that bank. The action was brought to subject the fund in the lands of the defendant so received to the payment of the debts of the plaintiff as a preferred claim. The court held that the payment of the draft to the American Exchange Bank and the credit of the amount by that bank to the Commercial Bank was payment to the Commercial Bank, and that from the moment of such payment the Commercial Bank became the debtor of the owners of the draft, and held that the owners of the draft had no such specific lien or claim upon the funds in the hands of the defendant as to give them a preference over other creditors of the insolvent bank. In this case the court also held that the plaintiffs could not have maintained an action for the money against the American Exchange Bank, had they bought it before the money was paid over to the defendant.

The court, on page 483, say that the proceeds of the plaintiff's draft were indistinguishably mingled with the assets of the Commercial Bank; but the amounts collected by the American Exchange Bank, and of which the proceeds of plaintiff's draft formed a part, were intact when the receiver took possession of the assets of the Commercial Bank, and a portion of them were paid over to the defendant.

The court in this case, *ib.*, 482, quoting from Parson's Mercantile Law says; "What a bankrupt holds in the right of another does not pass to the assignee; if therefore, the bankrupt has collected a debt for another, and has kept the sum so collected apart, it belongs, generally speaking, to him for whom it was collected. But if it is merged indistinguishably in the general assets of the bankrupt, the owner has only a claim for it to be proved like other debts. So, if the bankrupt sold goods for his principal, and they are not paid for, the principal can collect the

debts, and sue in his own name, or, if the bankrupt has received payment for the goods, and has kept that payment apart, the owner, generally, could reclaim it; but not if it were merged in, and mingled with his assets."

This case is cited with approbation in *Hermann v. Dayton*, 10 Ohio St., 446; *Bank v. Butler*, 41 Ohio St., 522 and *Bridge Co. v. Bank*, 46 Ohio St., 232.

It is claimed, however, that the principle in the case at bar should be governed by the case of *Pennell v. Deffell*, 4 De Gex M. & G. 372, and the cases following it. That case was referred to by the court in the case of *Shaw v. Bauman*, 34 Ohio St. 25, 30, the court quoting from it, and without either affirming or rejecting the doctrine, holds that it is not at point; and then proceeds to lay down the rule, as follows, *Ib.*, 32: "The rule in equity is well settled, and by a class of cases not supposed to be in conflict with the foregoing, that if a trustee deposits the funds of a trust estate in a bank, in his own name, individually, with his own private funds, he thereby becomes debtor to the trust estate and creditors of the bank; and in case the trust funds are lost through the insolvency of the bank, the trustee becomes individually liable for the loss."

The Supreme Court of Ohio in this case does not hold that a fund cannot be followed, even where there is the relation of debtor and creditor, but taken in connection with the *Reeves* case I think the court limits the application of the rule to instances where the fund has been kept separate and apart from the assets of the party receiving it.

A number of authorities have been cited which hold a contrary or rather an extended doctrine.

These cases are collected by Judge Jackson in his decision in the case of *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep., 684, 692, and a fair statement of the doctrine claimed is stated by him. In that case Judge Jackson held that where money was collected on paper of complainant by the correspondents of the Fidelity Bank, and credited to it, and in which cases the accounts between said Fidelity Bank and said correspondents exhibited a continuance balance due the former from the latter down to the date of the Fidelity Bank's failure, as large or larger than the amount of the proceeds of complainant's said paper so collected and credited by said correspondents respectively to said Fidelity Bank, and in which cases such balances so due from said correspondents at the time of the failure of the Fidelity Bank were subsequently paid over to and received by the receiver of the bank, that the complainant could have reached and subjected those credits in the hands of said correspondents which were made up of the proceeds of its paper, and that it could follow the same in the hands of the receiver.

It seems to me that the doctrine laid down by the Supreme Court of Ohio in the *Reeves* case, 8 Ohio St., 333, is contrary to this doctrine, and I am of course bound by that case.

It seems to me that under the peculiar provisions of the powers of attorney, directing the attorney in fact to pay the money over to the banker in Europe designated in the power to be accounted for by that bank to A. Seineke, Jr., it was the intention of the parties that A. Seineke, Jr., should receive the funds collected or the credit given by the European bank, and give credit to the party for whom the collection was made.

Applying the rule therefore as I conceive it to be in Ohio, and construing the powers of attorney as above, I do not think either of these

parties, excepting Jos. Arnold and Fred G. Schultz, has clearly shown that he is entitled to a priority; the relation between each and Seineke, Jr., was that of debtor and creditor, not that of trustee and *cestui que trust*, and as to them and the other creditors of A. Seineke, Jr., equality is equity.

The claims of Bernard Kamman, Henry Kamman and Joseph Gehring are simply debts and clearly not entitled to any preference.

The claim of Sophia Munding: No money was received by A. Seineke, Jr.; simply a credit given the firm by C. Larblin; clearly she does not trace any of her money in the funds in bank or other funds in the hands of the receiver, and she can therefore have no preference.

The claims of Louise Gallenkamp, and Henrietta Wilhelme, G. A. Heichele, Anna Gadomsky, Jacob Gadomsky, William Brauch and Anna Maria Brauch, C. N. Nielson, Louis Wehrman, Curator, have no priority, if I am right in my conclusions.

As to the claim of Zimmerman & Co. I find more difficulty; but under the Reeves case, 8 Ohio St., 333, I think the fact that the amounts were deposited to the credit of A. Seineke, Jr., and mixed with their funds, precludes the right to follow the funds.

Claim of Jos. Arnold.—I think this claim for a preference should be allowed. The money was received on the day the receiver was appointed, and I think went into his hands unmixed with the assets of A. Seineke, Jr. He may have an order directing the receiver to pay him \$5.10, without interest out of the assets in his hands as a preferred claim.

Claim of Fred C. Schultz.—I think he is entitled to a preference. The draft remained in the hands of Seineke, Jr., separate and apart, and so went into the hands of the receiver, and the receiver collected the money on it. He may have an order directing the receiver to pay him \$299 without interest out of the assets in his hands as a preferred claim.

The view I take of the law of this case makes it unnecessary for me to pass on the question of application of payments.

Wulsin and Suire, for receiver.

Lowmon, Spiegel, Gasser, Rothe, Marckworth, Helleberg, for creditors.

[Darke Common Pleas, 1891.]

#### ARCHBISHOP ELDER V. HENRY.

Where a catholic is buried in a catholic cemetery, in consecrated ground, but it is afterwards ascertained that the burial is in violation of the rules of the cemetery, the deceased not having been a communicant, the removal of the body to an unconsecrated part of the ground may be ordered, and if resisted, the court will order the sheriff to make the removal.

Jennie Henry, a French catholic, of Greenville, had been quietly married to Frank Henry by a Lutheran minister, the parties having reasons for keeping the matter secret. The wife died in child-birth, and permission was given the husband to bury the body in consecrated ground by the parish priest, who was not aware of her marriage outside

of her church. On discovering the fact that she was not a communicant, the matter was referred to Archbishop Elder, of Cincinnati, who ordered the removal of the corpse to an unconsecrated portion of the cemetery, but the husband and others refused to allow this, when the archbishop began action in the Darke county common pleas court, claiming that the cemetery was held in law as a private institution, and that the rules regarding interments had been violated, and asking the removal of the body from the consecrated ground. The court granted his request and ordered the husband, who was defendant in the case, to remove the body within twenty days. On the failure of defendant to comply with this request, an order was issued by the court, on the motion of the plaintiff, to the sheriff, which reads as follows:

*Whereas*, An order of the common pleas court made at the October term, 1890, required the defendant, Frank Henry, to remove the body of one Jennie Henry, deceased, from the cemetery in question within twenty days from December 16, 1890;

*Whereas*, Said twenty days having expired, and said Frank Henry having failed to remove said body of said Jennie Henry, deceased, from consecrated ground in said cemetery, you are therefore commanded to cause the said body of said Jennie Henry, deceased, to be removed from the consecrated part of said cemetery without unnecessary delay.

In obedience to this order, the sheriff, with the assistance of an undertaker, disinterred the body of Mrs. Henry and removed it to another cemetery.—[Editorial.

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## WARRANTY.

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[Superior Court of Cincinnati, General Term.]

\*HAUSER, KRAMER & CO. V. J. J. CURRAN ET AL.

1. A written contract of sale of a machine not yet constructed will not exclude oral proof of the circumstances, conversations, and representations, showing that it was understood to be sold to do particular work, and thus prove an implied warranty of fitness.
2. That the machine has a known name, will not necessarily make the sale one of a known and ascertained article not subject to warranty of fitness.

MOORE, J.

Petition in error to the judgment of special term against plaintiff in error, upon findings of fact and conclusions of law duly excepted to.

This is an action to recover the balance of purchase price of a machine designated in a written contract of sale as a dryer or kiln, for drying green lumber used in making barrel staves, etc.

The defendants in special term were a firm of coopers in this city, engaged in making beer kegs, barrels and vats; the plaintiffs' agent visited the members of the defendants' firm, and succeeded in selling them the right to build one of the kilns, with the articles used in the construction, all of which are fully described in the written contract. The kiln turned out to be a failure, and further payments of its price were refused.

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\*Judgment of the superior court on answer and cross-petition reversed; and judgment reversing the judgment in favor of the plaintiff below at special term, affirmed; unreported, 51 O. S., 587.

The plaintiff in error, in special term, claimed as a defense: First that the defendants in error in selling the machine made certain representations to the plaintiff in error, as to what the machine would do, after being fully informed as to what the purchasers would require it to do; that these representations were false.

Second—That the defendants in error were fully informed, before the contract was entered into, that the machine was required to dry particular kinds of wood, of particular sizes, which sizes and kinds of wood were the only kinds and sizes used by the firm in their business, and that knowing this the defendants in error, in selling said machine or the right to use it, were bound by the implied warranty that it was fit for the specific purpose required.

This answer sets forth that the machine was tendered back to the seller and a remission of the contract of sale demanded and a return of the money paid on account.

The particular point and controlling question, is as to the effect of the conversations between the parties and the surrounding circumstances prior to and at the time of entering into the contract of sale and their weight and relevancy in connection with what took place subsequently ending in the contract.

The plaintiff in error claims:

First—That the findings of fact show a case for rescission of a contract, because it was entered into upon the basis of representations made by the seller to the buyer, which afterwards turned out to be untrue, and which were in fact untrue at the time they were made.

An examination of the bill of exceptions and the finding of fact fails to produce sufficient evidence to sustain the first defense. The representations complained of, and which induced the sale, were not fraudulent in law; fraud was in fact disclaimed by the plaintiffs in error.

The court in special term found that the representations of the agent of defendants in error, in inducing the contract, were not good grounds for a rescission for the reason that they consisted of general statements of the excellence of the kiln or dryer as set forth in a circular describing it, and the opinion of the agent upon its comparative merits with other kilns or dryers, and the agent's promise that the machine would dry the particular size and kind of wood which the buyer wished it to dry; that the representations were matters of opinion or mere "dealer's talk" and that no statement of an existing fact was made.

The second defense, to-wit: that the circumstances under which the sale was made, that is, with full knowledge that the machine was bought for a specific purpose, raises as a matter of law an implied warranty that it was fit for the purpose, states a proposition which, if the treatment of it as to its sufficiency as evidence if proven by the court in special term, was wrong, must now prevail. The court then found that the representations of the seller's agent did not constitute a warranty, because they were incompetent to prove it, the contract of sale being in writing and silent upon the subject of warranty, and that no oral warranty could be engrafted upon a written contract; the court held that if the agent repeatedly said he would warrant the fitness of the machine, it must be excluded because it was not put into the writing, and was at most an implied warranty.

This view of the court excludes all that took place between the buyer and the seller prior to the sale, leaving the buyer without the benefit of warranty of any kind.



We think the record shows a case for the application of the well known rule that where goods are sold for a particular use, made known to the seller, the buyer relying on the seller's judgment to select and not his own, an implied warranty is created that the article furnished is reasonably fit and admissible for that purpose, which is especially true where the seller is also manufacturer. We wish to distinguish between the rule just announced, and that in cases of a "known and ascertained article" and so often held to be a limitation on the doctrine of an article furnished for a particular use, a limitation pointed out in the leading cases upon that subject, notably in *Chanter v. Hopkins*, 4 M. & W., 393; *Olivant v. Bagley*, 5 Ad. & El. N. S., 288; *Prideaux v. Burnett*, 1 C. B., 613, where it was held that known and ascertained articles being ordered, and furnished, though intended for a particular use, the liability of the maker and vendor extends only to defects in the material and workmanship, and not to such as arise from the principle or mode of construction.

In the case at bar the thing ordered was a "Curran & Wolff dryer." In one sense it was "a known and ascertained article;" it was a patented process, and was advanced as such through the medium of circulars, and in the market was known as a machine for wood drying purposes, but when the manufacturers' agent sold it to the plaintiff in error, he stepped beyond his position as a vendor of "a known and ascertained article, liable only for defects in material and workmanship, and undertook to supply the principle and mode of construction of a dryer which would accomplish the work which the buyer said he wanted done. The record shows that the agent was shown the wood, to be dried. He was told by the plaintiff in error that if his machine would do the drying, the nature of which was explained to him, that he might supply it. That if it would not do that it was not wanted at all. The agent was told by the plaintiff in error that they "would have nothing to do with the kiln unless the agent would guarantee it." The agent said he would do so if his principals would so instruct him. He wrote then, and they said the machine would do the drying, and thereupon the contract was signed. It furthermore appears, that as the machine could not be examined the agent was given to understand that his judgment in the matter would be relied on, as to capacity. This, we think, is clearly shown by the testimony of the agent who alone conducted the negotiations of sale, with the testimony of Hauser, Sr. one of the defendant firm below; in fact there is no conflict in the testimony as to the representations made.

In *Rodgers v. Niles*, 11 Ohio St., 48, a manufacturer of a steam boiler was held to impliedly warrant them free of all defects either of workmanship or material, latent or otherwise which would render them unfit for the usual purposes of such boilers.

It is possible to refer to a large number of cases in support of this distinction, in *Rodgers v. Niles*, notably; *Brown v. Saler*, 27 Vt., 222; *Hoe v. Sanburn*, 21 N. Y., 552; *Frank v. Vening*, 102 Mass., 132; *Gest v. Jones*, 32 Gratt., 518; *Poland v. Miller*, 95 Ind., 387; *Biglow v. Boxall*, 38 Upp. Canada, Q. B., 452; *Crane v. Honning*, 26 Kas., 94; *Pt. Carbon Ore Co. v. Groves*, 68 Pa. St., 149.

The reason of the rule is in fact found to be in the protection necessary to a purchaser in the purchase of an article to be made and furnished in the future.

In first Smith's Leading Cases, 250, it is stated that the sounder view seems to be that no engagement of this sort can be implied against

the vendor, save when the contract is partially or wholly executory; and that in this case it is not in the nature of a warranty, but of an implied stipulation forming part of the substance of the contract.

In Broom's *Legal Maxims*, the writer says, page 614, "Where an agreement is for a specified chattel in its then state there is no implied warranty of its fitness or merchantable quality, but if a person is employed to make a specific chattel, then the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used.

It will be observed that the plaintiff in error does not rely upon an express warranty of quality, but on the evident intention to consider the original negotiations as partly reduced to writing and the necessary implication of law under the circumstances shown.

We are inclined to treat the circumstances surrounding the parties and the representations made by the agent of the defendants in error prior to the signing of the contract of sale, as evidence of an intent to contract for the delivery of an article for a particular use in accordance with the judgment of the seller. This finding, with the written contract before us, raises the question, whether the rule, as stated to be where an article is sold by a formal written contract, no oral warranty made at the same time can be shown since the writing is conclusively supposed to embody the whole contract, will be violated by recognizing an implied warranty of the fitness of the machine for a particular use.

Many authorities are to be found containing exceptions to the rule excluding oral evidence, where the writing leaves the fair inference that it was not intended to reduce the whole contract to writing.

We are aware that some of the earlier authorities in New York, Massachusetts and Wisconsin are against the proposition to admit parol statements to prove warranty in the face of a written contract, silent upon the subject; but later cases, notably the case of *Chapin v. Dodson*, 78 N. Y., 80, adopted a course of reasoning which we think upon principle in no way disturbs what has so often been held to be the true rule.

*Chapin v. Dobson* was an action brought for an alleged breach of an agreement in writing, by which the plaintiffs agreed to furnish, and the defendants to purchase, certain machinery upon terms and at times specified. The defendant alleged and was permitted to prove, under objection, a parol agreement made at the same time and in consideration of which he executed the writing by which plaintiff's guaranteed, that the machines should be so made that they would do the defendant's work satisfactorily; if not, that plaintiffs would take them back; evidence was also given showing a breach of such guaranty: a referee found that the matters in writing and the oral guaranty constituted the contract between the parties. *Held*, that the evidence was properly received, as there was nothing on the face of the instrument to show that it was the whole agreement between the parties, and as the oral guaranty did not controvert and was not inconsistent with the written contract.

The case decides that the rule prohibiting the reception of parol evidence varying or modifying a written agreement does not apply where the original contract was verbal and entire and a part only was reduced to writing; nor does it apply to a collateral undertaking; these facts are always open to inquiry, and may be proved by parol.

In considering the case, the court at page 82 says: "The writing specified machines described as 'First Breaker Feeders' of certain dimensions. How they work, and whether well or ill is not stated. If

it had called for a machine to satisfy a required purpose of which the plaintiffs had notice, and which they undertook to supply, they would have been bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and a warranty would have been implied that it was so." The court goes on to say it is contended, however, by the appellant, that this rule does not apply in this case, because a specific and designated machine was the subject of the contract. It may well be doubted whether in view of the findings of the referee and his refusals to find, the case is brought within the rule laid down in cases on which the appellants rely; but it is not necessary to determine that question, for the guaranty as made does not contravene the written contract, and is not inconsistent with it. If the fitness of the machine is implied, the guaranty is in harmony with it, and adds nothing; and if it is not implied, the paper contains no declarations that the machines shall be taken with all faults and insufficiencies or at the defendant's risk. The parol evidence therefore contradicts no term of the writing, nor varies it. The written contract and the guaranty do not relate to the same subject-matter;—the contract is limited to a particular machine as such. The guaranty is limited to the capacity of the machine. It is one thing to agree to sell or furnish machines of a specific kind, as of such a patent or of a particular description, and another thing to undertake that they shall operate in a particular manner, or with a certain effect, or as in this case, that they shall do the buyer's work satisfactorily. The first would be performed by the delivery of machines answering the description or specifications of the patent. As to the other, it in no respect touches the first, nor does it operate as a defeasance, but leaves it valid and to be performed, and the consequences of a breach of the guaranty are a recoupment, or abatement of damage in favor of the defendant, and this is so whether the contracts are in writing or not; for the guaranty is valid although not in writing: and the same rule must apply, for in either case the relation of the guaranty to the contract would be the same." This case was approved in *Guillard v. Hafer*, 92 N. Y., 539, and we think is in point. We think the court in special term should have considered what took place between the parties prior to the sale as to their intention, and that the writing referred to was simply descriptive of what was necessary in making a transfer and fixing the price, and that it was not their intention to do more than that.

Indeed, under authority of *Byers v. Chapin*, 28 Ohio St., 300, we might have considered the right of plaintiff in error to a rescission upon failure of an implied warranty.

SAYLER, J., concurs.

HUNT, J., dissents.

Drausin Wulsin and Frank O. Suire, for plaintiffs in error.

Chas. W. Baker, for defendants in error.

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68

## ORDINANCE AGAINST INTOXICATION.

[Defiance Common Pleas, January, 1891.]

BUDD JEFFERIES AND GEORGE HENDERSON V. DEFIANCE (CITY).

Under sec. 2108, Rev. Stat., Ohio, it is not the simple act of being intoxicated that may be provided against by an ordinance, but it is only when such intoxication results in a disturbance of the good order and quiet of the corporation. And an averment in the affidavit to that effect is necessary.

## PETITION IN ERROR.

SUTPHEN, J.

The transcript from the mayor's docket shows that the plaintiffs in error were prosecuted before the mayor upon an alleged ordinance of the city of Defiance. And the affidavit in the transcript shows that the plaintiffs in error were found in said city in a state of intoxication, but fails to show any other, or different offense than "being found in such condition of intoxication."

The record further shows that the plaintiffs in error were found guilty of the charge contained in the affidavit, and thereupon the mayor imposed a fine of \$20 against one of the plaintiffs in error, and \$10 against the other plaintiff in error. To this action and judgment of said mayor, the plaintiffs at the time excepted, and the purpose of this proceeding is to test the correctness of the said judgment.

The prosecution before the mayor was in the name and on behalf of the city, and the important law question in the case is, whether the affidavit shows that an offense was committed by the plaintiffs in error against any valid ordinance of the city, for the violation of which the mayor had cognizance. The mayor had jurisdiction to try and punish any person violating any ordinance of the city: also concurrent jurisdiction with justices of the peace, within the corporate limits of the city, to try and punish persons for committing certain misdemeanors.

All prosecutions for the violation of ordinances must be in the name of the city, and for violation of any of the statutes of the state, the prosecutions must be in the name of the state.

Section 6940 of the Rev. Stat. provides, that, whoever is found in a state of intoxication shall be fined \$5, neither more nor less, but just \$5. But under this law the prosecution must be in the name of the state. The present prosecution not having been in the name of the state, but in the name of the city, the statute just referred to can have no application, unless it may furnish the means of determining the general policy of the state in regard to the amount of fine that the legislative power of the state would deem to be reasonable upon a given state of facts. But whether or not, the statute limits the rights of cities to pass an ordinance imposing a fine for a greater amount than specified in the statute, it is not necessary to express any opinion in order to arrive at a proper solution of the question made in this case.

The ordinance upon which this prosecution was based, is not set out in the record, but the facts upon which the prosecution is founded are set forth in the affidavit set out in the record, and the question presented is, "whether the facts thus set forth constitute any offense against an ordinance, which the city had the power to pass. If the city had no power to pass an ordinance making it an offense for any one to be found

in a state of intoxication, then the prosecution, was not authorized, for such an ordinance would be null and void.

The power of cities and villages in reference to intoxication or drunkenness are set forth in sec. 2108 of the Rev. Stat., which among other things provides that the council of a city or village shall have power to provide for the punishment of persons disturbing the good order and quiet of the corporation, (1) by clamor and noise in the night season, (2) by intoxication, (3) drunkenness, (4) by using obscene and profane language in the streets and other public places to the annoyance of the citizens, or (6) by otherwise violating the public peace by indecent and disorderly conduct or (7) by loud and lascivious behavior.

All of the different acts following the numbers, 1, 2, 3, 4, 5, 6 and 7, above indicated, refer back to the introductory part of the section, making said several acts unlawful when they result in disturbing the good order and quiet of the corporation.

So that it is not the simple act of being intoxicated that may be provided against by an ordinance, but it is only when such intoxication results in a further condition of affairs to-wit: A disturbance of the good order and quiet of the corporation.

There is no averment in the affidavit to the effect that the plaintiffs in error by their intoxication thereby disturbed the good order and quiet of the corporation.

It follows, that if the ordinance is correct and makes intoxication an offense when it results in a disturbance of the good order and quiet of the city, then the affidavit is wholly insufficient, because there is no such averment contained therein, and so without reference to what the ordinance may contain, no offense is stated which would or did authorize the mayor to impose any fine whatever upon the plaintiffs in error. Simple intoxication, or being found in a state of intoxication, are not punishable offenses under any ordinance that the city is authorized to pass.

The disturbing of the peace, quiet and good order of the city by intoxication is the offense against which the city may legislate. And a prosecution must then be for disturbing the peace and quiet of the city by intoxication. This does not appear in the record; therefore the judgment below is reversed, and the plaintiffs in error are discharged at the costs of the defendant in error.

Judgment accordingly.

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## MUTUAL INSURANCE.

79

[Hamilton Common Pleas, January, 1891.]

### WILLIAM HALL V. CITIZENS' MUT. LIVE STOCK ASS'N.

1. The policy of mutual assessment associations agreeing upon loss to pay the member a fund collected by assessment upon all the members not exceeding \$200, is to be construed as implying a promise to levy such assessment, and the assured need not seek specific performance, but may sue at law for the breach of such promise.
2. A petition on such policy counting on a promise to pay the amount on loss is demurrable. The proper averment of breach of the contract is for the neglect or refusal to levy the assessment.

3. *Query*, whether the plaintiff may not recover the maximum amount without averring or proving what an assessment would have yielded. The weight of authority placing the burden of proof, not upon the plaintiff to show what an assessment would produce, but upon the defendant, who has all the books and papers, to reduce it below the full insurance.

The defendant—a mutual assessment company organized under Rev. Stat. sec. 3691, subsections 1-12 — issued its certificate of membership to plaintiff, by which, in consideration of five dollars, and his agreement to pay all assessments from time to time, not exceeding one per cent. on the estimated value of the animal named, it agreed upon receiving satisfactory proof of death of the animal, a mare, to pay him "his *pro rata* proportion of the mortuary fund, collected by assessment, not to exceed two hundred dollars, within sixty days after the next mortuary payment is levied, ensuing the receipt and acceptance of proofs of loss."

The plaintiff's mare having died, he obtained judgment before a justice, and on appeal filed a petition averring an insurance contract for two hundred dollars, due performance by himself, the loss of the animal, due proofs of loss, and asks for judgment for two hundred dollars. The defendant demurs on the ground that no cause of action is stated.

BATES, J.

In support of his demurrer, the defendant urges that the contract is not to pay a sum of money, but only to pay an assessment to be levied, and hence, that the remedy is a suit to compel the levy of an assessment, and that no action at law for the recovery of money can lie, and he cites *Eggleston v. Centennial Mut. L. Ass'n*, 18 Fed. Rep., 14; *Smith v. Covenant Mut. Ben. Ass'n*, 24 Fed. Rep. 685; *Rainsbarger v. Union Mut. Aid Ass'n*, 72 Iowa, 191. These cases distinctly deny that any action at law can lie, for there is no promise to pay money. It may be stated here that in the first of these cases the policy specially provided that "the only action maintainable on this policy shall be to compel an assessment," hence it is no authority either way; moreover it is contrary to *Oriental Ins. Ass'n v. Glancey*, 70 Md. 101, where the policy contained a nearly similar provision. The other two cases cite no case, and seem innocent of the great number of authorities on the subject. Moreover, the case in 24 Fed. Rep. was said in *Earnshaw v. Sun Mut. Aid Ass'n*, 68 Md. 465, to concede that an action at law might lie, and as to the Iowa case, a still later case, *Garretson v. Equitable Mut. etc. Ass'n*, 74 Iowa, 419, though not overruling the other, sustained a recovery at law for the full amount, because the defendant had not raised the objection at the trial.

1. Now, a contract of this kind must receive a reasonable interpretation, and equivocal phrases must be construed in view of the just and reasonable, and, therefore, probable intention of the parties, and in view of the fact that a contract which gives a right and denies a remedy would be contrary to public policy.

Now, the attitude of the parties towards each other is this: The plaintiff desired to buy insurance, and the defendant to sell it. The defendant having no fund, is to raise the means to pay a loss by assessment upon its membership; but in levying assessments it does not do so as an agent of the plaintiff, but on its own behalf, as a contracting party. Moreover, any dispute requiring resort to the courts would arise on the question of liability to assessment, which alone concerns the assured, and not the making of it; as whether he sustained any loss, or had been guilty of any fraud, or had observed the conditions of the contract and the like,

which are questions of fact to be settled on direct issues, whereas, in a suit to compel the levy of an assessment they would seem to be collateral matters to the issues of the pleadings. For these reasons it cannot be deemed that either party intended by this contract that in case of a dispute as to the liability, the plaintiff should be put to the trouble and expense of levying his own assessment through the compulsory machinery of a court of chancery. And the rational interpretation of the contract is that the defendant impliedly promises to levy an assessment, and that a failure so to do is a breach of the contract.

It seems to me that the authorities sustain this result with sufficient unanimity to forbid the question being deemed an open one. The policies that have been the subject of litigation have varied greatly from each other, but for present purposes I shall divide them into two classes, in both of which classes actions at law have been held to be maintainable.

In the first class the promise to levy an assessment seems to be an express one, as where the policy states that an assessment shall be levied and the sum collected paid; *Curtis v. Mutual Ben. Life Co.*, 48 Conn., 98; *Suppiger v. Covenant Mut. Ben. Ass'n.*, 20 Ill., App., 595; *Life Ass'n. v. Lemke*, 40 Kan., 142; *Taylor v. Natl. Temperance Union*, 94 Mo., 35; and *dicta* in *Benefit Assn. v. Sears*, 144 Ill., 108; and *Burdon v. Mass. Safety Fund Assn.*, 147 Mass., 360-367; the last two cases sustaining equity suits for specific performance, but recognizing actions at law.

But in the next class of cases there is no express promise to levy an assessment, but like the case at bar, they merely state in one form or another that the assured shall receive the amount of an assessment not exceeding a certain sum. Yet in all these cases an action at law has been sustained for failure to levy the assessment, thus interpreting the contract as an implied promise to assess. Such are the following: *Lawler v. Murphy*, 20 Atl. Rep. (Conn., 1890), 457; promises to pay "a sum received from a death assessment" not to exceed \$1,000. *Elkhart Mut. Aid. Benev. and Relief Assn. v. Houghton*, 103 Ind., 286; entitled to "\$1,000, or so much thereof as may be realized from one assessment." *Protective Union v. Whitt*, 36 Kan., 760; \$2,000, "the sum to be paid is conditioned upon assessments made therefor." *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md., 465; entitled to benefits to be assessed, the amount so collected to be paid within 90 days after proofs. *Burland v. Mut. Ben. Assn.*, 47 Mich., 424; entitled "in the sum of one dollar for each contributing member," not exceeding \$2,000. *Neskern v. Northwestern Endowm. and Legacy Assn.*, 30 Minn., 406; like the foregoing. *Bentz v. Northwestern Aid Assn.*, 40 Minn., 202; will pay "75 percent. of the net proceeds of one full assessment," not exceeding \$2,000. *Ball v. Granite State Mut. Aid Assn.*, 64 N. H., 291; like the Connecticut case above. *Freeman v. Natl. Ben. Soc.*, 42 Hun., 252; like the Connecticut case above. *O'Brien v. Home Ben. Soc.*, 46 Hun., 426, 51 Id. 495; like the Indiana case. *Jackson v. Northwestern Mut. Rel. Assn.*, 73 Wis., 507; 80 per cent. of an assessment levied and collected therefor, not exceeding \$4,000. *Mutual Accident Assn. v. Barry*, 131 U. S., 100; a sum represented by two dollars for each member "to be paid" to the assured.

II. The proper form of pleading is resolved by the nature of the action. The only action at law being founded not upon a promise to pay, but upon the breach of a contract to lay an assessment, it follows that a pleading counting upon a promise to pay the sum prayed for is clearly bad. The proper averments must show that the defendant has refused to lay an assessment within the stipulated time, or if it has collected the

assessment, that it refuses to pay it over. *Curtis Mutual Benefit Life Co.* 48 Conn., 98; *Protective Union v. Whitt*, 36 Kan., 760; *Life Assn. v. Lemke*, 40 Kan., 142; *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md. 465; *Taylor v. Natl. Temperance Union*, 94 Mo., 35; *Jackson v. Northwestern Mut. Rel. Assn.*, 73 Wis., 507.

But it is not necessary to show any demand upon the company independent of the proofs of loss. *Protective Union v. Whitt*, 36 Kan., 760.

On this ground the petition in this case is clearly bad, and the demurrer well taken. Whether the plaintiff ought not also aver that the assessment if made would yield the amount he prays for, depends on a consideration now to be examined.

III. Down to this point the law seemed to me to set the question at rest, but from here a divergence in the authorities appears. Some courts conclude that as the plaintiff can recover only what an assessment upon the membership would yield, he must aver and prove what that amount would be, and can only recover what he proves; and if he does not prove the membership subject to assessment, he can recover only nominal damages. This is held in *Newman v. Covenant Mut. Ben. Ass.*, 72 Iowa, 242; *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261; *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md., 465; *Ball v. Granite State Mut. Aid Assn.*, 64 N. H., 291, and a *dictum* in *O'Brien v. Home Benefit Soc.*, 51 Hun., 495.

But the great weight of authority proceeds on the basis that as the defendant company has all the books and papers and the knowledge or means of knowing as to the amount an assessment would yield, it will be presumed in the absence of any evidence, that the maximum sum stated in the policy would be realized, and the burden of proof is on the defendant to show a lesser amount if he desires to reduce the recovery below this. *Lueders v. Hartford Life & Annuity Ins. Co.*, 12 Fed. Rep., 465, 4 McCrary, 149; *Lawler v. Murphy*, 20 Atl. Rep. (Conn.), 457; *Suppiger v. Covenant Mut. Ben. Assn.*, 20 Ill. App., 595; *Elkhart Mut. Aid, etc., Assn. v. Houghton*, 103 Ind., 286; *Protective Union v. Whitt*, 36 Kan., 760; *Life Assn. v. Lemke*, 40 Kan., 142; *Bentz v. North-western Aid Assn.*, 40 Minn., 202; *Supreme Council v. Anderson*, 61 Tex., 296, and a *dictum* in *Jackson v. North-western Mut. Rel. Assn.*, 73 Wis., 507.

The demurrer will be sustained therefore—not because the action will not lie, but for want of the necessary averments of breach contract.

John Wentzel, for plaintiff.

Joel C. Clore, for defendant.

## VACATION OF STREETS.

[Hamilton Common Pleas, 1891.]

### IN RE HOTEL ALLEY.

The Newport Bridge Company condemned part of Hotel alley in the city of Cincinnati for the Cincinnati approach to the bridge. An action was then brought to vacate the parts of the alley north and south of the approach. Such vacation was consented to by all the abutting property owners, but the city came in with a cross-petition claiming damages as a "lot owner" under Rev. Stat., 2656.



MAXWELL, J.

The section referred to only provides cumulative remedies, and preserves any rights the city has.

While the city is not a lot owner within the terms of the procedure provided in this section, yet its rights can be enforced by an answer and cross-petition and [following *Cincinnati v. Commissioners*, 1 *Disney*, 5] that if the city has any special damages by reason of change of drainage, etc., it will be entitled to the same.

It has no claim for compensation for a proprietary interest if any have been sustained.

City Solicitor, for the city.

Kramer & Kramer, C. B. Simrall, Alfred Mack and Paxton & Warrington, for the abutting lot owners.

## APPROPRIATION OF LAND.

91

[Superior Court of Cincinnati, General Term, 1891]

### \* *MT. ADAMS AND EDEN PARK INCLINED RY. CO. V. CINCINNATI (CITY.)*

1. The power vested in common council to pass an ordinance is legislative, and any agreement to restrain or abridge that discretion is against public policy, and will not be entertained.
2. The common council has no authority to contract to levy an assessment, and certify the same to another in case of appropriation of land; nor has the city power to borrow money in anticipation of assessment, except by issuing bonds and advertising for bids for the same, as provided in sec. 2703 and 2709 of the Rev. Stat.
3. Section 2251 of the Rev. Stat., which provides for the appropriation of private land for a street by any person interested, does not contemplate any re-payment, other than that found in the beneficial interest, because of this proposed appropriation.

This is an action in which the plaintiff seeks to recover from the city of Cincinnati the sum of \$8,730.00, with interest from August 22, 1882. The petition, filed July 24, 1882, alleges that the city of Cincinnati, on or about the twenty-seventh day of August, 1879, was about to proceed to appropriate certain lands in said city for its use as a street, being an extension of Grand street, from Nassau street to Gilbert avenue, through the premises of Richard Mathers and James E. Mooney, and it was therefore agreed between the said James E. Mooney and the said city of Cincinnati, acting by its board of public works and common council, that the said James E. Mooney should advance unto the defendants a sum of money sufficient to defray the costs of said appropriation, which cost, including the amount payable to the owner of the premises appropriated, and the costs of proceeding to appropriate the same, should be assessed upon the premises benefited by such appropriation—such assessment to be made by a valid ordinance for that purpose, which should be adopted by council—said assessment to be payable unto the said James E. Mooney to reimburse him for said advance.

\* For a previous decision, see 10 Dec. Re., 679. The judgment of the superior court was affirmed by the Supreme Court, unreported; 52, O. S. 629.

The plaintiff further alleges that in pursuance of said agreement James E. Mooney paid into the treasury of the city, in August 22, 1879, the sum of \$8,750.00, being the full amount of the cost of said appropriation, and the council appropriated the said premises and paid for the same the said sum of \$8,750.00; but said city, though often requested, has refused and still refuses to make any assessment to pay the cost of said appropriation, or to deliver any such assessment to the said Mooney or this plaintiff, or any part of said sum of money; that said Mooney, for valuable consideration, heretofore assigned and transferred his claim against defendant growing out of the premises, unto the plaintiff; and the plaintiff is now the owner and holder of the same.

The answer of the city of Cincinnati admits that it is a municipal corporation, being a city of the first class under the laws of Ohio, and further admits that the said James E. Mooney paid into the treasury of Cincinnati on or about August 23, 1879, the sum of \$8,750.00, and that said sum was used by the city for the purpose of appropriating lands in said city for the extension of Grand street from Nassau street to Gilbert avenue, but denies that there was an agreement on the part of the city of Cincinnati to repay or reimburse said plaintiff for the sum so as aforesaid advanced in any mode or manner whatever.

It is further alleged that the said James E. Mooney on or about the twenty-eighth day of October, A. D. 1878, for the purpose of inducing the defendant to open and extend Grand street from Nassau street to Gilbert avenue, in connection with William M. Ramsey, entered into a certain undertaking or indemnity bond to the city of Cincinnati, binding himself to pay all costs and expenses incurred by defendant for the appropriation aforesaid; that because of said indemnity bond said defendant was induced to make the appropriation aforesaid; that the costs and expenses of said appropriation amounted to the sum of \$8,750.00, and that sum was duly paid by said defendant for such appropriation; that said sum of money paid by the said Mooney to the said defendant was due to and was paid to said defendant by said Mooney by virtue of and in accordance with the obligations of said bond, and that said defendant is not indebted to the said plaintiff in any sum whatever.

There is a further denial of each and every allegation in the petition not therein before expressly admitted.

#### STATEMENT.

The board of public works, on the twelfth day of October, 1878, recommended to the common council that it pass an ordinance to condemn a strip of land lying between Nassau street on the south and Gilbert avenue on the north, which would be included between the extended lines of Grand street, authorizing and directing the city solicitor to institute the necessary proceedings in the court for an inquiry and assessment of compensation therefor, and providing that the amount so found, together with the costs of the action, should be assessed on the property abutting on the improvement. The ordinance was read the first time in the board of council on the eighteenth day of October, 1878, and was referred to the committee of condemnation and vacation. It was reported back on November first, 1878, read a second time and engrossed. Two days prior to this time, James E. Mooney and William M. Ramsey executed a bond to the city of Cincinnati, by which they bound themselves to the city in the sum to be ascertained: the condition

being as follows: "Whereas said James E. Mooney is a person interested in appropriation of private property for the opening and extending of Grand street in said city from Nassau street to Gilbert avenue, which is now being considered by the boards of said city government, now therefore if said city shall appropriate property for such purpose, the expense of the same to be assessed on the property abutting thereon, and benefited thereby and the assessment to be certified to the obligors herein, and cause an application to court to be made to assess the damages therefor, the said obligors bind themselves as aforesaid to pay all costs and expenses incurred by the city in such application, and further to pay into court or otherwise as the law officer of the city, or as the court shall direct, all damages which may be assessed by the jury in such proceedings. Said payment to be made for costs and expenses immediately after the conclusion of this case, and for damages within the six months allowed by law."

This bond was approved by the board of public works, November 1, 1878, and was read in the board of councilmen the same day. Nothing further was done with it.

It never was approved or accepted by the board of council, and was never even read in the board of alderman. In the board of council the condemnation ordinance was read a third time and passed November 15, 1878.

On the twenty-second day of November, 1878, in the board of alderman the rules were suspended, the ordinance was read the third time and passed. On November 25, 1878, it was approved by the mayor and board of public works.

Condemnation proceedings were had, and on August 22, 1879, Mooney deposited \$8,750.00, the amount of the condemnation money, with the city treasurer, who gave him the following receipt:

"Received of James E. Mooney, for condemnation of ground for the purpose of extending Grand street from Nassau street to Gilbert avenue, eight thousand seven hundred and fifty dollars.

"Credit General Fund, \$8,750.00.

"(Signed) HENRY STEGNER,

"Ass't City Treasurer."

This money was paid to the property owners. Grand street was opened by the city as a public street and continues to be used as such. Applications have been made to council to make the assessment upon abutting lots to pay for the improvement and costs for the same to the obligors of the bond, and although ordinances have been introduced, they have never been passed.

The evidence discloses that James E. Mooney, who was and is a stockholder in plaintiff's company, transferred and assigned to the plaintiff the claim in consideration of the payment by the plaintiff to him of the amount of such claim. The plaintiff paid the cost of the excavation for the street and laid a single track of street railway therein. The judgment below was rendered for the defendant in error—the intervention of a jury having been waived—by the trial court. A motion for a new trial was overruled, to which the plaintiff in error excepted, and this proceeding is to reverse this judgment of the court in special term.

HUNT, J.

It is claimed by the plaintiff in error that the liability against the city exists by reason of the words of the condition of the bond as the contract under which the money was paid, and which, by the acceptance and use of the money, it is said, became an express obligation of the city to make an assessment and certify the same to the obligors. It is contended that the money paid under this bond was not paid by way of voluntary gift, but under an express agreement to repay the money in assessments. In support of this proposition, it is further urged that the appropriation ordinance subsequently passed by all (November 22, 1878) the municipal boards declares that the cost of the appropriation shall be assessed upon the abutting property, and such a declaration would be utterly inconsistent with the claim that Mooney was to make a gift of the money for the appropriation to the city; for, in that event, there would be no necessity of assessing the cost against the abutting owners.

(1) The city of Cincinnati defends on the grounds that aside from the legal effect of the bond in question, and of the legal right of the city, to make such an agreement, there was no agreement at all on the part of the city, for the reason that the bond was never presented to the board of aldermen for action. The indorsements on the back of the bond—which is submitted in evidence—show its history in accordance with the facts we have recited. The board of public works and board of councilmen, even admitting that they consented to all the terms of the bond, cannot make an agreement for the city, without the concurrence of the board of aldermen, and no such action was had on this bond, and the plaintiff, therefore, failed to show an agreement to the condition of this bond on the part of the defendant.

(2) That even had the bond been approved before all the boards, a legal and binding contract could not arise from it.

It is urged as a ground of recovery in this action that the city agreed, in consideration of Mooney paying the cost of said appropriation, it, the city, would pass a valid assessment ordinance, which should be adopted by the common council, and that the city has refused to make any assessment.

As the power to pass an ordinance is legislative, and cannot be abridged and entailed by contract, such an agreement is contrary to public policy and void, and a contract which tends to restrain the unbiased judgment of public officers will not be sustained, and unless express power is given to a municipal corporation to make such a contract, it cannot well be inferred. Nor would it be difficult to predict the result if a municipal legislature acting under limited and specified powers could effectually bind itself in advance to any particular course of legislation. Chief Justice Marshall, in referring to the power of a municipality to make a change of grade, notwithstanding a contract, says: "A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which should so operate as to bind its legislative capacity forever thereafter and disable it from enacting a by-law which the legislature enables it to enact may well be questioned. We rather think that the corporation cannot abridge the legislative power." *Goszler v. The Corporation of Georgetown*, 6 Wheaton, 593.

To the same end, says Judge Dillon in the case of the Illinois and Canal Co. v. St. Louis, 2 Dillon C. C., 87:

"The power conferred upon municipal corporations for public purposes cannot be either delegated to others or surrendered or renounced. Such corporations may adopt by-laws, or make authorized contracts, but they have no power as a party to enter contracts or pass ordinances which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing at all times their public duties."

Presbyterian Church v. City of N. Y., 5 Cowan, 538; Mayor v. Second Ave. Railroad, 32 N. Y., 261; Richmond Gas Light Co. v. Middleton, 59 N. Y., 228; Gale v. Village of Kalamazoo, 23 Mich., 344; Louisville, City Railroad Co. v. Louisville, 5 Bush., 415; Cooley's Constitutional Limitations, p. 251, (Margin p. 206).

Certainly the power of taxation, including the power of local assessment, is an important function of government, and is essentially legislative in its character.

No proposition can be countenanced with safety that would abridge that power by contract, for the effect would be to practically surrender or transfer legislative control from the city to an individual to whom the power was not originally committed.

But it is insisted on the part of the plaintiff in error that if the money was advanced, not as a voluntary gift, but under an agreement that it should be repaid, there is no way of recovery, and that if the money was used by the city for proper legitimate municipal purposes to-wit: in buying real estate for a public highway, that the law is well settled, that under such circumstances the plea of *ultra vires* will not avail against a municipal corporation.

It is true ordinarily that the obligation to do justice rests upon all persons, natural and artificial; and if a municipality obtain money or property without authority, the law, independent of any statute, will compel restitution or compensation, and that the law which always intends justice, implies a promise. The defense of *ultra vires* is not favored in law. Perhaps the doctrine is well expressed in Green's Brice's *Ultra Vires*, 729, *et seq.*, in which the American editor of the work observes in this connection: "In the United States the defense of *ultra vires* interposed against a contract wholly or in part executed, has very generally been looked upon with disfavor; the result has been that in some cases a liberal construction has been applied so as to destroy the foundations of the defense: in others the courts have allowed the recovery of the money paid, not upon the contract, but because of the money received and the benefits enjoyed; while in still another class of cases the doctrine of estoppel *in pais* has been applied to exclude the defense."

We can conceive of a distinction, however, in regard to municipal corporations in actions of implied assumpsit with respect to money or property received by them and applied beneficially to their authorized objects through contracts which are simply unauthorized, and those contracts which are prohibited by their charter, or some other law, bearing upon them, or are *malum in se*, or a violation of public policy. This is the very distinction commented on by the court in *Allen v. President and Councilmen of La Fayette*, Supreme Court of Alabama, Albany Law Journal, October 2, 1890, and cited approvingly by counsel.

In this case it was held that when municipal officers have no express authority to borrow money, and instead of the warrants being given to the vendor of a school-house building they borrowed money and gave

warrants therefor, and with the money pay the vendor, the warrants are void, but the town is liable on an implied contract to repay the money, which it has received and applied to an authorized purpose. It was so held, we take it, under the charter of the town of LaFayette which authorized the president and councilmen there to buy and the town to hold property, and which was reasonably necessary to the exercise and performance of expressly granted and imposed functions and duties, and which the use of its funds had enabled the corporation to acquire and devote to its legitimate purposes. It may be that the town was liable as upon implied assumpsit, not under, but wholly apart from the unauthorized purpose. But our statutes in regard to the borrowing of money and the levying of assessments by municipalities are so guarded in their character that the law will not look with favor upon the expenditure of public funds unless authorized by law. To this very end the Worthington law and the Burns law were enacted by the general assembly.

Certainly if contracts like that in question are not prohibited by some law bearing on them, they are so violative of public policy that they should not receive the sanction of the law; nor do we consider it necessary to consider at length the question whether the city is estopped to plead the defense of *ultra vires* in an action to recover the money paid on the faith of a promise by the city to reimburse the plaintiff's assignor by giving him assessments through an ordinance for money used, because the evidence taken with the legal presumption, warrant the finding of the trial judge that no such promise was in fact made by the city of Cincinnati. The plaintiff relies upon the language of the bond purported to have been given to the city to support the contract. But if this bond, like a voluntary deed, simply conferred a benefit without giving rise to any obligation binding the obligor, perhaps delivery to an officer of the city authorized to receive such an instrument might raise a presumption of acceptance. But where an acceptance imposed on the city an obligation to make an assessment and certify it to the obligors of the bond, the acceptance should have been clear and unequivocal. The only city board which approved the bond was the board of public works, and there was no action of approval on the part of the other co-ordinate branches of the city government. It cannot certainly be claimed that when the condemnation ordinance was passed, the city made contract with Mooney to pay back in assessments any money he might advance to make the condemnation effective.

It is argued that authority is found in sec. 2704 of the Rev. Stat. for the council of any municipal corporation to borrow money at a rate of interest not exceeding seven per cent. in anticipation of the collection of any special assessment, and this transaction was in fact only a mode of making a loan in anticipation of the assessment under that provision of the statute. The language of the statute is so construed that the power to issue bonds given by this section is simply in addition to the power to borrow money, and that it does not require the municipal corporation to issue bonds for the money so borrowed. Sections 2703 and 2709, apply to the bonds issued under sec. 2704, and relate to the character of their issue, and under what ordinance, and provide for the sale by way of notice and competitive bids etc. If the transaction is to be regarded in the light of a loan in anticipation of assessments, there was a violation of the statute in not securing the loan on the best terms by advertising for competitive bidding, or if the contract upon which the plaintiff relies be

regarded as a contract to levy an assessment for the benefit of the plaintiff to pay a loan, it cannot be sustained in law. There certainly was no power to certify the assessment to Mooney under sec. 2808 of subdivision 7, and this is the only provision of the statute where a municipal corporation is given authority to make and certify assessments to any one. This section describes the mode by which bids for public improvements shall be received and the contracts made. Nor can the claim reasonably be maintained that such a contract exists on the part of the city to receive the money one year later and buying the land. The statute in express terms makes provision for the appropriation of private property for a street, alley or public highway on the part of a person who may be interested in such proposed street or highway. Section 2251 of the Rev. Stat. says: "Any person interested in the appropriation of private land for a street, alley or public highway, may, before or after the passage of an ordinance for the opening of such street, alley or public highway, or before or after application to the court, execute his bond, payable to the corporation to the acceptance of the council, conditioned for the payment of all damages which may be assessed by the jury, and such bond shall be good in law, and if such bondsmen pay or deposit according to the order of court, then such street, alley or highway shall be opened, or the corporation may at its discretion make such payment or deposit and collect by law the amount of such damages of such bondsmen with or without costs, as the court may direct.

It seems evident, then, that the payment can be regarded only as a voluntary payment on the part of Mooney under the provisions of sec. 2251, of the Rev. Stat. Such a proceeding is certainly not authorized under any other legislation, and it was made only because of the beneficial interest which Mooney himself claimed in the proposed appropriation of the lands for the street or highway. It is much more consistent to suppose that this motive alone prompted this action rather than to conclude that the payment was made to the city on the promise that the money should be returned to Mooney. This view of the case, too, is supported by the evidence that this plaintiff paid the costs of the excavation for the street and laid a single track street railway therein. It is also a significant fact that the receipt given at the time makes no mention of the condition, under which the money was paid, but simply declares that it was for the condemnation of ground for the purpose of extending Grant street to Gilbert avenue, and was credited to the general fund. The section quoted is authority alone for such a proceeding, and does not contemplate any re-payment other than that found in the beneficial interest because of the proposed appropriation.

The judgment of the superior court in special term will therefore be affirmed.

MOORE, J., concurred.

SAYLER, J., dissented.

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## TAXATION.

[Hamilton Common Pleas.]

## JOHN ZUMSTEIN, TREASURER, V. CONSOLIDATED COAL &amp; MINING COMPANY ET AL.

Lands owned by a municipal corporation and leased for a period exceeding fourteen years, and not subject to revaluation, are taxable in the name of the lessee; and upon a failure to pay the taxes properly charged against said lands, the county treasurer in an action brought for that purpose may sell the fee of said lands to pay the taxes so charged.

EVANS, J. (orally.)

The case of John Zumstein, treasurer, against The Consolidated Coal & Mining Co., a corporation, is a suit brought for the purpose of subjecting certain property, real estate, in this county, to sell for taxes alleged to be due. It seems from the pleadings, and it is conceded, I believe, upon all hands that the realty in this case is the property of The City of Cincinnati,—that is, the fee of the property is in the city. This property is leased to the defendant for a term of years, and plaintiff claims and has introduced testimony tending to show that there were back taxes due upon the premises in the sum of \$9,336.11, with penalties, and asks a judgment for that sum, and that the premises or so much thereof as may be necessary to satisfy this claim, shall be sold.

The consolidated Coal & Mining Company, lessee, answers, as does The City of Cincinnati; and the point really at issue in the case is whether or not the fee to this property, this land, can be sold to pay these taxes in a suit against The Consolidated Coal & Mining Co.

It is claimed on the part of defendant that they, being lessees, own nothing but the lease; that such leasehold is the only property they have in the estate, and that consequently that is the only property that can be sold for the taxes.

It is claimed upon the part of the city that this land is not taxable; that it is exempt from taxation, and therefore it could not be sold under any circumstances for the taxes as claimed in this suit.

The whole controversy depends on the construction of sec. 2733 of the Rev. Stat., as amended, 78 Ohio L., 32, which reads as follows:

“Lands held under a lease for any term not exceeding fourteen years, and not subject to revaluation, belonging to the state or a municipal corporation, or to any religious, scientific, or benevolent society or institution, whether incorporated or unincorporated, or to trustees for free education only, and school and ministerial lands, shall be considered, for all purposes of taxation, as the property of the person or persons so holding the same, and shall be assessed in their name.”

The question is whether or not this property of a municipal corporation, being leased for a term exceeding the term named in this statute, brings it within the purview of the statute—whether it can be taxed in the name of this lessee, and the taxes collected by sale of the land itself.

There have been some decisions that while not perhaps deciding the exact point in this case, are sufficiently close to it to throw considerable light upon it; one being the case of Bentley v. Barton, cited by counsel, (41 Ohio St., 410) which was a suit by the treasurer of Columbiana county brought against the lessee of certain school lands—lands held by the state of Ohio as school lands. But the suit was brought for the pur-



pose of having these lands sold to pay taxes,—brought against the lessee and in the name of the lessee. The syllabus of the case that is pertinent to the inquiry is :

*First*—"That in the absence of a provision in the terms of acceptance of such lands by the state," (that is, school lands which were given to the state of Ohio by act of congress for the purpose of school lands, and school lands alone), "that they should be forever free from taxation, they are taxable after sale or lease, by the state, as other lands in the state."

*Second*—"That sec. 2733 Rev. Stat., provided for the taxation of such lands held under such lease, as the property of the lessee."

That decision seems to determine that lands coming under this section, when they are leased as provided by this section, may be taxed. That whatever the legislature may have said theretofore by way of exempting certain lands from taxation, or whatever status lands may have had by reason of the conditions of a gift as in this case; the Supreme Court evidently concedes in this syllabus that the legislature has the power to assess taxes upon this class of property.

Municipal property is not exempt from taxation by any constitutional inhibition, and therefore the entire question is left to the legislature itself, and if the legislature in its wisdom sees fit to impose a tax upon the property owned and held by a municipal corporation, there is no reason why it may not do so as well as that it may assess a tax upon the property of any individual; because municipal corporations are the creatures of legislation; they are created by act of the legislature; whatever powers and whatever immunities they have are given to them by virtue of the legislature unless the constitution otherwise provides; and therefore, being the creatures of the legislature, and being entirely in the power of the legislature so far as the constitution does not limit that power, there is no question, in my mind, that the legislature has power to have these lands placed upon the tax duplicate and taxed the same as any other land.

Our circuit court has also rendered a decision upon this section, in *Ludlow v. Brewster*, 2 Circ. Dec., 47, the syllabus of which is as follows:

"Lands held under lease for any term exceeding fourteen years, and not subject to revaluation, belonging to a municipal corporation (precisely this case), are made subject to taxation by sec. 2733 as passed February 17, 1881, although they are exempt under the provisions of sec. 2732."

That is, the legislature by sec. 2732 made this class of property exempt specifically from taxation; but what the legislature may do the legislature may undo. If the legislature can say to-day that certain classes of property are exempt from taxation, it may to-morrow say, or another legislature may say, that that property shall be taxed, there being no constitutional provision that in any way restricts the power of the legislature over this subject.

The court in passing upon the question says:

"Section 2733 is an affirmative and taxing section, and not open to controversy, as decided by our Supreme Court in the case of *Bentley v. Barton*."

The second proposition of the syllabus being as follows:

That sec. 2733, Rev. Stat., provided for the taxation of such lands under such lease as the property of the lessee."

So there can be no question in the light of the decisions of the courts of this state, the circuit court and the Supreme Court, that this land is taxable, and that it is taxable in the name of the lessee.

Now what does that mean? It does not say that the lease is taxable; it says the lands are taxable, and taxable in the name of the lessee. If the statute provided that they are to be taxed in the name of the lessee, then the question is what proceeding is to be brought, and against whom is the proceeding to be brought, to enforce this tax. The statute is that "for all purposes of taxation," "these lands shall be considered" "as the property of persons holding the same." The person holding the same is the lessee, and therefore for all purposes of taxation these lands are the property of the lessee. For the purposes of this case these lands are the property of the defendant in this case, just as much as though it held a title deed absolute in fee simple to this land. And being taxable in the name of the lessee, I can conceive of no other way of proceeding to collect these taxes, except by an action against the person in whose name this property is held, as the owner for the purposes of taxation. We are not interested—we are not concerned about the ownership for any other purpose except the purposes of taxation. We are not concerned about its ownership for the purposes of selling or leasing or devising, or of improving, or of any other purpose. This is simply an action for taxes, and we are simply concerned to determine what is the law with reference to this property's taxable qualities and characteristics.

It seems to me that in the light of the decisions and the plain reading of this section which says that the property shall be considered the property of the persons holding the same—not the leasehold shall be the property, but the land or lands shall be the property of the persons holding the same, and shall be assessed in their name; that for the purpose of taxation this lessee is the holder and owner of the land, and that the action is properly brought, and the relief sought is one that may be awarded by the court.

As to the amount of the tax—the value of the land has been fixed by the proper taxing officers, and there is no evidence in this case to show that the taxation has been wrongful, or has been too high, even if it could be shown; so that I see no proper judgment in this case except for the plaintiff. That will be the judgment of the court.

Frank M. Coppock and Rufus B. Smith, for plaintiff.

Herbert Jenney, E. W. Kittredge, for the Consolidated Coal & Mining Co.

Hortsman, Galvin, Whittaker & VanHorne, for the City of Cincinnati.

## EXECUTOR'S SALE.

102

[Morrow Probate Court, 1891.]

## \*ANONYMOUS.

1. In a proceeding for the sale of decedent's real estate under sec. 6142, Rev. Stat., the judgment lien-holders against the interest of one of decedent's heirs in the real estate sought to be sold to pay debts are not necessary parties.
2. When such lien holders come in and answer and cross-petition in such a proceeding, on motion of the administrator such pleadings will be stricken from the files.
3. In allowing homestead to a widow under sec. 6155 Rev. Stat., on the proceedings of an executor to sell lands to pay debts, the dower interest need not cover the same part of the ground as the homestead so assigned.

POWELL, J.

The case came upon a motion to strike from the files answers and cross-petitions of judgment lien-holders against the interest of an heir of decedent on a petition by the administrator to sell lands to pay debts. The court held as above.

James H. Beebe, for the motion.

S. C. Kingsman, *contra*.

## \*Explanatory.

The facts in the cause are few and simple, but the question raised by the motion is one of practice, heretofore undecided by any of the higher courts of our state, and yet one of considerable importance. It involves a construction of sec. 6142 of the Rev. Stat. of Ohio (Smith & Benedict).

Mr. W. died two years ago, intestate, and leaving surviving him a widow, two children, J. W. and C. W. and the heirs of a third child, A. W. The decedent left but little personalty, all of which was taken by the widow, and seventy acres of land adjoining the village of Mt. Gilead, well improved and quite valuable. The widow was first appointed administratrix, but before any effort at a settlement of the estate she resigned, and J. W. was appointed administrator *de bonis non*. He therefore, there being no personal property left to be administered upon and debts to the amount of some \$1,000 existing against decedent's estate, petitioned the probate court for leave to sell the whole of the real estate at private sale to pay debts. The widow and all of the heirs were made parties defendant, as were also all persons holding judgment liens against the decedents in his life-time. R. & S. and C. & B., who had secured judgments against J. W., the administrator *de bonis non* and one of the heirs, prior to the death of decedent (his father), and who after decedent's death caused executions to be issued out of the court of common pleas and levied on his undivided interest in the real estate of the decedent, were also made parties defendant and came in and answered setting up their judgment liens against the interest of this heir, and cross-petitioning and asking that the probate court permit a sale of the lands and after the payment by the administrator *de bonis non* out of the proceeds of all of decedent's debts and the costs of administration, that the balance be partitioned by the probate judge among the heirs, and that out of the share, if any, going to J. W., the administrator *de bonis non*, that the several judgment liens against the same be ordered paid in their proper order of priority. The widow answered asking a sale of the premises, but that her dower be assigned out of the same by metes and bounds, and she be also set off a homestead worth \$1,000. To the answers and cross-petitions of R. & S. and C. & B., the administrator *de bonis non*, J. W., filed a motion asking that they be stricken from the files because they had been improperly filed in the cause: because it was uncertain whether there would be any funds left out of the proceeds of the sale of the realty out of which said claims could be paid; because the probate court had no jurisdiction in that cause of the matter set up in said answers and cross-petitions and no right or power to grant the desired relief or make the order prayed for, and had no authority to adjudicate in the cause at bar any question between lien-holders against one of decedent's heir's interest in the realty; because the statute only contemplated the

## Morrow Probate Court.

making of parties defendant in such cause the lien-holders against the decedent, and the heirs had only a contingent interest, subject to the payment of decedent's debts, and the administrator in contemplation of law was only to be allowed to sell so much of the realty as would pay the debts of the decedent, and for other reasons. The court ruled that the motion should be sustained. When the legislature in the section of the statute referred to used the language "all mortgagees and other lien-holders" in designating who should be made parties defendant in a proceeding brought by an administrator to sell decedent's land, it was meant only the mortgagees or lien-holders who had claims against the decedent, and was not intended to confer on those persons who might have judgment claims against one of decedent's heirs, the right to come in in such a proceeding and have their rights adjudicated, and no authority is by statute conferred on probate courts in such cause to settle any disputes that might arise between these outside parties. It is only "as soon as the executor or administrator shall ascertain that the personal estate in his hands will be insufficient to pay all the debts of the deceased, with the allowance to the widow and children, for their support, twelve months, and the charges of administering the estate, he shall apply to the probate court or the court of common pleas for authority to sell the real estate of the deceased." He is only at liberty to sell so much as will pay the decedent's debts and the other expenses enumerated in sec. 6136, Rev. Stat., so that the presumption follows that there would be no surplus to be applied to the payment of the individual debts of the heirs, and they become for this reason improper parties. The lands, it is true, descend immediately on the death of the decedent to the heirs, but it is subject to the payment of debts of the decedent (*Overturf v. Dugan*, 29 Ohio St., 230), and only so much of the lands so descended can be so sold. It could subserve, in contemplation of law, no good purpose to make the judgment lien-holders against an individual heir a party in interest. The only way his interest could be reached would be either by a proceeding in garnishment after a sale had been effected and a surplus was found to be in the hands of the personal representative, or by a proceeding in aid of execution. The interest of an heir of a decedent in the possible surplus of the proceeds of the sale of decedent's real estate under the statute to pay debts is too remote and uncertain to warrant the interposition of the probate court in a proceeding to sell the land instituted by the personal representative, and on motion pleadings seeking such order or relief will be stricken from the files because of this fact, and of the fact that such adjudication and order in such a proceeding is beyond the jurisdiction of the probate court, and is wholly foreign to the cause.

In this cause also another question arose of great importance. It was on the demand of the widow for the homestead exemption of \$1,000 and her dower interest in the farm. The practice has universally been in Morrow county, if not throughout the state, to have the dower interest include and overlap the homestead. In the case at bar though, on motion of the widow, the appraisers were instructed by the probate judge, under the authority conferred on them by sec. 6155, Rev. Stat., and in protection of the widow's rights and in accordance with her demand, to set off out of the realty a homestead and her dower by metes and bounds. The appraisers then proceeded to set off twenty acres off of the south side of the farm, including the house and outbuildings, for a homestead to the widow valuing it at the rate \$50.00 per acre; this left fifty acres out of which her dower was to be assigned, and the appraisers under the statute referred to set off to her fifteen acres just north of and adjoining the twenty set off as a homestead, thus making in all thirty-five acres, or one-half of the farm, including all of the buildings, orchard and improvements set off as a homestead and dower. Counsel for the creditors contended that legally the dower interest was intended to cover the same land as the homestead in every case where both were set off, and that in case where one-third of a decedent's estate was set off to his widow as a homestead that, it being intended by the legislature in enacting sec. 6155 that the dower should overlap, cover and include that already set off as a homestead, and this being the practice observed and followed for years, that the widow would not be entitled besides her homestead to have any additional land set off to her as dower. The appraisers, however, followed the opposite view setting off dower as if no homestead had been set off (except to take one-third in value of the balance after the homestead had been set off), and giving her as homestead twenty acres and as dower fifteen acres, and the report was confirmed by the court.

This is contrary to the practice that has been prevailing here, and the best attorneys differ as to their construction of the statute. It is a question worthy of discussion by the bar of Ohio.—J. H. B.

## INFANT PARTNERS.

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[Hamilton Common Pleas, 1891.]

## J. D. LYGHTEL v. P. W. COLLINS.

An infant may rescind a partnership of which he is a member. If he does, he can only recover his capital, less what he has received from the firm, and all partnership creditors must be first paid, and he can not recover any allowance for services in the absence of express stipulations.

BATES, J.

A minor bought an interest in Collins' commission business, paying therefor \$400 cash and giving Collins a note for \$100. After being in the firm two and one-half months, Lyghtel dissolved it, and sued by his mother, as his next friend, to recover back his capital, on the ground of misrepresentations as to the value of the stock and profitableness of the business.

In deciding the case, Judge Bates said the misrepresentations relied on, if made to a man, would not have misled him at all; but made, as they were, to two women and a minor, it was not so clear. The case, however, must rest on another independent question, viz.: an infant's right to rescind a contract. In fact both parties can dissolve such a firm; the infant because of his minority, and the adult because of the hazards from the power of an irresponsible partner who could make debts and evade personal liability for them.

An infant's right to rescind a contract of partnership is the same as his well settled right to rescind any other contract. Hence, he can rescind and recover back what he paid, subject to the following limitations growing in part out of the peculiarity of the relation of the partner:

First—He can not rescind the burden and keep the benefit, but must revoke the entire contract or none. Hence, all he has received from the firm must be deducted from what he put in, and only the balance recovered.

Second—Partnership creditors must be paid out of the assets before he is paid. He can not take assets and leave his co-partner to pay all the debts. This follows from the fact that his capital was not to his partner, but to the firm, which is either the same as a distinct person, or it is the same as if the custody of the money was in part in himself as one of the principals; and his right of recovery out of assets is restricted to the balance after debts are paid.

Third—He cannot receive anything for services. Although what he has received from the firm is to be deducted from his recovery of capital and advances, yet no allowance for work can be made for two reasons, viz.: First, he was not an employee of his co-partner, but of the firm or, rather, of nobody, for any services were to the firm, so that he would be in part his own employer: and second, because there can be no implied contract for services when the express contract negatives such an inference; and as the express contract was for a partnership, if he revokes that contract he can not by implication substitute another contract such as an implied promise to pay for services when no such obligation was contemplated by either party. See *Abbott v. Inskip*, 29 Ohio St., 59.

Authorities for the foregoing propositions will be found in Bates on Partnership, secs. 143-150. The case of Sparman v. Klein, 83 N. Y., 245, is singularly like the present case, both in its facts and in the pleadings. The judgment will be for a cancellation of the notes, and as there are no debts, and the assets will reach some \$400, a judgment for the minor's capital, less his withdrawals of \$117—*i. e.*, for \$287. But no interest will be allowed on the \$287, except from the time of disaffirmance, which was when the suit was begun.

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## INSECURE BUILDINGS.

[Hamilton Common Pleas.]

## CINCINNATI (CITY) V. JOHN G. MOORMAN ET AL.

The insecure building law of 1887, being to protect life, will be liberally construed. The court will aid it by injunction against using the building on application of the inspector. And a petition in the name of the city, verified by the inspector, will be deemed to be filed on his application.

SHRODER, J.

The defendants are owners of a six-story factory building in Cincinnati, Nos. 708 to 716 West Front street, inclusive. The petition alleges that by reason of cracks and other defects in the walls, the buildings have become unsafe and dangerous to working people who, during working hours, occupy the buildings and other premises adjoining; that the building inspector has notified the defendants to make the buildings safe, and that they have failed to comply with the notice. An injunction is prayed for, to restrain the defendants from using or permitting said buildings to be used for any purpose whatsoever until they are repaired and put in safe and good condition, so that they may be used without risk or danger to human life, and from permitting them to be used as long as they continue a menace to surrounding property and human life.

The defendants demurred that the inspector's duties, under the building act, relate only to buildings in course of construction or of repair; that the court can not enjoin the use or occupation of an unsafe building unless the inspector himself invokes the action of the court in the name of the city, and that the duties as to insecure buildings are imposed upon the fire marshal.

The court held "That the building act of March 21, 1887, requires the owner of an unsafe and dangerous building, immediately upon notice of inspector, to make it safe and secure. That the act, being enacted for the protection of human life, it must be given a liberal construction, such as will most effectually accomplish its purpose. That the court will aid the enforcement of the law by injunction and other suitable processes. If the action is brought in the name of the city, it will be regarded as made upon the application of the inspector (as is required by the statute), wherever from an examination of the petition it is apparent that the inspector is instrumental in bringing the action, in this case, although the petition does not expressly or directly state that the action is instituted upon his application, yet it is sworn to by him as building inspector. This is sufficient record evidence that he is the applicant for the relief. The demurrer is, therefore, overruled."

Wm. H. Pugh, for the demurrer.

## INSOLVENT ESTATES.

126

[Superior Court of Cincinnati, General Term.]

WILLIAM BELL V. JENNINGS MILLER.

Unsecured creditors will be allowed to intervene to contest the validity of preferences set up in an equitable proceeding brought by one member of an insolvent firm against the other member for dissolution, appointment of a receiver, sale of assets and distribution of proceeds.

SAYLER, J.

The plaintiff filed a petition, setting up that he and the defendant are partners, under the firm name of Bell, Miller & Co.; that said firm is unable to meet its obligations now due, and those coming due, and is insolvent; that both plaintiff and defendant are also insolvent; that said firm is the owner of a stock of merchandise of great value; that chattel mortgages have been executed by said firm to divers creditors thereof, to secure the payment of large sums of money now due, and that said mortgages have been duly filed, and are a lien on said property; and some of said mortgage creditors are about to take possession under said mortgages, and are threatening to sell said property; that said firm is unable to continue business, and that the partners can not agree upon the matter of conducting the same; that there is imminent danger of said firm property being seized by process in actions by creditors, and a sale either under such process or by the said mortgagees would cause said property to be sacrificed to the irreparable injury of the plaintiff and defendant, and to the creditors of said firm; that plaintiff is entitled to a dissolution of said firm, and so demands, but that plaintiff and defendant cannot agree upon the method of dissolution or the liquidation of the affairs of said firm; that it is necessary for the protection of the plaintiff, the defendant, said firm and all parties in interest, that a receiver be appointed by this court to take charge of said firm property, and dispose of the same under order of the court, wherefore plaintiff prays that said firm may be adjudged dissolved; that a receiver may be appointed to take charge of all the property of said firm, and to dispose of the same as the court may order, and to distribute proceeds thereof as the court may direct, and for such other and further relief as equity may require.

Under this petition a decree was taken dissolving the partnership, and appointing a receiver of the assets.

The receiver files a report showing sales of assets amounting to over \$200,000.

H. B. Clafin & Co. and others file answers and cross-petitions setting up chattel mortgages executed by the partners a short time before the appointment of the receiver, under which they claim preferences and ask that the court may find the said mortgages to be valid and subsisting liens upon the said property or its proceeds, and order the receiver to pay the same.

Whereupon certain unsecured creditors of the firm file answers and cross-petitions attacking the validity of such mortgages, and asking that they may be set aside and held for naught.

The case comes on for hearing on a motion filed, to strike these answers and cross-petitions of the unsecured creditors from the files on the ground that such creditors are not proper parties.

It is claimed that this is a proceeding in equity, and that the equity rule that no new party may be made without consent of the plaintiff, except a lien-holder, prevails; that if the unsecured creditors wish to attack the mortgages they must do so in an independent proceeding in an action, brought by one for the benefit of all, and in which an injunction will issue restraining the distribution of the assets on bond being given, or that they shall file a creditors bill to subject the funds to the payment of their claims; or that they shall proceed under sec. 6344, Rev. Stat.

But I think it is well settled that a general creditor, whose rights rests only in contract, and not yet reduced to judgment, is not entitled either to an injunction or a receiver against his debtor, on whose property he has acquired no lien. Any interference with the debtor's property, or with his right of disposing of it, before judgment, is beyond the judicial power, and courts of equity will not extend their extraordinary jurisdiction beyond the limits fixed by the authorities (High on Receiver, sec. 406). Wherefore it seems to me that an action could not be brought by the unsecured creditors—or by one for the benefit of all—for the purpose of attacking the validity of the mortgages, until they had obtained judgments on their claims—and of course a creditor's bill to subject the property to the payment of the claim can only be brought on a judgment; as it would require time—possibly six months—to obtain their judgments, and as in the meantime no injunction could be obtained, restraining the distribution of the proceeds, such remedies would be virtually useless to the creditors. The provisions of sec. 6344, Rev. Stat., are not applicable, as there is no question of setting aside a fraudulent transfer, but the question of attacking the validity of a mortgage, the assets being in court.

The only hope the unsecured creditors have of securing anything out of the insolvent estate, is by being allowed to contest the validity of the preferences in this proceeding in which the fund is held.

In the case of *Sayler v. Simpson*, 45 Ohio St., 141, being on assignment proceeding, the court held that on application to the probate court by the mortgagees for the payment of their mortgages out of the fund, the unsecured creditors of the assignor may intervene, and contest their right to such payment.

It is claimed, however, that the court so held, because by reason of the statute all unsecured creditors were parties to the proceeding, and that thereby that case is distinguished; that in the case at bar a person having no lien, can not be made a party, and that unsecured creditors have no lien.

In the case of *Law v. Ford*, 2 Paige's Ch. R., 310, the chancellor said that as a general rule, each partner had an equal right to the possession of the partnership effects, and to collect and apply them in satisfaction of the debts of the firm. That where either party had a right to dissolve the partnership, and the agreement between the parties made no provision for closing up the concern, it was of course to appoint a manager or receiver, on a bill filed for that purpose, if they could not arrange the matter between themselves. That in such a case the court would direct the receiver to apply the partnership property and funds to the payment of all the debts of the firm, ratably, without giving a preference to the favorite creditors of either partner.



If the assets are to be distributed to the creditors—have not the creditors an interest in the proceeding to see that they receive all the assets to which they are entitled?

Story on Partnership, sec. 300, lays down the doctrine that when the partners, themselves, have a lien upon the partnership effects, for the discharge of all the debts and obligations thereof, as they have in all cases where they have not parted with it, that lien may, in many cases, be made available for the benefit of the creditors. But then the equities of the creditors are to be worked out through the medium of that of the partners.

It seems to me that this is a case in which the lien of the partners should be made available for the benefit of the creditor, in making him a proper party for the purpose of protecting his interest.

It is very clear from the allegations of the petition that the purpose of this proceeding is to wind up the affairs of the partnership for the benefit of the creditors. There are allegations that the partners cannot agree, etc., but it is evident that the firm being insolvent was compelled to close its business, and in place of making an assignment under the insolvent debtors statute, and filing the deed in the probate court as the statutes of Ohio contemplate should be done in such cases, the parties have chosen to file a bill in equity asking for dissolution, the appointment of a receiver, sale of the assets, and distribution of the proceeds as the court may direct. There is no prayer for an account between the partners. It is purely a proceeding in equity to do what would be done by an assessment under the statute. I think the court should be very slow in allowing the parties to avail themselves of the forms of an equitable proceeding to defeat the creditors of the right our Supreme Court say they have, viz.: the right to contest the preferences.

As said by the Supreme Court in *Saylor v. Simpson*, 45 Ohio St., 150, by allowing them to intervene in this case for the purpose of contesting the validity of the preferences, the assignee (in this case the receiver) may proceed with safety in the administration of his trust under the orders and directions of the court, having control of the whole subject.

I think, therefore, that the unsecured creditors should be allowed to intervene and contest the validity of the mortgages, and will overrule the motion.

Kramer & Kramer, for secured creditors.

Gov. Foraker, for unsecured creditors.

## STREET RAILROADS.

128

[Hamilton Common Pleas, 1891.]

\* ADAM KNORR ET AL. V. ISAAC J. MILLER ET AL.

1. Under Revised Statutes, sec. 2502, the consents of abutting property owners inure to the benefit of the lowest bidder. 34 Ohio St., 194; 7 Dec. Re., 496, followed; 6 Dec. Re., 887; 1 Circ. Dec., 178, distinguished.)
2. Under R. S., sec. 1778, the tax-payer is an agency created by the legislature, to represent the interests of the public, in cases provided for in that section.

\*The circuit court allowed the injunction, and then affirmed this opinion; opinion 3 Circ. Dec., 297. The judgment of the circuit court was affirmed by the Supreme Court, unreported, January 26, 1892.

3. Under R. S., sec. 2502, the legislature has placed positive and absolute restrictions and limitations upon the authority of municipal council and officials, in granting street railroad franchises. No discretion is vested in them to make the grant to any other than the "lowest bidder."
4. Under R. S., sec. 1779, the court has no power to ignore, or disregard, either directly or indirectly, the express and direct prohibition of sec. 2502, or to give effect to any municipal action done in excess of the restricted and limited power by this section conferred upon municipal authorities.

SHRODER, J.

This cause has been submitted upon a demurrer to the petition, and upon a motion for an injunction as prayed for in the petition.

I. The petition alleges that the plaintiffs are tax-payers of the city of Cincinnati, and that they sue in the behalf of said city; that they have made a written request of the city solicitor to apply for the injunction, and have been refused; that on September 5, 1890, the city council passed an ordinance establishing a street railway route known as number 23, and providing for the right to construct and operate it, and directing that the consents of property owners of the majority of feet front on each street of the route be filed with the board of public improvements, and inviting bids from persons who would construct and operate the route and carry passengers at the lowest rates of fare; that the ordinance of the city, passed February 7, 1879, delegated to the B. P. I. the duty of receiving and opening such bids, and of ascertaining the lowest bidder; that in pursuance of ordinance of council advertisements were made for sealed proposals for the construction and operation of said Route No. 23, inviting them to be made in accordance with the provisions of the ordinance of February 7, 1879; and that such proposals were made to and received by the B. P. I.; that the ordinance of February 7, 1879, authorized the B. P. I. to transmit to common council an ordinance setting forth the name of the successful bidder, granting to him the right to construct and operate the established route. The petition further alleges that in pursuance of said advertisement, two bids were made to the B. P. I., one by Simeon Johnson, and the other by the defendant Isaac J. Miller; that Johnson's was the lowest bid, and that his proposal to carry passengers on said route was at the lowest rate of fare; that on October 2, 1890, the bids were opened by the B. P. I. and that the consents of the owners of the majority of feet front on each street were filed with the Board and that said board transmitted to council a granting ordinance with the name of Miller as the grantee, recommending its passage; that said ordinance has been passed by council and approved by the mayor and the board of city affairs; and that it has become operative as far as it legally may. The petition avers that said Miller and the defendant Thomas G. Smith as President of the B. C. A., have entered into a contract for the construction and operation of Route No. 23; and that Miller threatens to proceed with said construction and operation and to exact from passengers the rates of fare proposed by him; that said contract is made by the city in contravention of law; that the performance of it by Miller would, for the reasons given, produce a great and irreparable injury to the city and to tax-payers including the plaintiffs.

The petition makes other statements which are not material for the purpose of this decision. The prayer is that said Miller, his associates, agents, etc., and Thomas G. Smith, be enjoined from performing said contract, either by construction or operation of said route, and from in any way acting or claiming under said contract, and for other relief.

The defendant, Miller, demurs upon two grounds: 1st, that there is a defect of parties defendant in that the city of Cincinnati is not made a defendant; 2d, that the petition does not state facts sufficient to constitute a cause of action.

Upon the first ground it may be observed that the action is brought in behalf of the city, and that no specific relief is sought against it. The facts alleged disclose nothing which would require the bringing in of the city in order to grant full and complete relief to the plaintiffs. This can be done without making any decree or order against the city. If the presence of the city is necessary for defendant's protection, or material to a complete adjustment of the rights of these parties, it is not made apparent from the allegations of the petition. See *Pomeroy Rem.* 247, 248.

Upon the second ground it is argued that the facts alleged do not show any injury done to the plaintiffs as tax-payers or any equity in their favor as against the defendants. This action is commenced by virtue of the Rev. Stat., sec. 1777 and 1778; the former section authorizing the bringing of an action by the city solicitor in behalf of the city to restrain the performance of a contract made in its behalf

in contravention of the laws; and the latter section authorizing any tax-payer to bring such action upon the failure of the city solicitor to do so when requested in writing by the tax-payer. These sections do not provide new remedies, but are designed to regulate the practice in certain particulars. The remedy found for the tax-payer in the interest of inhabitants, according to Dillon (2 Dillon Munic. Corp. 4 ed. par. 915) bears an analogy to that given to stockholders in the case of private corporations. He appears in a representative capacity, as does the city solicitor in *Mathers v. Cincinnati*, 7 Dec. Re., 496, and he, like the city solicitor, is an agency created by the legislature for bringing the action under sec. 1777 for redress of any of the wrongs there specified, 31 Ohio St., 345. To sustain his cause he must show a wrong or injury done to the rights of himself and others in his situation. It does not follow that the rights should be such as belong to tax-payers only; it is sufficient if tax-payers with non-tax-payers suffer injury from the wrong complained of. In matters of public concern we may assume that the legislature would make provision for the redress of wrongs to non-tax-payers as well as to tax-payers. This is supplied by adopting the agencies spoken of, the city solicitor and tax-payer; relying upon the sense of duty of the solicitor and the community of interest between the tax-payer and non-tax-payer as sufficient to insure all necessary and proper employment of such processes, while at the same time affording guaranty against an abuse of them; which might be the case if all persons, irresponsible as well as responsible, were indiscriminately permitted to assume such representative functions. This view of the law is upheld by the fact that in several of the taxpayer's actions found in our reports, the wrongs complained of do not appear to have affected any rights which belonged to plaintiff as a tax-payer distinct from those belonging to non-tax-payers; for example, *Cin. Str. R. R. Co. v. Smith*, 29 Ohio St., 291.

The decisions of *Sommers v. Cincinnati*, 6 Dec. Re., 887, and *Bunning v. Cin. St. Ry. Co.*, 1 Circ. Dec., 178, were against the tax-payer. The adverse rulings were not placed upon the ground that no wrong was done to plaintiff's rights as a tax-payer, but that the rights infringed upon were such as the positive law conferred upon abutting property owners only, none of whom made complaint, and all of whom the court assumed were satisfied with defendant's action.

The petition alleges that under the ordinance and contract the defendant Miller will have the franchise of operating the route and of exacting a fare in excess of the lowest bidder's. There is no doubt but that the rate of fare will directly affect the interests of all the public, tax-payers and non-tax-payers. Being so, this fact sufficiently discloses an injury to plaintiff's rights in consequence of the making of the alleged contract.

It is further contended that sec. 1777 applies only to cases where the contract is itself, or in itself contains, provisions in contravention of the laws. This section is remedial and ought to be liberally construed, so as to accomplish the evident purpose of protecting the public interests against the abuse of official trusts. Now sec. 2502, Rev. Stat., expressly prohibits the grant of permission to construct and operate street railroads, except to persons that will agree to carry passengers at the lowest rates of fares. Notwithstanding this section the municipal authorities might pass ordinances and make contracts innocent of any unlawful terms or provisions, yet actually produced or made in open defiance of these positive prohibitions. If sec. 1777 was only to operate upon the terms and provisions of the contract, and not upon the manner in which it was made or brought about, the section would be practically nullified. Such a construction would be sacrificing substance to form.

It is also urged that the council under secs. 3438 and 2502, Rev. Stat., is the only body authorized to make the grant and contract, and the petition does not show that council failed to grant the route to the lowest bidder. But the facts alleged are that council delegated to the B. P. I. the receiving and opening of the bids, and by general ordinance and by advertisement directed and referred the bidders to the B. P. I.; that it also imposed upon the B. P. I. the duty of transmitting to council the granting ordinance with the name of the successful bidder inserted in it; that in accordance therewith the B. P. I. transmitted and recommended the passage of the ordinance complained of; and the recommendation was adopted and the ordinance passed. When council adopted the recommendation of the board and passed the ordinance, upon the facts alleged, the action of the B. P. I. in this respect was accepted and treated by council as its own. According to these allegations the granting ordinance and the contract were made by council to Miller when he was not the lowest bidder, and were therefore made in contravention of the laws.

From the foregoing it follows that demurrer ought to be overruled.

II. Upon the motion for an injunction it appears from the evidence that in pursuance of the advertisement spoken of in the petition, both Miller and Johnson filed their sealed proposals with the B. P. I. The proposals were duly opened on October 2, 1890, and that of Johnson offered to carry the passengers at the lowest rates of fare. At this time no consents of the property owners had been filed, and none were filed until the fourteenth of October, 1890. On October 13, 1890, Johnson made a declaration to the board that he could not get the requisite consents because they were under the control of his rival bidder, Mr. Miller, who, together with the members of his family was the owner of the majority of feet front on one of the streets of the proposed route. The B. P. I. on the fourteenth day of October passed a resolution, which, after reciting that Johnson had wholly failed and neglected, after a reasonable time, to obtain consents of property owners, and that property owners on one of the streets refused under all circumstances to give him any consents, concluded as follows: "We therefore conclude that he is not able to obtain said consents, and we therefore reject his proposition to construct and operate said Route 23."

Thereafter the Board refused to entertain Johnson's proposal, and the defendant Miller thereupon filed the requisite consents of the property owners upon the route. The B. P. I. then adopted and transmitted to council the granting ordinance which was passed by council—all of which took place as alleged in the petition. The grant thus awarded was accepted by Miller, and this contract with that made in pursuance thereof constitute what is claimed to have been made in behalf of the city in contravention of the laws. The question presented by these facts is, was the grant awarded to the lowest bidder? If the action of the B. P. I. in casting Johnson's bid out, was lawful, then the answer is in the affirmative. Was it a prerequisite to Johnson's status as a bidder under sec. 2502, Rev. Stat., that he personally should secure or be able to secure in his own favor the statutory consents, or was he as a bidder entitled to the benefits of the consents by whomsoever gotten or secured? In *State v. Bell*, 34 Ohio St., 194, the Supreme Court in the second syllabus decided that the consents, "by whomsoever obtained, inured to the lowest bidder." The Hamilton county district court, in *Mathers v. City*, 7 Dec. Re., 496, made the same ruling. A reference to the opinion in the last mentioned case will furnish a clear and sound argument in support of such construction of this sec. 2502.

If it were necessary to add any other argument, it may be said that it was not the legislative intention to confer upon the property owners the right of deciding who should receive the grant. They were given a voice in this matter in order to protect them "from the exercise of an arbitrary power on the part of the city authorities, in permitting the streets to be used for street railroads." *Roberts v. Easton*, 19 Ohio St., 78, 86. This right was not conferred upon them to protect them from awarding the use to any particular person. The statute itself directed that it shall be given to none but the lowest bidder, and this provision is not designed to be exercised upon the additional condition that the property owners should consent to the person to whom the franchise was to be awarded. In prescribing the "lowest bidder" condition, the law looked to the interest of the general public; and while it sought to protect property owners against the arbitrary use of the streets for street railroads, it did not intend to expand this protection into a power whereby the general public interests, as subserved by the "lowest bidder" clause of the section, were to be held subject to the veto power of a comparatively small local interest. If the property owners were given a voice in the selection of the grantee, how was their choice to be determined? Must their action be unanimous along the whole route, or along any single street of the route, or is it to be by majority vote among themselves, or according to the selection of a majority of the streets? These queries and the silence of the statute upon this subject would indicate that as to the personalty of the grantee the consent of the property owners was not to be required. Assuredly the legislature could not have intended to submit a question of this character to personal predilections of individuals. And it will not be claimed that this right of consent arises from a right of property. Were it so, then the property rights of the minority would be disposed of by the will of the majority, a conclusion which would prove the unsoundness of the claim.

It must be kept in view that the streets are highways for public travel, and that they are essentially and primarily intended for that public purpose. One can appreciate that while abutting property owners may have a special interest in the mode in which the public are to travel on the street, it is the public at large which has the main concern in the person who is to construct and operate the route and furnish and carry on the means by which it is to do its traveling. The statute has for

the public decided that it shall be no one but the person who will carry passengers at the lowest rate of fare, and has at the same time placed in the hands of the property owners the means of protecting what is recognized to be of special concern to themselves—that is, the mode in which the street is to be used for travel.

The consents consequently are to apply only to whether the proposed railway is to be constructed and operated. They are simply the property owners "permitting the streets to be used for street railroads." *Roberts v. Easton supra*, 86. Nothing else. Being so, and the lowest bidder being entitled to the grant if the consents are given, it follows that in the intent of the law they inured to his benefit. A construction of the section 2502 which would require that the consents when given should refer to any particular bidder, would defeat the most material and beneficent feature of the section, the "lowest bidder" clause—which is clearly intended for public interest. It would enable property owners or other persons to control the selection of the successful bidder and thereby introduce a test of decision not contemplated by the statute, and supplant that especially provided by it.

It has been urged that the decision of *The State v. Bell, supra*, is inapplicable here because there the consents had been filed before the proposals were opened. It is difficult to see why this should make any difference. It is a *non sequiter* to hold that the meaning of the statute should be affected by the presence or absence of consents. For in no event can any but the lowest bidder have the grant awarded to him; and the presence or absence of them can only determine the question whether any award shall be made at all, but can not have any influence as to the person to whom the award shall be given. In that case the Supreme Court in its syllabus (which under its rule 6 is the decision of the whole court) declared that the consents inured to the benefit of the lowest bidder; and in his opinion Judge Okey explicitly said that the contract can be awarded to the lowest bidder alone, and the consents, no matter to whom given or by whom obtained, are the assent to the construction and operation of the railway in the designated streets, and "hence must inure to the benefit of the lowest bidder."

It follows that if Johnson was unable to obtain the consents his inability did not disqualify him as a bidder. He had the right to secure to his bid the benefits of whatever consents, if any, were to be produced to the B. P. I. As long as no consents were present he stood on at least an equal footing with all other bidders, and he could not according to law lose his position because of his inability to comply with a condition which the law does not attach to the validity of his status as a bidder. When the B. P. I. refused to consider his bid for the reason stated, their action threw out the lowest bidder and resulted in the council's granting of the route to the defendant Miller, and his acceptance. The contract was thus made in contravention of law.

It is, however, claimed by defendant Miller, that Johnson's bid was fraudulent in that he made it in bad faith for purposes of obstructing the construction of the route, with no intention either to accept any grant, if awarded, or to perform the contract if accepted; and that being fraudulent it was void in law, and therefore to be considered as no bid. This claim is denied by plaintiffs. Upon this issue evidence was adduced on both sides. But it is insisted by plaintiffs that this issue is wholly irrelevant because in view of the "lowest bidder" clause of section 2502 the motive of the bidder is not a proper subject of inquiry; and further that council has exercised by general ordinance, the power of exacting a guaranty for the faithful performance of the bidder's contract.

Limitation of the power which is vested in the council to make the grant in question, is found in section 2502. This section sets forth the measure of that authority. It forbids such grant being made to any except the party who will carry passengers at the lowest rates of fare. It literally imposes this absolute restriction upon the exercise of the power. If council or any other municipal authority is endowed with any discretion in the premises to inquire and pass upon the bidder's motive, it must be ascertained by looking into the reason for imposing this restraint. It has been uniformly held that restrictions of this character have been enacted in order to protect public interests against the favoritism or frauds of public officials. To frustrate and check them the statute undertakes to define the extent of their powers, and refuses to confide any others, treating alike the honest and dishonest official. In the light of the terms of the statute, and of the object to be subserved by this peculiar feature of it, it would be manifestly inconsistent to infer an implied power to go beyond the letter to the extent of judging of the motive of the bidder. If a discretion were to be implied, why ought it not be enlarged to the power to inquire into his abilities, his record, his moral standing or his associations—where is the line to be drawn? Is it not clear that clothed with such a discretion a dishonest or partial official would be possessed of insuperable means of carrying on

the practice which the statute intended to prevent? Endowed with the power to determine the good faith of a bidder, an unconscionable official would not lack the ingenuity of discovering bad faith wherever it suited his purpose, nor be wanting in plausible argument to sustain his belief. Such a discretion would furnish him a subterfuge whereby the restriction, though observed in form, could be substantially evaded. The fraud which would lie in his decision could seldom be detected or proved. A construction of the section giving this discretion would supply him with the means of undermining and destroying the barrier erected against his malfeasance. The execution of the law would in his hands disappoint the intention of its maker. For then it would keep the word of promise to the ear and break it to the hope.

It becomes apparent from an examination of the statutes, enacting laws of this kind, that where the legislature intended conferring power beyond the mere finding of who is the lowest bidder, it found apt and appropriate expressions to that end. Legislatures have in some instances authorized the making of contracts to the lowest and best bidder, or to the "lowest responsible bidder," and the like. But where the expression was to the "lowest bidder," this limitation was held to be the measure of the power. *Zottman v. San Francisco*, 20 Cal., 96-102; *Brady v. The Mayor, etc.*, 16 How. Pr. 432-3; *Sadler v. Eureka County*, 15 Nev., 39, 43, 44.

The decisions *Beaver v. Trustees*, 19 Ohio St., 97, and *Boren v. Com'rs*, 21 Ohio St., 311, indicate that in this state a similar strictness of construction would be adopted.

In *Roberts v. Easton*, 19 Ohio St., 86, the language of the opinion is: "The power of the city authorities to act in the premises does not depend upon something to be done or determined by them, but upon a condition required by the statute." In *Beaver & Butt v. Trustees, etc.*, 19 Ohio St., 108, the court, when speaking of the necessity of a strict reading of a statute of like character to *Rev. Stat.*, sec. 2502, says: "To hold otherwise would be to nullify or reverse the evident policy of the statute, and to render possible and easy the exercise of such favoritism by the trustees towards particular parties as it is the obvious policy and intention of the statute to render impossible."

See also remarks of the court in *Boren & Guckes v. Com'rs*, 21 Ohio St., 311, 320, bottom of page.

These considerations lead to the conclusion that the inquiry into the question of Johnson's motive was not relevant or material, because neither the B. P. I. nor council were invested with any other power than determining who in fact was the lowest bidder.

It ought, however, to be added that the B. P. I. did not reject Johnson's bid upon the ground of bad faith, but their decision made in their collective capacity, as evidenced by their minutes, was upon the ground of his personal inability to obtain the consents.

It is also claimed that *Rev. Stat.* sec. 1779, authorizing the court to make such orders may be equitable and just, empowers it to disregard the "lowest bidder" restriction, and to enlarge the statutory condition, by going into an inquiry of Johnson's motive. This provision of this section is the usual prayer in equity bills. It is found in other statutes. If it is peculiar in any respect, it must be where it applies this order of equity and justice, if the tax-payer has only good cause "to believe" his allegations well founded. Whatever jurisdiction is thus given, it is one to be governed by the rules and usages recognized by courts of equity.

The court of equity assumes no right to interfere with, and by its orders and decrees virtually to repeal, express provisions of statute or to defeat their operation in particular cases. The conditions or restrictions, fixed by legislature for the public benefit, can not be overridden because they happen to operate hard in a particular case. (93 N. Y., 561). This principle is so firmly established, that in cases of forfeiture by statute (as distinguished from forfeiture by contract)—although forfeitures are abhorred by the law—a court of equity takes no authority to afford relief. See *Keating v. Sparrow*, 1 Ball & Beatty, 373; *Powell v. Redfield*, 4 Blatch, 46-49. (See 92 U. S., 49; 5 Wisc., 551). Here the lowest bidder clause is a condition upon the exercise of municipal powers. In *Roberts v. Easton*, 19 Ohio St., 86, the court said that the power of the city depended upon a condition required by the statute (See 63 Mich., 528-531). In this case the condition was unfulfilled. The public, represented by the tax-payer, could exact a strict compliance with this condition which was expressly enacted for its benefit. (93 N. Y., 561). The action is not between Johnson and Miller; but between the public and Miller, and the violation of provisions made for the benefit of the public is the cause of action. Were the court, for any cause, to override the statutory restrictions, it would not only be exalting itself above the statute, but would be offering inducements to municipal

authorities to evade or violate the same. Under cover of investigating motives and other attributes of bidders, it would be compelled to approve city contracts made in contravention of law, upon similar grounds. Nor can it be said that without a discretion in the court to ascertain the motives of the lowest bidder, his failure to perform his contract would leave the city remediless. In addition to the security required by the ordinance, the act of April, 1890 (87 Ohio L. 122), the specific performance could be enforced by action of the city solicitor or tax-payers. Therefore no equity to avoid these statutory restrictions can arise from the necessities of the case. Finally, it may be suggested whether a court of equity would interfere with an award made to the lowest bidder, basing its action upon its power to question his motives; could its jurisdiction be invoked upon such a ground? If not, then how can his motives be relevant or material with the court, when the public, through the tax-payer, complains that he was unlawfully prevented from bidding?

It was also insisted that the plaintiffs have not proved that the defendant, Miller, was not the lowest bidder before the city council. The evidence establishes that under sec. 6 of Ordinance No. 50 (establishing the route) and the general ordinance passed February 7, 1879, the sealed proposals were by council directed to be addressed to B. P. I.; that this board was required by the ordinance of council to ascertain the bidder and to receive the consents and thereafter transmit to council an ordinance setting forth the name of the successful bidder, together with its recommendation of the passing of the ordinance, and a report from the city engineer with respect to the consents. These were the steps provided by council, and no other provisions were made for bringing the subject before it. By its own ordinances the proposals were not to be presented or passed upon directly by council. The evidence also shows that the proceedings were carried out by the municipal authorities precisely as directed by these ordinances. There was no opportunity afforded to bidders otherwise to produce their proposals before council. No other deduction can be made from the evidence than that neither Miller's nor Johnson's bid was passed on by the council except through the agency of the B. P. I.; and that council took no direct action in the ascertaining of the lowest bid. If the validity of the granting ordinance depended upon such direct action of the council, then the evidence has clearly shown that neither Miller nor any other person was the lowest bidder before that body. In such case, if the defendant's contention on this point be correct, council in making the grant exceeded the limited power conferred by sec. 2502 of the Rev. Stat.

The question of plaintiff's interests as tax-payers recurred upon the motion. The evidence furnished the additional information that by sec. 5 of Ordinance No. 50, and sec. 5 of the granting ordinance, the revenue to be derived by the city from the operation of this route would be affected by the number of cars run and gross receipts received by the grantee. The rate of fare would exert an influence upon the traffic of the road, and in that manner upon the city's revenue from that source. Certainly under such circumstances the tax-payers have a pecuniary interest affected by the contract in question.

The conclusion of the court is that the contract complained of in this case, as made in behalf of the city with Mr. Miller, was made in contravention of law; and that these plaintiffs in view of the evidence adduced, are entitled to have their motion granted. It is so ordered.

Edward Colston, Burch & Johnson, for plaintiffs.

J. B. Foraker & Isaac J. Miller, for defendants.

NOTE—This cause was by agreement submitted as upon a final hearing, and a final decree was entered.

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## TAXATION.

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[Superior Court of Cincinnati, Special Term, January 2, 1891.]

GEORGE SCOTT'S SONS V. FREDERICK RAINE, AUDITOR.

SAMUEL J. SCOTT ET AL. V. FREDERICK RAINE, AUDITOR.

1. The city board of equalization, created under sec. 2805 of the Rev. Stat., has statutory powers only, and such powers must be strictly construed. It is the settled policy of this state that there can be no impairment of the tax duplicate unless expressly authorized by law.

2. The duty enjoined upon the auditor of Hamilton county, Ohio, in the matter of placing upon the duplicate the reductions in excess of additions made by the city board of equalization in 1887 is clerical only, and in the performance of that duty, the auditor is to be governed by the records of such board, so far as applicable; nor can such records be contradicted or impeached except for fraud or mistake.
3. The terms "depreciation in value of property by reason of flood," and "destruction by \* \* \* flood \* \* \* of any structure of any kind," are not synonymous, and no discretion is vested in such city board of equalization under sec. 2753 of the Rev. Stat., to deduct from the tax duplicate by reason of any such depreciation without a corresponding addition.
4. The act of the general assembly, entitled "An Act to amend sec. 2753 of the Rev. Stat.," passed May 18, 1886, (O. L. Vol. 83, p. 194) is not retroactive, but prospective only in its operation.
5. A lease for a term of ten years renewable for ten additional years, with a covenant that the lessee pay all taxes and assessments, or a mere change of title by descent, devise or deed of gift will not operate as such a change of ownership as to estop the state under secs. 1040 and 2803 of the Rev. Stat., from the charging against said real estate taxes omitted thereon.

HUNT, J.

The plaintiffs in these two actions, respectively, seek to enjoin the collection of certain taxes on the duplicate of Hamilton county, Ohio, for state, county, city and school purposes in the years 1887, 1888, 1889 and 1890.

Nearly two hundred cases are now pending in which the same questions, practically, are involved, and the court, with a view of simplifying the litigation, will indicate the legal principles which should govern in the determination of nearly all the cases.

The petition in case No. 44,861, filed July 26, 1890, alleges that the plaintiff is a partnership organization for the purpose of and doing business in the state of Ohio, and is the owner of the following described real estate, situated in the city of Cincinnati, county of Hamilton and state of Ohio, to-wit: Lots one (1), two (2), three (3), four (4), five (5), and six (6) of Ellis and Sturges' subdivision, and lots one (1), two (2), thirteen (13), and fourteen of Carr's subdivision; that said property, with the improvements thereon, is and was for the years 1887, 1888, 1889 and 1890, valued for taxation at \$19,850.00, and taxes for those years were duly assessed thereon for state, county, city and school purposes, and charged on the duplicate of the county for said years; and plaintiff, or its grantor, paid the full amount of said taxes for said years, except the year 1890, which is not yet payable; and said premises are not legally taxable for any higher or greater sum; yet the defendant, without authority of law, and wrongfully and illegally, is about to add to said property the sum of \$6,300.00 on the duplicate of said county; and threatens to assess against such additional amount the rate of taxation fixed for state, county, city and school purposes for the years 1887, 1888, 1889 and 1890.

It is further alleged that plaintiff had at all times paid all taxes lawfully due on said premises to the year 1890, when the same became payable, but said additional amount so threatened to be added by the defendant is wholly illegal and wrongful, and unless the court enjoins the defendant from proceeding, as he threatens, the plaintiff will be subjected to great and irreparable injury, and his property rendered liable to penalties and sale.

The equity power of the court is invoked to restrain the defendant from charging the property of the plaintiff with such additional sums,



and from levying taxes against said property in such additional amount, and from delivering to the treasurer for collection any duplicate for taxes in such additional amount, and for all proper relief in the premises.

A bond was given in the sum of \$500.00, and a temporary restraining order issued as prayed for in the petition.

And it appearing that John Hagerty had become auditor of Hamilton county since the commencement of the action it was ordered that he be made a party defendant, Ent. 1890, October 6, Min., 101.

An answer was filed by the defendant John Hagerty, auditor of Hamilton county, Ohio, on the sixth day of October, 1890, in which it is alleged that prior to the commencement of this action, his predecessor Frederick Raine, auditor of Hamilton county, Ohio, had duly corrected the taxable valuation of the property described in the petition by adding thereto the amount therein stated, together with the taxes omitted on said amount during the years named in the petition, and had duly certified the same to the treasurer of Hamilton county for collection.

For a second defense the defendant admitted that plaintiff is the owner of the property described in the petition; but denied each and every other allegation contained in the petition.

The plaintiffs, on December 10, 1890, for reply to the first defense of the answer of John Hagerty, auditor, denied each and every allegation contained in the answer.

In the case of Samuel J. Scott et al. v. Frederick Raine, auditor, (No. 44,862), the averments of the pleadings are substantially the same, with the exception that the plaintiffs allege ownership in certain real estate in the city of Cincinnati, county of Hamilton, and state of Ohio, to-wit: lots number seven (7), eight (8) and nine (9) in Ellis and Sturges' subdivision, and that said property, with the improvements, is and was for the years, 1887, 1888, 1889 and 1890, valued for taxation at \$2,610.00 and taxes for said years were duly assessed thereon for state, county, city and school purposes, and charged on the duplicate of said county for said years, and that plaintiffs, or their ancestors paid the full amount of said taxes for said years, except 1890, which is not yet payable, and said premises are not legally taxable for any higher or greater sum; yet the defendant, without authority of law, wrongfully and illegally, is about to add to said property the sum of \$700.00 on the duplicate of said county, and threatening to assess against such additional amount. The rate of taxation fixed for state, county, city and school purposes for the years 1887, 1888, 1889 and 1890. The plaintiff gave bond in the sum of \$500.00, and a temporary restraining order, also issued in this case, as prayed for in the petition.

It is admitted that the total amounts added to and deducted from the values of different pieces of realty in the city of Cincinnati by the annual city boards of equalization for the years 1884, 1885, 1886, 1887, were as follows:

1884--Deductions.....	\$64,590 00
1884--Additions.....	32,580 00
1885--Deductions.....	411,910 00
1885--Additions.....	27,710 00
1886--Deductions.....	237,930 00
1886--Additions.....	38,980 00
1887--Deductions.....	470,010 00
1887--Additions.....	40,570 00

It is further conceded that the said amounts added and deducted are in addition to and exclusive of the amounts added and deducted by said boards of equalization, respectively to and from the values of the new entries, new buildings, and buildings, orchards, timber, ornamental trees and groves destroyed of each year, as said values were presented to them by the auditor of Hamilton county and the assessors of Cincinnati, and that said deductions are also in addition to and exclusive of the amounts, deducted by said boards themselves for buildings, orchards, timber, ornamental trees and groves, destroyed in each year, when the assessor had failed to make returns of the destruction of the same, and to fix a value thereto.

The complaints of the plaintiffs to the board of equalization, relating to the effect of the floods of 1883 and 1884, and the evidence touching the same may be summarized as follows: That a part of the structures located in tracks described in the petition in case No. 44,861 as lots one (1), two (2), three (3), four (4), five (5) and six (6) of Ellis and Sturges' subdivision, and lots one (1), two (2), thirteen (13) and fourteen (14) of Carr's subdivision, were impaired in value by foundations being weakened, and the rental value decreased; that one or two small structures were materially injured, and some brick-kilns so affected by the flood that they were taken down, but practically replaced soon afterward; that one building was taken down altogether—the value of which was subsequently omitted from the tax duplicate—and a new building erected which extended some seven feet over the lot. All the property is located in the flooded district, and its value for rental or selling purposes is very much injured.

The minutes of the annual city board of equalization for 1887, on which their actions are grounded (June 17, 1887, pp. 211, 222), show as follows:

“ COMPLAINT OF GEORGE SCOTT.

Lot 1—22 feet. Ellis & Sturges, per Commissioners, N. S. Front street, 112 feet east of Carr.

Lot 2—22 feet. Ellis & Sturges, per Commissioners, N. S. Front street, 154 feet east of Carr.

Lot 3—22 feet. Ellis & Sturges, per Commissioners, N. S. Front street, 156 feet east of Carr.

Total value, \$7,620 00.

Deduct \$1,800 property depreciated in value by reason of flood.”

“ COMPLAINT OF GEORGE SCOTT.

Lot 4—21 $\frac{47}{100}$  feet. Ellis & Sturges, S. side Sargent street, 144 $\frac{11}{100}$  feet, east of Carr street.

Lot 5—21 $\frac{47}{100}$  feet. Ellis & Sturges, S. side Sargent street, 128 $\frac{47}{100}$  feet east of Carr street.

Lot 6—21 $\frac{47}{100}$  feet. Ellis & Sturges, S. side Sargent street, 107 feet, east of Carr street.

Total, \$2,340 00.

Deduct \$600, property depreciated in value by reason of flood.”

“ COMPLAINT OF GEORGE SCOTT.

Lot 7—21 $\frac{47}{100}$  Ellis & Sturges, N. S. of Sargent street, 107 feet, E. of Carr street.

Lot 8—21 $\frac{47}{100}$  Ellis & Sturges, N. S. of Sargent street, 128 $\frac{47}{100}$  feet, east of Carr street.

Lot 9—21 $\frac{47}{100}$  Ellis & Sturges, N. S. of Sargent street, 148 $\frac{11}{100}$  feet, east of Carr street.

Value, \$3,310.00.

Deduct \$700, property depreciated in value by reason of flood.”

"COMPLAINT OF GEORGE SCOTT.

Lot 1—37 feet.	Carr's value .....	\$5,570
Lot 2—30 feet.	Carr's value.....	4,400
Lot 13—25 feet.	Carr's value.....	3,110
Lot 13—25 feet.	Carr's value.....	3,110

Deduct on Lot 1, 57 feet. \$1,400, property depreciated in value by reason of flood.

- Deduct on Lot 2, 30 feet, \$1,100, etc.
- Deduct on Lot 13, 25 feet, \$700, etc.
- Deduct on Lot 13, 25 feet \$700, etc."

It will be necessary to follow at some length the history of the legislation in Ohio on the subject of the equalization of the value of real estate, since some of the questions are new and have not been passed upon by any of the courts. In this way alone can the legislative intent be best ascertained.

The first act on the subject is found in the Territorial Laws, adopted June 19, 1795,—to take effect October 1, 1795, 1 Chase p. 171, secs. 12 and 13. In that act entitled, "A law for raising county rates and levies," the commissioners named therein were empowered to diminish or add to such persons rate of assessment as to them should seem just and reasonable, \* \* \*. The said commission, upon learning of the said appeals, shall rectify and adjust the said assessments by abating on, or adding to the sums contained in the said respective duplicate \* \* \* and shall deliver to the treasurer of the said respective counties, a true account of the sum total any collector shall be charged with pursuant to this law. The same power to add to or deduct from the valuation of real estate for purposes of taxation remained the law for several years. See chapter CX. "An act levying a territorial tax on land," approved December 19, 1799, 1 Chase Stats., p. 167, sec. 8 and 9. The same provisions embodied in the legislation found in chapter LX. entitled, "An act regulating county levies" passed February 17, 1805, 1 Chase Stats., 472, and also in chapter CCCLXXXV. in the act entitled "An act levying tax on land, passed February 26, 1816, 2 Chase Stats., p. 972.

The first board of equalization for the State of Ohio was created in the year 1825 under the general act entitled, "An act establishing an equitable mode of levying the taxes of the State," passed February 3, 1825, 2 Chase Stats., 1480.

The county commissioners, auditor and assessor constituted a board of equalization, to sit on the fifteenth day of October following, and the power was expressly given to this board to equalize the valuation made by the assessor as therein before provided, either by adding to, or deducting from any valuation made by such assessor, such sum as to them or a majority of them should appear just and equitable. Section 20 of this act provided for a state board of equalization consisting of one member resident within each congressional district of this state, together with the auditor of state, and power was given to equalize the valuation of the lands in the several counties throughout the state, "which they shall do by deducting from or adding to the valuation thereof, made by the assessor and corrected as herein before provided for in such county such per centum as to them shall appear just and reasonable." \* \* \* and the auditor of state shall make a record of the per centum so ordered to be added to or deducted from the valuation of the lands in

the several counties in the state, to said board of equalization, and shall transmit to the several county auditors of the several counties in the state, the per centum so ordered to be added to or deducted from the valuation of lands therein as aforesaid; and the state auditor and the several county auditors shall correct the valuation of lands in the respective counties according to the determination of said board of equalization."

There was an important modification of the legislation which had characterized the state from the first territorial enactment respecting the raising of levies for public purposes. The act entitled, "An act to provide for the re-valuation of real property in the state," which is not dated, but said in chapter 310 to have been passed February, 1834, limited the power of boards of equalization so that such boards had no authority to reduce the aggregate value of real property within such county as originally fixed by the state board of equalization. Curwen Stats. chap. 10, sec. 17, p. 121.

The object of this act was to give permanency and stability to the tax duplicate as the only basis for future taxation and the source of revenue for purposes of state administration. This is manifest in all subsequent legislation, and it is certain that the change was so radical that such boards became boards of equalization, in fact, and with no power whatever to impair the tax duplicate except as might be expressly provided.

In the year 1846 the legislature passed an act for levying taxes on all property in the state according to its true value, and was specific not only in fixing definitions as to taxable property, but indicated by express enactment certain property as exempt from taxation, and gives rules for valuing property. The act of March 2, 1846, entitled, "An act for levying taxes on all property in the state according to its true value." (Curwen Stats., p. 1260) fixes as well the duties of county auditor, and in sec. 43 it is provided that "if any county auditor upon receiving the returns of any township assessor, shall be satisfied that he has omitted any property, money or credits in his township, which he was bound to return, such auditor may authorize and require such assessor to proceed to correct any error or omission which may have occurred in assessing the property, money or credits of his township, and in such case, such assessor shall, within ten days after being so required and authorized, proceed to correct such errors and omissions, and make return thereof to the auditor of the county; but nothing herein contained shall authorize any assessor to reduce the amount charged against any person in his former return."

It may be proper, perhaps, to indicate the rules to guide boards of equalization under the act of March 2, 1846, (Sec. 44). This is the first legislation specifically defining and fixing the duties and prescribing rules for the government of such boards, and they have been retained substantially in all subsequent legislation.

"1. They shall raise the valuation of such parcels of real estate as in their opinion have been returned below their true value to such price or sum as they may believe to be the true value thereof agreeably to the rules prescribed therefor in the twelfth section of the act.

"2. They shall reduce the valuation of such parcels as in their opinion have been returned above their true value, as compared with the aggregate valuation of the real property of such county, having due

regard to the relative situation, quality of soil, improvements, natural and artificial advantages possessed by each parcel.

"3. They shall not reduce the aggregate value of the real property of the county, as returned by the assessor with the additions made thereto by the auditor as heretofore required.

"4. They shall equalize the valuation of the several new structures returned by the several assessors of their county; and in so doing they shall not reduce the aggregate value of all new structures so returned, but such aggregate value, deducting therefrom the value of structures destroyed by fire, flood, or otherwise, as returned by the assessors under the provisions of this act, shall be added to the previous valuation of the real property of such county."

It will be observed by an examination of the statute that the same rules apply as well to city as county boards of equalization. The city board of equalization was organized under sec. 2805 of the Rev. Stat., which provides that in each city of the first and second class there shall be an annual board for the equalization of the value of the real and personal property, moneys and credits in such city, to be composed of the county auditor and six citizens of such city, to be appointed by the council thereof; said board shall have all the powers, and be governed by the rules, provisions and limitations prescribed in the next preceding section for the annual county board.

In order, therefore, to comprehend precisely what power is vested in the city board of equalization it will be necessary to quote from sec. 2804 of the Rev. Stat.: "Said board shall have power to hear complaints and to equalize the valuation of all real and personal property, moneys and credits within the county, and shall be governed by the rules prescribed for the government of decennial county boards for the equalization of real property; provided that said board shall not reduce the value of the real property of the county below the aggregate value thereof as fixed by the state board of equalization, nor below its aggregate value on the duplicate of the preceding year, to which shall be added the value of all new entries and new structures over the value of those destroyed as returned by the several township assessors for the current year; provided, further, that except as to new structures, and structures destroyed, and lands and lots brought on to the tax-list since the preceding decennial state board of equalization, the annual county board shall not increase or reduce the valuation of any real estate except in cases of gross inequality, and then only upon reasonable notice to all persons directly interested, and an opportunity for a full hearing of the question involved."

It will be seen that the provision incorporated into the act of March 2, 1846, (2 Curwen Stats., sec. 44, p. 1260), which so carefully guards the tax duplicate, has since remained the law of the state. Indeed this very act recognized the progress and development of the state and specifically enforced upon county boards of equalization that they should "not reduce the aggregate value of all new structures so returned, but such aggregate value deducting therefrom the value of all structures destroyed by fire, flood or otherwise, as returned by the assessors under the provisions of this act, shall be added to the previous valuation of the real property of such county."

The board of equalization by the act of March 2, 1846, was not allowed to reduce the aggregate value of the new structures as returned

by the assessors in equalizing the value of such new structures, but the general assembly removed the limitation in the act passed April 13, 1852 (3 Curwen Stats., p. 1763, secs. 60 and 61), and afterwards followed this legislation in the act passed April 5, 1857, (4 Curwen, secs. 44 and 45, p. 3304), so that authority was given to equalize their value without reference to the aggregate return of the assessors. By the provisions of sec. 2807 Rev. Stat. new structures are regarded in the same light as personal property and their value may be changed without notice to owner.

It will be noticed in all the legislation respecting taxation and revenue from the act of February, 1834, to the present time, that the legislature has never receded from the position that boards of equalization have no power to reduce the aggregate value of the real property below the aggregate value thereof, as returned by the assessors, with the additions made thereto by the auditor. Section 2 of article XII of the Constitution of 1851 declares that laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money. The state can take no other position. In the case of *The Bank of Toledo v. The City of Toledo et al.*, 1 Ohio St., 622, the court recognized the salutary doctrine by declaring that the property of every person, however absolute the tenure by which it is held, must be liable to bear an equal and just proportion of the public burden by way of taxation, in return for the protection and advantages afforded by the government, and that the proportion of taxation must be determined by the legislative power, which extends to all persons and property in the state.

The principle is as old as government itself and antedates even written law.

In Rutherforth's *Institutes of Natural Law*, pp. 272, 273, it is written that: "As it belongs to the legislative power of a civil society to direct the several members of it what they are to do for the common good, so it belongs to the same power to direct them likewise, what they are to give for this purpose, that is, the power of raising money to answer the expense, which the society must make in its political capacity, or in pursuing the ends for which it was formed, is a part of legislative power."

The Supreme Court of Ohio, in discussing the legislation relating to the appraisement for taxation of the real property of the state, declared in the case of *The State of Ohio ex rel. E. W. Poe, Auditor of State, v. Fred. Raine, Auditor of Hamilton County*, 47 O. S., 447, that two legislative objects had been disclosed: the first, that the decennial appraisement of real estate, as finally equalized by the state board of equalization, shall not be reduced by the subsequent action of the successive annual boards of equalization; the other, that to this valuation there shall be added from year to year the net annual increase that may result from the growth and development of the state.

"These annual boards of equalization," further says the court, "have two sets of duties to perform in reference to real estate, which, while closely allied, are, in fact, independent of each other; one is to correct any gross irregularities that may exist in the appraisement value of the several lots and tracts of land within their jurisdiction as these valuations appear on the duplicate of the preceding year; and this they are required to do, whether new structures have been erected or

old ones destroyed during the preceding year or not; their power to equalize gross irregularities is neither enlarged nor diminished by the erection of, or the total failure to erect new structures; the other is, to equalize the value of the new structures erected, and old ones destroyed, as the same have been returned by the several assessors for the year, in order that the net increase for the year of the value of real property may be added to the duplicate of the preceding year."

"A careful examination," says Bradbury, J., "of all the statutes relating to those duties of boards of equalization, whether they are annual or decennial city or county boards, will disclose the care with which the legislature prohibited a reduction of the aggregate valuation that might come before such boards for equalization, either from the decennial land appraisers, or from the duplicate of the preceding year. And the care and precision with which the legislature limited and guarded against the abuse of the power of reduction when it came to grant it to the state board of equalization, by sec. 2818 Rev. Stat., gives emphasis to the legislative purpose. The legislature evidently thoroughly comprehended the danger of clothing these local boards with such power—it knew the pressure which would be brought to bear upon them, and the temptations and importunities they would be required to withstand. No specific reference to them is necessary, for they will suggest themselves to any one having the slightest knowledge of public affairs."

We have thus devoted some time to the history of taxation in the state in order that the legislative intent might be ascertained from the successive enactments. It is evident that the integrity of the tax duplicate must be maintained and that the power given to local boards in that respect is guarded with zealous care. This position too, we take it, is emphasized by the recent decision of the Supreme Court in the case of the State of Ohio *ex rel. E. W. Poe, Auditor of State v. Frederic Raine, Auditor of Hamilton County*, just quoted, wherein the very reductions in excess of the additions in question are held to be illegal and void.

But it is contended in these cases that under the amendment to sec. 2753 of Rev. Stat., passed May 18, 1886. (Ohio Laws vol. 83, p. 194), a discretion is vested in the city board of equalization to reduce the aggregate of the tax duplicate by taking therefrom the value of buildings depreciated in value by flood or structures destroyed by flood. This is urged on the ground that the law recognizes no distinction between property depreciated by reason of flood and structures destroyed by flood.

The language of sec. 2753 so far as it relates to the question, reads as follows: "And in case of the destruction by fire, flood, cyclone, storm, or otherwise, of any structure of any kind, \* \* \* over one hundred dollars in value, the value of which shall have been included in any former valuation of the tract or lot on which the same stood, the assessor shall determine as near as practicable how much less valuable such tract or lot is in consequence of such destruction, and make return thereof, and in case the assessor shall fail or neglect so to do then the county or city board of equalization shall perform such duty and the auditor shall deduct the same from the value thereof as it stands on the tax list."

It is insisted on the part of the plaintiff that this section is simply remedial and should, therefore, be liberally construed to accomplish the object intended, and the cases of *Adm'x of Tracy v. Adm'r of Card*, 2 Ohio St., 431 and *P. C. and St. L. R. R. v. Hine, Adm'r*, 25 Ohio St. 629

and Pollock et al. v. Speidel, 27 Ohio St., 86 are cited in support of that position.

The case too, of Lee, Treas. v. Sturges, 46 Ohio St., 153, is discussed at some length as not applicable to this controversy. Spear, J., there held on page 160 that "it seems clear that the legislative purpose was to tax all the property of corporations as well as all investments in stocks." The question in that case was whether the stock of a foreign corporation, part of whose property was within the state of Ohio, and then taxed, was taxable in the name of the holder. The court said that the property which the corporation held, and the stock of that corporation, were not the same property, but distinct and different properties, and therefore the provision of law exempting stocks of domestic corporations was an exemption strictly, and therefore should be strictly construed. It is argued that such a rule cannot apply to the case at bar because property destroyed by fire, flood, cyclone, or otherwise, ceases to exist, and it is simply absurd to speak of a provision for taking the value from the tax duplicate as an exemption, and that it would be the grossest injustice to tax that which has no existence.

It must be conceded that many of the buildings in the flooded districts have been materially injured and that real estate in those sections has depreciated in value. Perhaps valuable structures, erected years ago, will, when destroyed altogether, not be replaced by reason of the hazard of the water. The successive floods have occasioned hardship, and in many instances the valuations now on the tax duplicate are unjust and inequitable. The power is already vested in the city board of equalization to afford relief by a uniform system of equalization under the limitation of the law-making power.

It is the duty of the court to administer the law as it is written.

It is apparent from an examination of the statutory provision that it is the value of a structure destroyed by fire, flood, cyclone, storm, or otherwise, that alone can be deducted from the value of the lot or tract on which it stood. The value contemplated by the statute is the total value of the property as it stands on the tax list; the deduction to be made can only be determined by ascertaining how much less valuable the lot or tract may be by reason of the destruction of such structure. It is only necessary to look for a moment at the duty of the assessor to lead to this conclusion. The assessor is strictly charged with the duty of determining as nearly as practicable how much less valuable such tract or lot is in consequence of such destruction, and make return accordingly. The board of equalization is empowered to the discharge of this duty only when the assessor shall fail in the performance of this obligation. The work of the auditor then follows. The auditor shall deduct the same from the value as it stands on the tax duplicate.

It is unquestionably the real value of the real estate which is taxable in case of destruction by fire, flood, cyclone or storm, or otherwise, of any structure, as the assessor or the board shall determine. The lot or tract of lands in question may have enhanced in value, and the law simply measures the value for purposes of taxation by deducting from the total value of the lot or tract any depreciation occasioned by the destruction of the structure.

From the first territorial enactment to the passage of the act of February, 1834, the commissioners—since supplanted by the board of equalization—had ample authority to make any deduction from the tax value of any piece of property by reason of depreciation or otherwise.



The limit of that depreciation was simply a matter within their discretion. Since the passage of the act now in force, the board of equalization has had full power to make a deduction for any cause which impaired or depreciated the value of any real property, provided it made an addition to other real property equal in amount so that the aggregate value of the tax duplicate should not be reduced. It is a significant fact that if the power existed in any officer or board to deduct without adding a corresponding amount for mere depreciation of value, it was never exercised until by the action of the boards in question. Such action has been declared by the Supreme Court to be not only unauthorized but without warrant of law; and that the auditor of state has authority to direct and require the auditor of Hamilton county to correct the tax duplicate accordingly because the error thereby committed is not fundamental but merely clerical.

When the legislature by the amendment of sec. 2753, passed May 18, 1886, authorized boards of equalization to deduct from the value of any piece of property for destruction of a structure by fire, flood, storm, cyclone, or otherwise, without a corresponding addition for the property thus destroyed, it was an innovation upon a rule, which, for more than half century had been the settled policy of the law. The principle that the tax duplicate shall not be reduced below the aggregate of the preceding year had become interwoven with our whole system of finance and taxation.

We hold to the opinion that the tax laws of the state do not favor exemptions, and that local boards having any such power as may be conferred by statute, that power must be strictly construed. There must be no impairment of the tax duplicate except in the mode prescribed by law.

It was manifestly the intention of the legislature to preserve the duplicate in its integrity so far as it could be done, in justice to the end, that the proper authorities might have a fixed basis on which to estimate the income to be received for the succeeding year, so that the expenses of the state government, and those of the eleemosynary institutions should be promptly met.

The Supreme Court has not been slow to mark the distinction between errors which are termed "clerical" and those which are regarded as fundamental. The decisions have been uniform in the direction of amplifying the power of the auditor in correcting the duplicate and preventing its impairment. In the case of the Insurance Company v. Cappellar, 38 Ohio St., 560, the court held that where an insurance company, in making its return for taxation, deducted from its assets the re-insurance fund, required by statute to be reserved by it, the error was clerical and could be corrected by the county auditor. McIlvaine, J., on page 574, emphasized this doctrine in these words: "True, it was held in State v. Commissioners of Montgomery County, 31 Ohio St., 271, that the corrections which the auditor may make under this section are merely clerical. The error to be corrected in relation to the plaintiff's taxes was the deduction of the reinsurance item from its credits. No fact is to be inquired into. Every necessary fact appears on the face of the returns. Charge the proper rate of taxes upon the amount of credits returned without any deduction, on account of the re-insurance item, and the error in the amount of plaintiffs' taxes will be corrected clerical work merely."

The decision, too, in the case of the State ex rel. E. W. Poe, Auditor of State v. Raine, Auditor, *supra*, shows that the term "clerical error," is not limited to such mistakes as occur in copying or in computation. It is distinctly held that errors by which property escapes its lawful share of taxation, must, of necessity, be either fundamental, and thus beyond the power of a county auditor to correct, or clerical merely, and therefore within that power. \* \* \* While we are not required, continues the court, in this case to lay down rules, if that were possible by which, in all cases, the character of these errors—as being fundamental or merely clerical—may be determined, yet certainly, those only are to be deemed fundamental that pertain to the very foundation upon which a tax rests; this, of course, includes defects and "imperfections in the law itself, and errors of judgment committed by public boards acting within the scope of their authority."

Perhaps the general construction to be given to tax legislation and that which is recognized by the authorities will be found in the case of Cornwall v. Todd, 38 Conn., 443, and quoted with approval by Cooley on Taxation, "Statutes relating to taxes are not penal statutes, nor are they in derogation of natural rights. \* \* \* They are just as essential and important as government itself; for without them in some form government could not exist. The small pittance we thus pay is the price we pay for the preservation of all the property and the protection of all our rights. \* \* \* In construing statutes relating to taxes, therefore, we ought, where the language will permit, so to construe them as to give effect to the obvious intention and meaning of the legislature, rather than to defeat that intention by a too strict adherence to the letter."

In the case of County of Olmstead v. Barber, 31 Minn., 261, the court said: "Every piece of property (not exempted) owes to the state its proportionate share of the amount necessary to be raised by taxation for the expenses of the government. Although for any cause the proportionate share for any one year of any piece of property may not be enforced, or even ascertained, the debt remains, and it may be ascertained and enforced in any subsequent year; and the owner cannot object to any particular mode adopted by the state for ascertaining such share, and enforcing payment of it unless such mode operates inequally or unjustly."

It will be observed that sec. 2814, Rev. Stat., provides that the annual county boards of equalization shall be governed by the rules prescribed for the government of decennial county boards for the equalization of real property. When the auditor shall lay before the board the returns made by the district assessor, with the additions which he shall have made thereto, such board shall immediately proceed to equalize such valuations so that each tract or lot shall be entered on the tax list at its true value, and for this purpose certain rules are to be observed. They are instructions in one sense, and yet the statute characterizes them as rules. They are mandatory in their character and cannot be disregarded.

The board of equalization, as has been said under its statutory power, evidently had the right to deduct for depreciation by flood when it made a corresponding addition in value to other property so that the duplicate should remain intact in the aggregate. It could not, however, make such a deduction for depreciation by flood unless it added an equal amount. It could deduct for destruction of structures by fire, flood,

storm or otherwise without such corresponding additions under the legislation of May 18, 1886.

It can hardly be contended that depreciation in value of property by flood simply means the destruction of structures. By reason of the floods of 1883 and 1884, unusual and extraordinary in their character, and by reason of the possibility of similar floods in the future, it may safely be said that all the real estate in the flooded district has become depreciated and impaired in value—improved as well as unimproved.

The owner of the unimproved lot thus depreciated in value by the flood is entitled in justice as well to a reduction in value for purposes of taxation.

The complaint in these cases goes to the effect of the floods of 1883 and 1884. It is not claimed that the structures in either of the cases at bar were totally destroyed, but simply that the property has been depreciated in value by reason of the floods; nor does the record of the board of equalization disclose any such state of facts. The entries in each instance are in the following words: "depreciation in value of property on account of flood; and when the board made a deduction for building destroyed, it expressly so declared in the minutes. Indeed the same language was adopted by the board with reference to the property on the north side of Sargent street, where it appears from the evidence, no buildings were destroyed. It cannot well be urged that parol evidence would be admissible to contradict the record, or to show that the entry was intended to include property "depreciated" as well as structures "destroyed."

It cannot be disputed that the board of equalization has only statutory powers and is one of special and limited jurisdiction. These powers cannot be amplified. These tribunals are mere creatures of the statute, and must look to it for all their powers. *The State v. Allen*, 43 Ill., 456; *Avery v. East Saginaw*, 44 Mich., 587; *Dickey v. The County of Polk*, 58 Ia., 287; *The State v. Anderson Collector*, 38 N. J., 173. The authority given by statute must be strictly pursued, and when the statute directs an equalization among congressional districts, such a board cannot equalize among the several counties of the state. *Hamilton v. State*, 3 Ind., 452.

Those local tribunals which have authority to review and correct the roll, acting under a special authority, must pursue it strictly. *Burroughs on Taxation*, 236. If the statute fixes the time at which they are to meet, they are not to meet at any other time. *Sioux City & Pacific R. R. Co. v. Washington Co.*, 3 Neb. 30.

The defendant insists that even though such power was vested in the board of equalization by the amendment to sec. 2753 of the Rev. Stat., passed May 18, 1886 (O. L. vol. 83, 194), yet such legislation is prospective and not retroactive in its operation. If prospective only, then no power vested in the board of equalization as claimed by plaintiff during the floods of 1883 and 1884.

The policy of this state is declared in the constitution, in the provision that "the General Assembly shall have no power to pass retroactive laws." (Sec. 28, art. 2.) And it is laid down as a rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. *Cooley's Com. Lim.*, 455; *Broom's Legal Maxims*, 34; *Bernier v. Becker*, 37 Ohio St., 72; *Allen v. Russell*, 39 Ohio St., 336, "\* \* \* still, even in cases where such constitutional inhibition does not apply, if it be doubt-

ful whether it was intended that the new act should operate retrospectively, the doubt should be resolved against such operation." Bishop's Written Laws, sec. 82.

But outside of the general rule which prevails in regard to this construction of statutes, that they must be given a prospective operation unless remedial, it is evident from the very character of the amendment itself that it was not intended to have a retroactive operation.

The amendments in question consisted simply in the insertion of the words "cyclone and storm," and the words, "or if orchards, timber, ornamental trees or groves," and the further words, "and in case the assessor shall fail or neglect so to do, then the county or city board of equalization shall perform such duty." The word "flood" was a part of the act of March 2, 1846, while the storms and cyclones which have only within later years swept over the state, destroying orchards, timber, ornamental trees and groves, undoubtedly suggested legislation on these subjects. Experience has taught that this power in nature is as potent for destruction as either fire or flood. New terms were introduced in the statute by reason of these new agencies and powers; nor could the term "flood" have been suggested by the floods of 1882, 1883 and 1884, since the word was incorporated in the statute of 1846.

The power thus vested is not absolute, but is a qualified one. The discretion is first given to the assessor in case of destruction by fire, flood, cyclone, storm or otherwise, of any structure of any kind \* \* \* the value of which shall have been included in any former valuation of the tract or lot on which the same stood, the assessor shall determine as near as practicable how much less valuable such tract or lot is in consequence of such destruction, and make return thereof, and in case the assessor shall fail or neglect to do so, then the county or city board of equalization shall perform such duty. The power of the board of equalization to act in the matter results from the non-action of the assessor. Section 1718 provides that in municipal corporations, divided into wards, an assessor shall be elected in each ward at every annual municipal election, who shall take the same oath, give the same bond, and perform the same duties as are provided with respect to township officers. The duty of the assessor to return destroyed buildings of 1883 and 1884 ceased with the assessor of those years and was not a continuing duty. These returns are for the current year (Sec. 2807, Rev. Stat.). Indeed the first board that could take advantage of this act was the board of 1887 for the reason, as expressed in the act, that the assessors for that year were the first assessors who could fail or neglect to return destroyed buildings after the passage of the amendment of sec. 2753. All assessors are required to make their returns on the third Monday of May, which in 1886 was May 12th. The amendment in question passed May 18, 1886. It would be giving to the annual board of equalization for 1887 an elasticity of power certainly not contemplated by the general assembly to take off for the year 1887, 1888, 1889 and 1890 buildings destroyed in 1883 and 1884. It is to be presumed that the officers did their duty according to statute and that returns were made during the current year and certainly there is no evidence whatever that the board of 1887 had any knowledge or acted on any knowledge of these destroyed buildings in 1883 and 1884. It having been determined then, in our opinion, that there is no power in the board of equalization to impair the tax duplicate except in the manner expressly authorized by statute and that "depreciation of value by reason of flood" is not synonymous with

"destruction by flood" and that the amendment in question is prospective and not retroactive in its operation, there will next be considered the question of *pro rata* apportionment of additions in excess of deductions.

This, doubtless, may be classified among those cases to which the Supreme Court has alluded "as requiring the exercise of a sound judgment coupled with an extensive knowledge of the law," *Poe v. Raine*, 47 O. S., 447. The county auditor has applied all additions to make good the first deductions—that is the aggregate additions necessary to equal the aggregate deductions can only be regarded by that officer.

It is urged by counsel that since the board of equalization presumed that all its deductions were valid and did not undertake to apportion the additions to any specific deductions, it must be conclusively presumed that each deduction, dependant entirely upon a corresponding addition is equally meritorious. The deductions, upon failure to make sufficient additions, it is contended, are only good *pro tanto*. In other words, inasmuch as the board does not undertake to consider the relative merits of the appraisal of each parcel of land, but only the duplicate as a whole, so, likewise, the court should only regard the deductions of the board as an entirety. This theory, of course, concludes that each deduction, presumptively, is of the same relative merit, and having determined that only a certain percentage of the grand total of deductions is good; such percentage necessarily should be equally divided.

Section 2806 of the Rev. Stat., provides that the county auditor shall lay before each of the above named boards, for the territory they respectively have jurisdiction over, the returns of the assessors for the current year \* \* \* and each of said boards shall keep a regular journal of its proceedings, which shall be deposited with the auditor. The action of the board, as evidenced by its minutes, must be regarded as conclusive in the absence of fraud or mistake; nor do we regard the case of *Mueller v. Fratz*, 35 Ohio St., 397, as in conflict with that position.

That case was decided on a demurrer to a petition which alleged that all the evidence before the board was the sworn return of *Mueller*, and that it was correct in all respects; that there was no other evidence offered, and that the addition was made without any other or further testimony and was unsupported by any evidence. *Johnson, J.*, in delivering the opinion of the court said: "The demurrer admits the truth of these allegations. The code requires that all proceedings under it shall be liberally construed with a view to promote its objects, and assist the parties in obtaining justice. \* \* \* Boards of equalization are sworn to fairly and impartially equalize the value of property for purposes of taxation. Incidental to this, is the power to add or deduct, upon such evidence as shall be satisfactory to the board. This involves the exercise of judgment founded upon evidence. \* \* \* In the absence of a showing to the contrary, it will be presumed, that such a board acts upon satisfactory evidence; but where, as in this case, it appears that it has not only acted without any evidence to support its decisions, but directly opposed to evidence in support of the return, we are compelled to hold that such action is contrary to the injunction of the oath of office, and is an arbitrary and unauthorized exercise of the power to add to or deduct from a return." It is evident from an examination of the facts that the court held that it was a case for a court of equity to interfere on the ground of what must have appeared to it to be a construction

fraud, for the court expressly says on page 404: "Under what circumstances a court of equity will relieve against the action of the board, on the sole ground that it was contrary to the weight of the evidence, when such action was the result of a fair and impartial consideration of the evidence, the facts of this case do not require us to determine."

"It will be conceded, however, that the jurisdiction of a court of equity, in cases of fraud and mistake, embraces the action of such boards, as fully as in other cases of like nature."

Even then McIlvaine, C. J., and White J., did not concur in the application of the second proposition in the syllabus. Boards of equalization are presumed to have acted on sufficient evidence when they add to the valuation returned to the assessor. *Hambleton v. Dempsey & Co.*, 20 Ohio, 168; *Ward v. Barrows*, 2 Ohio St., 242; *Skinner v. Brown*, 17 Ohio St., 33.

The records, then, being the guide of the auditor, it remains to be seen whether the auditor has acted within the limits of a legal discretion, and in the exercise of a duty, for no evidence has been introduced attacking the records, nor has there been any attempt to impeach the action of the board. The minutes of the board of equalization show every complaint with a history of its action, and there is in both cases here presented a final determination by the only tribunal authorized to act. There can be no other conclusion than that each addition inures to the benefit of the deductions first ordered, and necessarily validates the deductions in the order in which they are made. The Supreme Court has expressly decided that the board of equalization has no authority to reduce the duplicate over the preceding year, and has authorized the auditor of Hamilton county to replace the same as deductions made without warrant of law.

During the years 1884, 1885, 1886 and 1887 the respective city boards of equalization deducted from the grand duplicate of Cincinnati a valuation of one million, one hundred and eighty-four thousand, four hundred and forty dollars (\$1,184,440.00), and only added for the corresponding period the sum of one hundred and thirty-nine thousand, eight hundred and forty dollars (\$139,840). If the reduction of the one million and forty-four thousand and six hundred dollars (\$1,044,600) in excess of the additions is illegal and unauthorized by the decision of the Supreme Court, it is difficult to conceive how this excess can be legalized by any *pro rata* system, or even enforced, on the maxim that equality is equity.

These successive boards certainly never attempted any system by which there should be a *pro rata* reduction or addition.

The action of the board was taken at the meeting held June 17, 1887, while on June 10, 1887, the total sum of reduction was then equal to the total amount of addition. It is conceded in these cases, that at the time these reductions were made there was a balance against what may be termed the reduction fund.

It is apparent, too, that the board in making these reductions made a distinction between structures destroyed and depreciation in property on account of flood, for there is an entry on the minutes of the board for 1887, on p. 220, "deduct \$1,000, old building destroyed," and on p. 221, "deduct \$1,000 excessive valuation."

The duty enforced upon the auditor, as determined by the Supreme Court, is a clerical one, the performance of which is to be determined by the records of the boards of equalization. It is well settled by that de-

cision that all deductions made by the board of equalization in excess of additions are illegal, save and except the cases of deductions on account of structures destroyed by fire, storm, flood or otherwise. These records being the records of a board of limited jurisdiction, must affirmatively show on their face all the facts necessary to give jurisdiction and to validate their action. Burroughs on Taxation, p. 238; Cooley on Taxation, p. 413-14.

When a deduction is made under this section it must affirmatively appear on the record of the board that it is made for that reason, otherwise it falls within the limitation of the power of the board and is void unless there is an addition to support it. The board can only speak by its records. Even admitting a structure in fact to have been destroyed, it does not follow that in the absence of the judgments of the board expressed in its minutes that a deduction was made for that reason. Neither is the board obligated to deduct from the total valuation because of a building destroyed, but may make such deduction when the lot or tract of land has not increased in value and the circumstances warrant a deduction. Indeed there may have been such an increase in the value of the lot in question from the time of the decennial appraisement as may warrant the board in refusing to make a deduction from the total valuation on account of the destruction of the building or structure.

The equity side of this court is invoked to enjoin the auditor in the performance of a duty within the decision of the Supreme Court.

If the auditor is discharging the duty imposed on him by law, and not obligated to inquire by oral testimony beyond the record of the board of equalization, then no testimony is competent before this court for such purpose. It is not doubted that the jurisdiction of a court of equity in cases of fraud and mistake, embraces the action of such boards as fully as in other cases of like nature, but there is an entire absence of any charge of that character, and the minutes of the board not only disclose that the board acted on these complaints, but that it deducted for depreciation of value by reason of the flood without any corresponding addition, and that such deductions were made after the whole amount of the addition—taken as an entirety—had been exhausted. It is clear that all deductions in excess come within the decision of the Supreme Court and are embraced in that class which has been declared as unauthorized, and which the auditor of state has enforced upon the auditor of Hamilton county to replace upon the duplicate for purposes of taxation. The auditor of Hamilton county has no discretion other than to return to an impaired duplicate these excessive deductions as may be ascertained from the records of the board of equalization.

The plaintiffs claim that they are exempt from taxation by reason of a change of ownership by descent in one case, and a change of ownership by lease in the other case. The statute provides that the auditor may make corrections in the tax duplicate, and charge taxes for previous years: "Unless in the meantime such property shall have changed ownership, in which case only the taxes chargeable since the last change of ownership shall be added." Section 2803, Rev. Stat.; sec. 1040, Rev. Stat. George Scott, who held the property in both cases in fee simple, died August 10, 1888, intestate, leaving Samuel J. Scott, George E. Scott and Sarah A. Wait, his children and heirs-at-law. It is urged that by operation of law it passed to his children, and that the legislature has construed this statute by a correlative provision for the entry of a change of ownership on the tax duplicate. Section 1025 provides that

"The auditor shall, on application and presentation of title \* \* \* transfer any land \* \* \* charged with taxes on the tax-list, from the name in which it stands into the name of the owner, when rendered necessary by any conveyance, partition, devise, descent, or otherwise," and it is contended that this is a legislative recognition that ownership of real estate is changed by a deed of gift, by will, by inheritance, and by partition, as well as by bargain and sale.

It is further insisted that there is a change of ownership by lease. It seems that the heirs of George Scott leased to a partnership, of which one partner was a stranger to the inheritance, the property embraced in case 44,861, for a term of ten years from September 1, 1888, with the privilege of ten years additional, the lessees to pay taxes, etc., which lease was transferred on the tax duplicate October 23, 1888, and ever since that time this property has been taxed in the name of George Scott's Sons. Counsel observe that the lessors' title is diminished, and the lessee acquires a title which he did not before possess, and that, therefore, a lease effects a change in ownership. Taxes, it is urged, are levied from year to year, and are as temporary as the holding of the lessee, and an interpretation is given to the term "owner" in policies of insurance. 1 Wood Fire Insurance, sec. 340, p. 712; under Mechanic's Lien Statute, *Choteau v. Thompson*, 2 Ohio St., 114, and *Dutro v. Wilson*, 4 Ohio St., 102; and under Fire Escape Statute, *Lee v. Smith*, 42 Ohio St., 458; and in condemnation proceedings, *Coppock's Municipal Code*, p. 269; in street improvements, *Laird v. Cincinnati*, 6 Dec. Re., 1006, with other authorities; and that while *Davis v. Cincinnati*, 36 Ohio St., 24, cited by defendant, arose under sec. 2393, imposing a personal liability on the owner for a sewer abutting his premises, yet sec. 2285 is a similar provision as to street improvements generally.

It is true that the legislature has used the term "owner" in a qualified sense in various sections of the statute. What the legislature means by the term "owner" is to be determined by the subject-matter, and the purpose for which the statute is enacted.

"Owner" in the sense of the Mechanic's Lien Act, is not the same as "owner" in the sense relating to assessments. *Davis v. Cincinnati*, *supra*.

It must be remembered that the purpose contemplated by secs. 1040 and 2803 is to relieve property otherwise chargeable with taxes, and for that reason the rule that all exemptions from taxation must be strictly construed, applies to those sections. It is the general rule that taxes are a lien against the property irrespective of change of ownership, and the lien of the state for taxes is paramount to every other incumbrance, and effects the lands regardless of the ownership. The practical result of the claim of plaintiff to exemption under secs. 1040 and 2803, Rev. Stat., would be to include any change of title, however limited in duration whether such change of title came by descent or devise or deed or gift. The term "owner" in secs. 1040 and 2803 cannot be enlarged more than to include such a *bona fide* purchaser of the property as estops the state from the assertion of a claim against the property for taxes which at the time of the purchase were not on the duplicate and of which the purchaser could not be advised. There can be no good reason why the heirs of a decedent or the devisee of a testator, or the donee by deed of gift, or the lessee for a term of years should be exempted from the taxes legally due upon the land which but for this change of ownership the state would have been able to collect. They have not



parted with anything of value on the faith of the condition of the duplicate which is the very reason of the law itself. No such construction can be permitted. It would seem that the decision in *Davis v. The City, supra*, is conclusive as to what the term owner means, in so far as taxes and assessments are concerned, and assuming that Davis was the owner of a lease for a term of years with all the obligations to pay taxes and assessments as between him and the lessee, nevertheless the term "owner" in the statute referring to assessments—and certainly by fair implication referring to taxes—means owner in fee. Change of ownership therefore, means a change in ownership in fee, by a *bona fide* purchase, in order to estop the state under secs. 1040 and 2808 from the collection of taxes, which but for those sections would otherwise be collected.

It is within the power of a lessee to contract to pay assessments on a very limited term, and to refuse to contract even though the term is perpetual in duration. It was not the character of the lease but the character of the improvement that was in question in that case: it was whether the owner personally is liable for the assessment within the meaning of the assessment act, and it was decided then that it referred to the owner in fee, and not to the lessee for a term of years.

After a careful examination of the legislation of the state affecting the powers and duties of city boards of equalization and the principles of law as applicable to the facts in the cases presented, we conclude as follows:

I. That no discretion is vested in the city board of equalization to impair the tax duplicate except as may be expressly authorized by law, and that the powers of such boards, being of statutory creation, are limited and must be strictly construed.

II. That the duty enjoined upon the auditor of Hamilton county of placing upon the duplicate the reduction in excess of the additions made by the city board of equalization is clerical, and in the performance of that duty the auditor is to be governed by the records of the city board of equalization, so far as applicable; nor can such records be contradicted or impeached by oral testimony, except in cases of fraud or mistake.

III. That "depreciation in value of property by reason of flood," and "destruction by flood of any structure of any kind," are not synonymous terms, and that sec. 2753 of the Rev. Stat., (Ohio L., vol. 83, p. 194), confers no power on the city board of equalization to reduce the tax duplicate without a corresponding addition, in consequence of any depreciation of property in value by reason of flood.

IV. That the act entitled "an act to amend sec. 2753 of the Rev. Stat." passed May 18, 1886 (Ohio L., vol. 83, p. 194), is not retroactive but prospective in its operation.

V. That in restoring to the tax duplicate any deduction in excess of addition that may appear from the records of the board of equalization, having jurisdiction of the subject-matter, a court of equity will not interfere with the auditor in regarding such addition when made as inuring to the deduction first ordered, where the right to deduction and the addition is made to sustain it.

The temporary injunction in both cases will be dissolved and the petitions dismissed at costs of plaintiffs.

Bateman & Harper, for the plaintiffs.

Thos. McDougall and Rufus B. Smith, for the defendants.

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## TAXATION.

[Hamilton Common Pleas, 1891.]

## ELIZABETH MCCALL V. TREASURER (HAM. CO.)

The state auditor cannot delegate to the county auditor his power to reduce a valuation.

SHRODER, J.

Elizabeth McCall v. County Treasurer. The plaintiff was the owner of a lot in the Hewitt subdivision. The tax valuations of a part of the lots in this subdivision were reduced by the state board. At a latter date the state auditor wrote to the county auditor, authorizing him to make a similar reduction in the valuation of plaintiff's lot. The county auditor failed to do so, and this suit was to enjoin collection of taxes on the amount of the reduction which the state auditor had proposed.

Held: If the state auditor had acted in the matter of this reduction himself, such action would have been conclusive. But he had no authority to delegate to another discretionary power. Hence his letter was without effect.

Petition dismissed.

Tugman & Baker, for plaintiff.

Rufus B. Smith and Thomas McDougall, *contra*.

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## TAXATION.

[Hamilton Common Pleas, 1891.]

## WEHMER V. TREASURER, (HAM. CO.)

1. The authority of the board of equalization to deduct from the value of new structures, extends only to those finished during the current year.
2. Reducing a valuation made by them in a preceding year, before completion of the structure, is not reducing, but making an original valuation.
3. But back taxes erroneously collected, paid voluntarily, must be regarded as a gift to the county, and cannot be recovered.

SHRODER, J.

At the time of the assessor's visit in 1884, the plaintiff was putting up a building, which was not yet completed, and the assessor valued it as it then stood as \$2,000. Two months later when the building was completed the board of equalization added \$4,000 to the assessor's valuation. Taxes were paid upon this valuation under protest. The following year the assessor returned this structure as finished, and valued it at \$5,000. The board of equalization deducted \$1,000 from the valuation of the previous year, leaving it at \$5,000, as the assessor of that year had returned it. The suit was to recover taxes paid on the \$1,000 excessive valuation.

Held: A board of equalization has no authority to deduct from the valuation of new structures except those finished during the current year. But the action of the board of 1885 was for the current year.

What they did was not a reduction of a previous valuation, but the fixing of an original valuation. Their action therefore did not come within the ruling of the Poe case, and was legal. But there can be no recovery of taxes erroneously collected for the first year. They were paid voluntarily, and if wrongfully assessed must be regarded simply as a gift to the county.

Harding & Moore; Rufus B. Smith and Thomas McDougall.

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**TAXATION.**

165

[Hamilton Common Pleas, 1891.]

**WALKER V. TREASURER, (HAM. CO.)**

1. Where a new structure has been substituted for an old one, but in fixing the value of the new one for taxation, the board of equalization failed to allow for the one destroyed in rebuilding, an allowance cannot be made for it after the current year.
2. Where the tax was paid under the advice of the auditor to do so and secure a reduction for the following year, such advice not being within the official duties of the auditor, is no ground for relief.

SHRODER, J.

Walker v. County Treasurer. The plaintiff substituted a new structure for an old one. Neither the assessor nor the board of equalization in fixing the tax valuation of the property made any allowance for the old structure which had been destroyed. This omission was first discovered by the plaintiff when he received his tax bill. He protested to the county auditor, but was advised by that official to pay the bill and appeal to the board of equalization for the next year to make the matter right. This plaintiff did, and secured a reduction the following year on account of the old structure. The suit here decided was brought to enjoin an addition to the valuation of the property of the amount deducted on account of the old structure. Held:

The board of equalization which made the allowance for the old structure, had no authority so to do, for the reason that the structure was not one of the current year. The restoration from the amount thus deducted can not, therefore, be enjoined. The advice of the auditor, upon which the plaintiff acted in paying the excessive valuation for the first year, was not within his official duties, and was bad law, and a court of equity can afford him no relief.

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**TAXATION.**

165

[Hamilton Common Pleas, 1891.]

**KIRBY V. TREASURER, (HAM. CO.)**

Where valuation of property has been made on account of a new structure, without allowance for the old one, there can be no reduction the following year, on account of the excessive tax, although the amount was paid under protest.

SHRODER, J.

This case was similar to the last, except that the addition to the valuation of plaintiff's property on account of the new structure, and

without any allowance being made for the old structure, was without notice to the plaintiff. He paid the tax under protest. The following year a reduction was made on account of the old structure.

Held as above, that the action of the board of the following year was unauthorized, and that there could be no recovery on account of the excessive taxes for the first year. In this case court cited *Witbeck v. Winch* (decided last week by the Supreme Court) in support of the holding that there could be no recovery.

## 203 RECEIVERSHIP—PREFERRED CLAIMS.

[Clark Common Pleas, 1891.]

AKRON IRON CO. ET AL. V. WILLIAM N. WHITELY CO. ET AL.

1. "Every person who shall have performed any labor as an operative in the service of the assignor," in sec. 6355, Rev. Stat., held to include all classes of labor, except that which might be properly distinguished as professional or scientific labor.
2. No distinction can obtain under this statute between resident and non-resident laborers.
3. A court of equity will generally, though not always, in deciding the rights of labor claimants, in the administration of receiverships, be guided and controlled by the analogies to the law relating to insolvent debtors.

Upon Special Report, No. 10, of the Receiver.

MILLER, J.

Under the special report No. 10, filed by J. Warren Keifer, receiver of the William H. Whitely Co., the court is asked to direct the receiver in the matter of J. M. Goetschius and other residents of Ohio, and J. G. Irons, and others, non-residents of Ohio, who present claims against said company as entitled to be paid before the payment of other creditors, as being claims for work and labor performed for said company.

With reference to such claims, courts of equity in the administration of receiverships have been often, although not always, guided and controlled by the analogies of the law relating to insolvent debtors in the several states in which said trusts are being administered, and in connection with the above mentioned claims, the attention of the court is directed to a part of sec. No. 6355 of the Rev. Stat., of Ohio, which reads as follows:

"And every person who shall have performed any labor as an operative in the service of the assignor shall be entitled to receive out of the trust fund, before the payment of other creditors, the full amount of the wages due to such labor performed within twelve months preceding the assignment, not to exceed \$300."

Quite a number of authorities have been presented to the court by the attorneys representing said claimants, and the attorneys of the William H. Whitely Company, in which there has been a wide difference of opinion as to such claims, ranging from an allowance of attorney's fees in the sum of five hundred dollars in the case of *Gurney et al. v. The Atlantic & Great Western Railway Co. et al.*, in 58 New York, page 358, to a denial of all claims in *Jones v. Avery*, 50 Michigan, page 326, except those for manual or menial services.

It will be observed that the various cases cited are based largely upon the respective laws, and sometimes constitutional provisions, of the states in which the cases are reported. In 58 N. Y., it appears that the basis of the decision was the order of the court to the receiver upon the appointment as such receiver of the A. & G. W. R'y Co., to pay as a part of the preferred claims next to the expense of maintaining and operating the road, "Arrearages owing to the laborers and the employees of the said consolidated corporation, defendants, for labor and services actually done in connection with that company's railway and amounts due connecting roads."

In the above case it will be seen that the appointment of the receiver grew out of a suit pending in the Supreme Court of New York to foreclose a mortgage executed by said company, and the court appointed that receiver, not to close up the business of said company, but as in the case of the appointment of a receiver of the William H. Whitley Company, to continue to operate the same, and made provisions in its order for the terms and conditions upon which the same was to be operated, and the decision of the court of appeals was based upon the construction to be given to the word "employees" in said order, and not upon any provision of any insolvent act, thus recognizing the principle that in cases at least, where the business of the company was to be continued by the receiver, the court exercises the broadest powers of equity unhampered and unrestrained by any special statutes regulating assignments of insolvent debtors; in other words, courts of equity may, and do, make it a condition of continuing to operate an insolvent corporation, that the arrearages of claims of those who have by their labors contributed to the assets which go into the hands of the receiver, not for forthwith distribution to creditors, but to help in the continuance of the insolvent as a going concern, shall be reimbursed for said arrearages out of the first net assets remaining after the payment of the current expenses of the receivership. It is well to bear this point in view in studying the analogies of the various statutes relating to insolvent debtors.

With this saving remark the court comes to the consideration of the section of the Revised Statutes, above quoted, as furnishing analogy for the various claims here presented. There has been no authoritative expression of opinion by the Supreme Court as to the meaning to be given to the phrase "every person who shall have performed labor as an operative," and various constructions have been given by the various courts of inferior jurisdiction throughout the state—in some cases the construction has been very narrow and restricted. We should bear in mind that this is a beneficial statute, and therefore to be liberally construed, unlike the case above cited in 50 Mich., in which the court was giving construction to a constitutional provision which makes stockholders of a corporation as individuals, personally liable for labor claims; and also the case of Wakefield v. Fargo et al., 90 N. Y., page 213, also giving construction to a like constitutional provision of the state of New York, in which it was argued that the court should, as it did undoubtedly, construe said provision strictly (as being in the nature of a penalty) for the stockholder, and not liberally for the laborer.

There is another provision of the Ohio Laws, sec. 3206, giving a lien to laborers or employees "where employment is at agriculture, mining, manufacturing or other manual labor" for three months' wages; and the

court adverts to it for the reason that a strict constructionist hunting for analogies might prefer to be guided by that section instead of section 6355, and still further limit the amount of preference to be given to the laborer, and to illustrate the doctrine that in seeking analogies courts should look to the most beneficial statutes and then construe them beneficially.

The attention of the court has been called to a decision of the court of common pleas of Franklin county as to the claim of M. H. Strauss against the assignee of L. Strauss & Co., for twelve months' services as a clerk in the store of L. Strauss & Co. In that case the court quotes as to the meaning of the word "operative" in section 6355, Webster's International Dictionary, "a skilled workman, an artisan; especially those who operate a machine in a mill or manufactory." Why not also quote the first definitions, "a laboring man, a laborer." Why not also quote Worcester, "a laboring man; one employed in manufactories; an artisan." Why not quote from a hand-book of the legal profession, Bouviers' Law Dictionary—"a workman; one employed to perform labor for another;" or the recent admirable one in Anderson's Law Dictionary: "an employee, a servant." It seems that the court there was inclined to give too narrow a definition to the word; and that it should, under the rule that "beneficial statutes shall be construed liberally," have used the broad definition "an employee; a servant," as being more equitable. The court says that "the true conception seeming to be that the legislature intended by section 6355 to confer upon skilled workmen a higher preference than was conferred upon other workmen."

Now, the question may be fairly asked, upon what principle should the legislature favor a skilled workman more than a common laborer? Has the legislature done the foolish thing to provide that the skilled workman, receiving two, three or five dollars per day, who from his savings has a better chance to "lay aside for a rainy day;" shall be better protected than a common laborer at one dollar per day, whose earnings are consumed by himself and family every day for the commonest necessities of life? "Yes," says the court, "if all the classes of laborers were entitled to be included, the words 'as operative' are superfluous. They would have no meaning whatever."

Let us see about that, and in doing so we quote as the Franklin county court quotes from Chief Justice Shaw in *Thayer v. Mann*, in 2d Cushing Rep.: "We are not aware that the clause (any person who shall perform labor as an operative, etc.) has received any judicial construction, and the word 'operative' with one more qualification that this clause contains, is not definite enough to enable us to lay down any precise general rule. Probably the primary thought which legislators had in mind, was the wages due to men and women working for manufactories who usually receive their pay weekly or monthly. But certainly it is not limited to those working for manufacturers or mechanics, or to persons working in factories or workshops. Whether it shall extend to farm laborers, to house servants, to persons working singly or in gangs, in marshes or in woods, or under contractors on public works, at a distance from the home of both the employers and the laborers, are all open questions on this statute, and we do not feel called upon to suggest any general rule until they are more distinctly presented for adjudication."

How about that opinion as sustaining the opinion that it was the design of the legislature "to confer upon skilled workmen a higher preference than was conferred upon other workmen."

The fact of Justice Shaw making particular recital of a great variety of workmen in a great variety of places, other than manufactories, and at points away from and not under the eye of the employer, would seem to indicate, notwithstanding the apparent tautology of the phrase "labor as an operative," that in a proper case he would give a definition as broad and liberal as that in Anderson, to-wit, "an employee, a servant."

Justice Shaw goes on further to say, "we think the policy of the statute was to secure to a class of very needy and efficient laborers, who are very dependent and meritorious and who have little means of knowing the credit of their employers, the small amount due them for any recent service."

In this sentence is the meat of the whole matter. I do not refer to the last clause of the sentence, for that was written with reference to a statute limiting its operation to claims not exceeding \$25 for services performed within sixty-five days. The Ohio statute makes the limit \$300, for services performed within the year.

I refer particularly to the sentence, "who have little means of knowing the credit of their employers."

These statutes were framed in the interest of employees because they have not the same means of protecting themselves as other creditors.

There are two factors in every production, to-wit, capital and labor, each of which is entitled to fair consideration and to the protection of the laws, but there is a wide difference between them in their capacity for self-protection.

Capital is jealous, watchful, suspicious and ever alert. Labor is more trustful, dilatory and slow to act. Capital moves at the stroke of the clock, and at the close of banking hours each day moves upon unpaid claims by protests, attachments, garnishments and other summary remedies. Unpaid labor waits, and trusts and hopes for payment. Capital moves antecedently, or contemporaneously with the credit which it allows, by cognovits mortgages and hypothecations, and plasters the assets of a debtor all over with securities to protect itself.

Labor remains unsecured, and is happy if paid at the end of the term of service.

Capital has Briarean hands, reaching out by the help of able assistants, the trained officers of banks, mercantile agencies, and men learned in the law, to gather in its loans of money or advances of materials promptly upon their claims becoming due.

Labor is compelled to rely upon the word of the employer alone, and when at last the crash comes, it finds the assets of the failing concern directed into channels into which it cannot follow.

Capital having laid its hands upon all the available property of the insolvent, goes into the courts to establish its preferences and generously divides up or pro rates the property of the debtor with itself, utterly oblivious of the claims of labor, which unsecured looks on with dismay at the wrangles of secured creditors as to who shall have the lion's share of the capized concern.

When there is a wreck of a manufacturing establishment, there is plenty of salvage for capital, and but very little for labor, only in cases in which the law and the courts having reference to the inequality of conditions between capital and labor, steps in and tries to rectify it. For these reasons legislatures by statutory enactments have endeavored to restore the equality between creditors who are ever on the watch, and are always intelligent as to the financial condition of a debtor, and (to

use the language of Chief Justice Shaw) "a class of very needy and efficient laborers, who are very dependent and meritorious and who have little means of knowing the credit of their employers."

The court has thus fully drawn these distinctions in order to show that the statute under consideration, in the fact that it is in restraint of that rapacity, which under the guise of the doctrine of superior diligence—under the permission of the oft-perverted maxim "*qui prior est in tempore portior est in jure*," seizes on all of the effects of a debtor upon which it can lay its hands, and holds mercilessly on to all which it seizes, and is therefore a beneficial statute, and should be liberally construed.

The court is therefore of the opinion that it was not the intent of the legislature in the enactment of the statute aforesaid, to prefer one class of skilled laborers, and therefore, more intelligent laborers over the equally if not more needy common laborers; to establish under a show of equitable protections of labors, a class within a class; and if not, then by a parity of reasoning, it must have intended to include all classes of labor except that which might be properly distinguished as professional or scientific labor.

There being no requirement in the above statute that the labor entitled to its provisions shall be a resident of the state of Ohio, then no distinction can obtain under it between resident and non-resident laborers, and the court therefore holds upon this point all the several claimants to be equally entitled to the preference of the statute.

But the court in this case is not bound to look alone to the analogies of said statute to determine the equitable rights of said claimants.

The administration of an assignment is one thing—that of a receivership is another thing; especially is this true when a receiver is ordered to continue the business of the insolvent on account of whom it may concern.

Courts of equity have frequently in the latter class of cases, as in *Gurney et al. v. A. & G. Railway Co., et al.*, 56 N. Y., ordered that after paying the expenses of maintaining and operating the business of an insolvent corporation, there be paid, "First, arrearages owing to the laborers and employees of the said consolidated corporation defendants, for labor and services actually done in connection with that company's railways."

Why? First: Because the assets of the insolvent are summarily disposed of in an assignment, and the proceeds distributed according to law to the various creditors, thus making as little delay as possible to employees in the payment of such amounts as they may be fairly entitled to—thus avoiding the risk of having said assets and the fruits of their labor dissipated in the continuance of the business at the instance always of more wealthy and capable creditors.

In the other case all the assets are used in the transaction of the further business of the insolvent, and the laborer is delayed in the payment, and also subjected to the risk of a total loss of his claims, not of his own mind, but against his will, and at the instance of that class of creditors who can afford to wait and take the chances of all or nothing by the continuance of the business.

Second: Because, as in the case of the Akron Iron Co., and other wealthy corporations and individuals, plaintiffs in this case, all the assets of the bankrupt company have been taken into hand by the receiver



without consultation with the needy and often impoverished employees, and used for the transaction of his business. Of all that mass of assets, much the largest share was the production of said employees. There was not a machine in the shop; there was not a machine in the warehouse; there was not a machine in the hands of the agents of the William N. Whitley Co.; there was not a promissory note, book account, or other chose in action payable to said company but had on it the impress of the labor of said employees to a much larger amount than the materials used in it, (for these choses in action simply represented produced machinery)—the larger share representing the fruits of the employees' labor, the smaller portion the advances made by the other class of creditors. If the employees must pro rate; let them be allowed to do so out of what their own hands have made, and let the surplus—for there always will be a surplus of the fruits of labor (unless there should be such a wreck of the establishment as would make it impossible for a receiver to continue the business), go into the mass of the assets to be used in the continuance of the business. In other words, no creditors should be allowed in equity to continue the business and use the assets of an insolvent, without the consent of the employees, without first paying said employees their arrearages of wages.

So, standing upon the broader basis of the underlying principle, "let him that is stronger first do justice to the weak," it is not necessary to rely wholly or even at all upon the statute for the guidance of the court in the adjustment of these claims.

The logical conclusion therefore is that the claims of the employees of the William N. Whitley Co., for labor performed by them, either in the shop or office; either at home or abroad; either in setting up machines in the field or in selling the same; either resident or non-resident of the state of Ohio, ought to be paid in full.

But it appears by the report of the receiver that said claimants only ask for a preference to the amount of \$300. The court could scarcely give more than is asked—and will therefore use the analogies of the statute in order to fix the amount of the preference, and orders that the receiver, after careful investigation as to the validity of said claims, allow such as may be rightly due the claimants, excluding therefrom all accounts for expenses or materials furnished, as preferred claims to the extent of \$300, any balance remaining to any claimant to share *pro rata* with general creditors.

In thus disposing of these claims it may be objected that the same is outside of, and beyond the authorities. Let the objector carefully examine the authorities and see if great injustice has not often been done to employees out of too technical application to the rules of both of law and equity.

The court has simply moved forward out of the entrenchments of narrow-mindedness towards the line of good conscience, and sitting as chancellor *in foro conscientiae*, is entirely satisfied with this decision.

Keifer & Keifer, for receiver.

Wm. M. Rockel, Wilber Calvin and O. M. Miller, for claimants.

Pringle & Johnson, for Akron Iron Co.

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## MUNICIPAL CORPORATIONS.

[Superior Court of Cincinnati, General Term, 1891.]

AMELIA SHEHAN ET AL V. CINCINNATI (CITY) ET AL.

The law in force at the time of the passage of the improvement ordinance, governs with respect to the manner of assessment and the rights and liabilities of the owners of abutting property, 46 Ohio St., 296; this rule is not affected by the fact that the owners of the abutting property petitioned for the improvement.

SAYLER, J.

This case is reserved to this court on a bill of evidence, and from which bill it appears, that on November 19, 1886, a petition was filed with the board of public affairs, signed by more than three-fourths of the property frontage to be assessed, and including the plaintiffs—asking for the improvement of Seton avenue, from Warsaw pike to Rapid Run road, by grading, macadamizing the roadway, setting flat rock curb, gutters and crossings, and constructing necessary drains and retaining walls.

On November 26, 1886, the engineer reported to the board of public affairs that more than three-fourths had petitioned, and the board directed him to prepare the necessary papers for the improvements.

Whereupon on February 7, 1887, the board of public affairs recommended such improvement, and thereupon: On February 28, 1887, the common council passed a resolution declaring it necessary to improve Seton avenue from Warsaw pike to Rapid Run, by setting curbs and crossings, flagging gutters, macadamizing the roadway and constructing the necessary culverts, drains and retaining walls (such improvements being recommended by the board of public affairs) in accordance with plans and profiles on file in the office of the engineer of the board of public affairs. The expense of said improvement to be assessed per front foot upon the property bounding and abutting thereon according to the law and ordinances on the subject of assessments; the assessments therefor to be payable in ten annual installments, if deferred, and the same to be collected as provided by law and in the assessing ordinance hereafter to be passed. The resolution further provided that bonds should be issued in anticipation of the collection of the assessment.

Thereupon, on May 13th, the common council duly passed an ordinance to improve Seton avenue from Warsaw pike and Rapid Run road, and whereby it was ordained that Seton avenue from Warsaw pike to Rapid Run road be improved by setting curbs and crossings, flagging gutters, macadamizing the roadway and constructing the necessary culverts, drains and retaining walls in accordance with the resolution of council adopted February 28, 1887; and further that the expenses of the said improvement, including interest on bonds, if they be issued, shall be assessed per front foot upon the property abutting thereon, according to the laws and ordinances on the subject of assessments; the assessments therefor to be payable in ten annual installments, if deferred, and the same collected as provided by law and in the assessing ordinance hereafter to be passed. The ordinance further provided that bonds should be issued in anticipation of the collection of the assessments.

Subsequently the improvement was made, and an ordinance was duly passed, whereby the expenses thereof were assessed per front foot upon the property abutting thereon.

The plaintiffs respectively own lots abutting lengthwise upon Seton avenue on the corner of Warsaw pike and Seton avenue; one lot having a front of 69.16 feet on Warsaw pike, and abutting lengthwise on the east side of Seton avenue for a distance of 196.06 feet, having a width of 60 feet at right angles; the other lot fronting 51.77 feet on Warsaw pike, and abutting lengthwise on the west side of Seton avenue for a distance of 122.28 feet, having a width of fifty feet at right angles.

Section 2269 of the Rev. Stat., as amended March 27, 1884, provides among other things as follows:

"And if, in making a special assessment by the front foot, there is land bounding or abutting upon the improvement not sub-divided into lots, or if there be lots numbered and recorded, bounding or abutting on said improvement and lying lengthwise of said improvement, the council shall fix in like manner the front of such land to the usual depth of lots, so that it will be a fair average of the depth of lots in the neighborhood, which will be subject to such assessment."

This section was amended on March 11, 1887, and by the amendment the words "or if there be lots numbered and recorded, bounding or abutting on said improvements and lying lengthwise on said improvement," were omitted from the law.

Under the act of 1884 the assessable front of a lot lying lengthwise of an improvement was fixed to the usual depth of lots by the average of two blocks, whereas in the act of 1887 such lot is assessed for each foot abutting on the improvement.

The question to be determined in this case is whether the law of 1884, in force when the petition of the property owners was presented to the board of public affairs, and when the said board recommended the improvement, and when the common council passed the resolution declaring it necessary to make the improvement, shall govern in making the assessment on the lengthwise lying lots, or the law passed March 11, 1887, and in force at the time of the passage of the ordinance to improve, and all subsequent steps were taken in making the assessment.

A very strong argument has been made on the part of the property holders to the effect that the law in force at the time the petition to improve was presented to the board of improvements shall govern.

But the Supreme Court in the case of *Cincinnati v. Seasingood*, 46 Ohio St., 296, lay down the doctrine as follows:

"A municipal corporation having through its proper boards and officers passed a resolution and ordinance to improve a street, in its assessment of the cost and expense of the improvement upon the abutting property, it should be governed by the law in force at the time of the passage of its improvement ordinance, with respect to the manner of assessment and the rights and liabilities of the owners of abutting property."

The court say, p. 301, "The law contemplates that before the ordinance to make the improvement is passed, there shall be certain preliminary proceedings. Such ordinance is the resultant of those proceedings and evidences the final determination of property owners, through their public agents, to assume whatever burdens may be entailed upon them by the law in force when the improvement ordinance is passed. To enable the city to determine whether it is best to undertake the improvement to

afford persons interested an opportunity to be heard, and if desired to protest or submit objections to the work, the necessity of the improvement is to be declared by resolution, and notice of the resolution brought home to the abutting owners. Plans and profiles are to be prepared and placed on file for public inspection; a careful estimate is to be made of the cost of the work; and the owners of lots and land abutting upon the proposed improvement are afforded an opportunity of filing their claims for damages. At the expiration of the time limited for filing claims for damages, the council is to determine whether it will proceed with the improvement or not, and whether the claims for damages shall be judicially inquired into. Having determined to make the improvement, it is provided by amended sec. 2264 of the Rev. Stat. that the cost and expenses of the improvement, or any part thereof which may not be assessed on the general tax list, 'shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the feet front of the property abutting upon the improvement, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained.' It is evident from the language of this section that the property to be assessed, and the mode of assessment, whether by benefits, by valuation, or by the foot front, are to be determined by ordinance before the improvement is made; and the assessment is to be in the manner and subject to the restrictions prescribed by the statute in force at the date of the improvement ordinance."

And the court further say, page 303: "It is reasonable to presume that the passage of the ordinance to improve the street was not without reference to existing rights and liabilities; the ordinance was doubtless passed in full view of the law as it then stood in regard to special assessments."

It is claimed, however, that the case at bar is distinguished from the *Seasongood* case in that in the case at bar the property holders petitioned for the improvement, and that by such petition they waive the 25 per centum limit of the assessment and waive notice, and further that the city requires the owners petitioning to agree with each other and with the city to make good to the city any deficiency in the collectibility of the assessment caused by insufficiency of values of property of those not signing the petition, so that there is a waiver of the property owner of the 25 per centum limit and a waiver of notice, and an undertaking on his part to make good the deficiency of those not signing; that the city acted upon the petition and holds the property owner to his contract, and that therefore the property owner acquires a vested right as against the city from the date of filing the petition asking for the improvement.

It is provided by sec. 2271, that in cities of the first grade of the first class the tax or assessment especially levied or assessed upon any lot or land for any improvement shall not, except as provided in sec. 2272, exceed 25 per centum of the value of the lot or land after the improvement is made.

Under sec. 2272 when a petition is presented asking for the improvement, signed by three-fourths in interest of the owners abutting on the proposed improvement, the assessment may be made without regard to the 25 per centum limit.

It is clear that the provisions of sec. 2272 are for the benefit of property owners who could not otherwise obtain an improvement of streets on which their property abuts. But this section works no new mode of making improvements or levying consequent assessments, further than that the 25 per centum limit is thereby omitted from the proceedings.

The property owners propose to the city that if the city will make the improvement they will pay the expenses. This proposition binds no one; but on the strength of it the council declares by resolution the necessity of such improvement, and that confessedly binds no one, as under sec. 2304, notice of such resolution must be given, so that claims for damages may be filed, and it is only after the time has elapsed during which claims may be filed that the council may, under sec. 2316, determine whether it will proceed with the proposed improvement, and if it decides to proceed therewith, an ordinance for the purpose shall be passed.

Clearly, the city cannot be bound to anything until under sec. 2316 it decides to proceed with the improvement, and this decision is expressed by the ordinance to improve, and therefore by this ordinance the city accepts the proposition of the property owner.

Prior to that time the property owner is not bound. He may withdraw his name from the petition. He is only bound when the city accepts his proposition.

The question of the rights of the property owner under a petition to improve was considered by Judge Maxwell in a very able opinion in the case of *Black v. The City*, decided in October, 1887, and he held that the petition was in the nature of a request, and an agreement that if the city would do certain things they in their turn would undertake to pay for the improvement in whole or in part, and that this proposition of the property owner was accepted on the part of the city by the passage of the ordinance to improve, and that at that point in the proceedings the property owner acquired vested rights.

In the case of *Hays v. Jones*, 27 Ohio St., 218, which was a proceeding under the act authorizing the county commissioners to construct roads on the petition of a majority of resident land-owners, the court held that a land owner who had signed a petition could withdraw his name at any time before the improvement is finally ordered.

The case of *Grinnell v. Adams*, 34 Ohio St., 44, only held that when jurisdiction was given to the county commissioners to act in the matter of laying out or altering a road by the filing of a proper petition, such jurisdiction could not be defeated by the petitioners remonstrating against the prayer of the petition being granted, and the court expressly say that they do not overrule the case of *Hays v. Jones*, *supra*.

We think we are concluded by the holding of the Supreme Court in the *Seasongood* case in the determination of the controversy in the case at bar, and we therefore hold that the rights of the parties are governed by the act of March 11, 1887, and a decree will be entered accordingly.

HUNT and MOORE, JJ., concurring.

F. C. Ampt and J. C. Harper, for plaintiff.

Hortzman, Galvin, Whittaker & Van Horn, City Solicitors, for defendant.

## ALIMONY.

[Hamilton Common Pleas, February, 1891.]

ETTA C. HAND v. CHARLES E. HAND.

Payment of final alimony in installments, awarded for the support of children after divorce, can be enforced and willful non-payment punished by proceedings in the nature of contempts.

Plaintiff, Mrs. Hand, in 1888, filed a suit for divorce and alimony against her husband, but on final hearing both a divorce and alimony was refused, but the custody of the two minor children was given her and an allowance of six dollars per week for their maintenance awarded to her.

In 1889, the husband filed a divorce suit against her, and divorce was granted to him without resistance on her part, the decree leaving the custody of the children and the allowance as fixed in the former suit.

The installments of six dollars a week were paid for over a year, but are now some weeks in arrears, and the process of the court is asked against Mr. Hand in the nature of contempt to compel him to show why he does not pay the allowance or be attached.

BATES, J.

As to *pendente lite* alimony, willful non-payment of it is punishable as a contempt. Two carefully considered cases in our state so decide, *Stewart v. Stewart*, 10 Dec. Re., 662, and *Kaderabek v. Kaderabek*, 2 Circ. Dec., 236, and these are in line with the decisions elsewhere.

But final alimony is a wholly different matter. One object of the *pendente lite* allowance is to enable the court to investigate the merits by giving the wife means to exhibit her side; it is made while the marriage relation still subsists and the husband is liable for necessaries, and the court has not finished and parted with its share of the case; it is an order, and not a judgment, Rev. Stat. secs. 5310, 5640. Hence it is evident that no light is thrown upon the right to contempt process for final alimony by its authorization for the preliminary allowance. By Rev. Stat. sec. 5310, a judgment is the final determination of rights. An order is a direction of the court not included in a judgment. By sec. 5640, disobedience of an *order* is a contempt. Now secs. 5696 and 5703 denominate the court's disposition of children after a divorce, an order; hence a literal construction of the divorce statutes would seem to authorize contempt proceedings in a case like this.

But we may well hesitate in view *first*, of the constitutional prohibition against imprisonment for debt; *second*, of the fact that the contempt process is a discretionary power, difficult of review, involving personal liberty, making the court an aggrieved party and thus multiplying its difficulties to preserve a passionless and indifferent attitude, and hence should not be lightly resorted to, or extended into doubtful territory; *third*, of the fact that in ordinary cases for money, the court's functions are finished by the rendition of judgment, and the executive officers of the law, the sheriff, etc., take charge of its enforcement; that is to say, the court does not collect its own judgments.

Now, to consider these objections in their order:

I. I am satisfied that this claim is not a debt within the constitutional guaranty against imprisonment for debt. Debts are owing to indi-

viduals, and they alone have a recognizable interest in them; but the duty to support a child is an obligation owing by the parent to the public or body politic generally, and enforceable by the latter, as witness the statutes punishing a parent's abandonment and neglect of children by fine or workhouse sentence, (Revised Statutes, secs. 2099*b* and 6984*a*), and see sec. 3110, specifically stating the duty. It is on this ground the constitution does not prevent a money judgment under the bastardy act being enforceable by imprisonment, not as a penalty or punishment for a crime, but because it is not a debt, but a duty that a man shall save the public from the charge of illegitimate children he has brought into the world, *Musser v. Stewart*, 21 Ohio St., 353; and such being the law as to illegitimate children, it follows *a fortiori* that the duty to support legitimate children is at least as sacred and to be enforced by the same sanctions.

Moreover, a debt arises out of a contract or tort, and hence is founded on the promise or act of the parties, but the duty to support children is imposed by the law itself, as a consequence of the relation, as one example of a function that seems to pervade all nature, animate or inanimate, that the mature shall guard the immature—the parent, the offspring.

Again, a debt is the residuum of a past and finished transaction, and of a certain defined amount, but this liability arises out of an unfinished omnipresent responsibility of changeable weight.

A debt can be discharged by a single act or acts, and if not discharged remains in force, even for and against the estates of the respective parties when dead; but the duty to support is not dischargeable, but continues through immaturity, then falls of itself, and moreover does not descend to or against the respective administrators.

For the above reasons, I do not think the allowance for support of the children bears any resemblance whatever to a debt, and the constitution, therefore, does not forbid imprisonment for its neglect.

II. Ought a court—even if it can—enforce the allowance by attachment for contempt?

It seems obvious on a cursory view that contempts are of at least two kinds. 1st, those misbehaviors, which obstruct the court in the administration of its ordinary functions as distinguished from willful refusals to do towards the opposite litigant what the court decrees. The contempt chapter is perhaps confined to acts interfering with the courts' freedom in trying to reach a judgment, and not with the rights decreed to belong to the opposite side. It is to such matters only that the chief dangers of abuse of discretion above mentioned appertain.

2d. But there is another jurisdiction which perhaps ought not be called contempts at all; under which chancery courts can enforce their own decrees which are final, and therefore not orders but judgments under Rev. Stat. sec. 5310, above cited; the most common of which are injunctions, cancellations, specific performances, rescissions. Yet obedience to these are duties owed to the other litigant parties, and not to the public, and disobedience does not obstruct the courts.

The enforcement of the allowance for children in this case falls under the latter of these classes and hence any restrictive principle arising from the dangers of extending the jurisdiction of contempts proper of the first class do not apply, and no doctrine belonging to contempts, therefore, interferes.

The above argument is greatly re-enforced by the nearly parallel remedy for collecting money judgments by our proceedings in aid of ex-

ecution for citing and examining the debtor, in which by statute, Rev. Stat., sec. 5841, disobedience of the order to pay over is punishable as a contempt; and the right so to punish is admitted, provided constitutional rights are not invaded, in the two cases upon that section, viz.: Union Bank of Rochester v. Union Bank of Saudusky, 6 Ohio St., 254, 261, and White v. Gates, 42 Ohio St., 109, and is squarely held by Judge Seney in *ex parte* Concklin, 3 Circ. Dec., 40.

III. Even if the constitution and the nature of contempt proceedings do not forbid their applying to a case like this, yet if there is a remedy by execution according to the ordinary course, then this use of the contempt process is unnecessary, and not being an ordinary remedy, should not be resorted to. But is it so? The remedy by proceedings in aid would often be as adequate as the one here sought, and perhaps should displace it if possible; but proceedings in aid only obtain after execution is issued and returned unsatisfied, and depend therefore upon whether an execution is an available remedy. But a weekly execution for a small installment of alimony is in view of the time, trouble and advance costs required, no remedy at all. Suppose the alimony is in arrears one week, as it is sure to be, or many weeks, as it often is, the clerk, before issuing execution, would have to hear *ex parte* evidence, and make a finding as to the amount really then overdue, and thus is required to perform a judicial act, and that too on *ex parte* proof. Hence, I think, neither execution, nor consequently its sequel, proceedings in aid, are adequate.

Now for the court to call upon the debtor to explain his non-payment of final alimony, is not only no extraordinary stretch of jurisdiction, but is little else than an adaption of the proceedings in aid with a difference in the burden of proof, in that being charged with neglect of a duty owing, as already shown, to the public, the presumption of willfulness requires him to show an affirmative excuse.

The decisions had, for a number of years, been divided and wholly uncertain (other cases cited in text books are simply miscited and do not apply at all) thus: Wightman v. Wightman, 45 Ill., 167, and Andrews v. Andrews, 69 Ill., 609, holding the final allowance not to be a debt, and the failure to pay a contempt within the general chancery powers of courts—*contra* Coughlin v. Elhert, 39 Mo., 285, holding the final allowance to be a debt, unless for a specific sum in possession. Lyon v. Lyon, 21 Conn., 185, that a lump sum out of the husband's present estate is not a debt, but a specific proportion, to conceal which is a contempt. North v. North, 39 Mich., 67, that if execution can be awarded, no contempt process will lie.

But within the last year or two the drift has set unmistakably in favor of sustaining the process, viz.: Murray v. Murray, 84 Ala., 363, and Lewis v. Lewis, 80 Ga., 706, both emphasizing the public nature of the duty; *Ex parte* Cottrell, 59 Cal., 417, that a monthly allowance is not a debt, because it is a continuous allotment for support, and the Supreme Court of Vermont within a few months in Andrew v. Andrew, 20 Atl. Rep., 817, that it is within the inherent power of courts to treat willful non-payment of final alimony as a contempt. See also under peculiar statutes Chase v. Ingalls, 97 Mass., 524, and 80 N. Y., 156, (aff'g 18 Hun., 466).

I think, therefore, courts may cite the defendant to show cause why he should not be punished for contempt—not for mere non-payment, as under the bastardy laws above noticed—but for willful non-payment.

Porter & Rendigs, for plaintiff.

Blackburn, Broh & McCoy, for defendant.



## COMMISSION SALES.

250

[Columbiana Common Pleas, 1891.]

ALLHOUSE V. JAMES H. BAUM.

Where a person is employed to make sales on commission the employer has a right to reject sales to persons he does not consider financially good, without being liable for commissions.

NICHOLS, J.

Defendant, was a manufacturer of C. C. ware at Wellsville, and the action was brought by plaintiff for commissions on sales made by him for defendant under a contract.

It appears that certain orders were rejected in which defendant thought the buyer's financial standing not such as to warrant sales on time. Defendant testified that he took the rating from Dun's report, used also by the East Liverpool potters. The court held that the proprietor has a right to reject any he considers not good; that was the course of business, though the contract was silent on the question. The proof tends to show that all were rejected whose credit was somewhat shaken; though some witnesses testified to having sold to these parties since satisfactorily. It was the duty of defendant to fill the orders, provided a reasonable man would have thought it right—acting in good faith, and the court was unable to say that they were unreasonably rejected, though defendant may have been more cautious than others. The court did not think plaintiff is entitled to credit on these items.

Another point was as to orders objected because of the assortment; the class of ware called "Thirds" predominating. "Thirds" is a defective ware of which the proportion in C. C. ware is about ten per cent. of the kiln, inspection not being close in C. C.

The court refused to allow these items also, the preponderance of evidence showing that the custom among manufacturers is to fill orders for thirds, if on hand; if not, the order is thrown aside; that in class C. C. being an accumulation, not a stock, the orders are kept but a short time; if cast aside no advice is sent to the agent.

Plaintiff received judgment for somewhat less than defendant had offered to settle for.

## MUNICIPAL CORPORATIONS.

250

[Columbiana Common Pleas, 1891.]

COPE V. WELLSVILLE (VIL.)

1. The statute providing when proceedings to enjoin the carrying out a contract may be instituted by a taxpayer, on behalf of the corporation, does not require written request to be first given to the solicitor, where there is no such officer.
2. Section 2702, Rev. Stat., requiring money to be provided before contract is entered into is not confined to any class of contracts, and hence applies to electric lighting.

NICHOLS, J.

An action was brought to restrain the village from carrying out of a contract with the electric light company. Defendant filed a demurrer claiming that the action was not properly instituted. Section 1777 provides for the city solicitor instituting proceedings. Section 1778 provides when proceedings may be instituted by a taxpayer. Defendant urged that the plaintiff had not made the written request to the solicitor. It appeared that the village of Wellsville at that time had no solicitor and on that point Judge Nichols said: "The statute does not reach villages that have no solicitor—it is as if there were no statutory provision, and provision that request be made does not apply where there is no solicitor." Judge Cox, of the circuit court, had been cited on saying: "The remedy is purely statutory." The error in the case upon which Judge Cox was passing was that suit was brought in behalf of the taxpayer himself, not in behalf of the corporation.

As to the second point in the demurrer that the petition does not set forth a cause of action, Judge Nichols held that he did not know where any court gets authority for the statement that section 2702 applies to one class of contracts only—ordinary, or improvement, or extraordinary expenditures. The petition alleges that the village was entering upon contract for the expenditure of money without the certificate required by sec. 2702, showing that the money was on hand. This the village had no power to do.

Demurrer was not sustained.

250

### FRAUDULENT CONVEYANCE.

[Columbiana Common Pleas, 1891.]

M. J. ESTERLY V. J. ESTERLY & Co.

The common pleas, on setting aside a conveyance as in fraud of creditors, can not sell and distribute, but must certify the judgment to the probate court, where an assignee can be appointed.

NICHOLS, J.

This was an action to quiet title to a homestead in Columbiana. The court set aside the conveyance as a clear case of deliberate attempt to defraud creditors. But the court refused to grant the order of sale, distribution, etc., saying: "This court can only set aside the conveyance and certify judgment to the probate court, where an assignee can be appointed under sec. 6344. This section makes a conveyance in fraud of creditors to operate to the benefit of all creditors." Up to 1859 we had no such statute, and many Supreme Court decisions were made under the old regime. Cited, 2 Cincinnati Court Reporter, 443; 21 Ohio St., 295; 42 Ohio Laws, 168.

**GUARDIAN AND WARD—JUDGMENT—LIBEL.****250**

[Superior Court of Cincinnati, General Term, January, 1891.]

**COMMERCIAL GAZETTE CO. V EZRA V. DEAN.**

1. To give jurisdiction to the probate court over a minor, so as to authorize the appointment of a guardian for him, such minor must at the time of the appointment have an actual or a constructive residence within the county.
2. All questions necessarily arising in the case becomes res adjudicata by the final order of appointment, which binds all the world until set aside or reversed by a direct proceeding for that purpose. *Schroyer v. Richmond*, 16 Ohio St., 455.
3. But the jurisdiction of the court is a matter into which inquiry may be made even in collateral proceedings where the record contains no finding of fact expressly showing jurisdiction. *Scobey v. Gano*, 35 Ohio St., 550.
4. An inquiry into the truth or falsity of statements made to the court, is not a collateral attack upon the finding of the court, and a decree of court cannot estop a person from asserting that in procuring the decree a false statement was made, or perjury committed, that statement inducing a wrong finding.

**MOCRE, J.**

The plaintiff, in error alleges that at Special Term, a verdict was rendered against it in favor of the defendant in error, in an action wherein the plaintiff at Special Term alleged in his petition, that prior to, March 18, 1888, plaintiff made application under oath for, and had been duly and legally appointed by the probate court of Lawrence county, O., guardian of the person and estate of Leslie McCune, aged about eleven years, minor child of Walter S. McCune, late of Lawrence county, O., deceased; that plaintiff had given bond, taken the statutory oath and entered upon the discharge of his duties as such guardian; that defendant, meaning the Commercial Gazette Company, on the eighteenth day of March, 1888, contriving and intending to injure and defame plaintiff, and to cause it to be believed that plaintiff had been guilty of perjury in his said application for letters of guardianship of said Leslie McCune; that said appointment was procured for the purpose of gaining a few hundred dollars belonging to said child; that plaintiff was an unfit person to be appointed, or to act as such guardian; that he was dishonest, that his family was degraded, and his home an unfit place for said child, and to defame, and to degrade him in other regards, published of and concerning plaintiff said application as guardian, of said Leslie McCune, and of and concerning him as such guardian the false, malicious and defamatory words following, to-wit:

"The sharpness of a woman's pen."

"Leslie McCune's mother writes to the guardian of her child."

Following these headlines is a copy of the letter referred to, which is set out in full in the petition. This letter is charged in the petition as having been published, and plaintiff alleges as its contents among other things the following, to-wit: "By employing the most miserable specimens of humanity you have possessed yourself of Leslie, having previously by infamously false statements procured an appointment as her guardian;" and the following innuendo is attached: Meaning thereby that plaintiff, in his application for appointment as guardian of said Leslie McCune, had sworn falsely and committed the crime of perjury."

The answer alleges that said publication was of a letter written to the plaintiff by Libbie Culbertson McCune, the mother of Leslie McCune, the child named therein; that said child was living with its mother in the city of New York in her custody and control, its father being dead; that prior to March 4, 1888, detectives were placed to watch over the mother and child. On said date certain persons, without the knowledge or consent of the mother, abducted the child and took it to Ironton, O., and delivered it to the plaintiff, thereby causing great pain, anxiety and distress to said mother and causing her to write the letter to the plaintiff set out in said petition; that these matters aroused great and legitimate public interest, became a matter of general discussion in the newspapers and elsewhere in which plaintiff participated, and that said publication was made in good faith without comment and in honest belief in the truth thereof.

The reply of the plaintiff asserts that the letter of Libbie Culbertson McCune, as set forth in the petition, was false, wicked and malicious in statement, as said defendant could have ascertained before making said publication, and that the father of said child had died, and the mother had abducted it from her home and from the custody of her legal guardian and from those who had cared for and maintained her for years prior thereto at Ironton, O., and said child was living with her mother in the city of New York only in pursuance of said abduction.

The principal contention of plaintiff in error is that the court erred in the refusal to charge the jury as requested by it, in the following language:

"If you find that prior to the time plaintiff was appointed by the probate court of Lawrence county, as guardian of Leslie McCune her father had died; that her mother was then a resident of the state of New York, and that Leslie was not then in the state of Ohio, said appointment as guardian was without jurisdiction on the part of the court making it, and invalid, and conferred no right on the plaintiff to retain the custody and control of Leslie McCune."

It is apparent from the record that Dean's connection with the matters which provoked the writing of the letter, the subject of this controversy, was brought about by his appointment as guardian of the estate and person of Leslie McCune. It was to his conduct under an alleged false and fraudulent appointment as guardian by the probate court of Lawrence county, that the alleged libelous language was addressed. Such appointment, therefore, becomes an important issue to the defense in this cause in mitigation of damages. The plaintiff in error complains that the court, in its refusal to charge as requested, denied the right of the plaintiff in error to question the authority of the probate court of Lawrence county, O., to make the appointment. The certified copy of the records of the probate court of said county consisted of the application of Ezra V. Dean, which recites that he applied for appointment as guardian of the person and estate of Leslie McCune, aged ten years, minor and heir of Walter S. McCune, deceased, and contained his affidavit, in which he states "that said minor is a resident of Lawrence county, aforesaid," etc. Thereupon letters of guardianship were issued in pursuance of an entry on the journal of said court of date January 20, 1888, and wherein it is simply recited that on motion, E. V. Dean was appointed guardian of Leslie McCune, minor child of Walter S. McCune, deceased, and that bond as such in the sum of \$100, with E. Nigh and P. F. Gillet sureties, was given.

The letters of guardianship and the entry of appointment refer in no way to the residence of the child.

The alleged error involves the domicile of the child at the time of the appointment of Dean as guardian.

Section 6254 of the Rev. Stat. provides that the probate court in each county shall, when necessary, appoint guardians of minors resident in such county.

Section 6255 permits a third person to be appointed guardian of the person and estate either.

(1) Because the father or mother are unsuitable.

(2) Or if the interest of the ward for any other cause will be promoted thereby.

Section 6264 refers to the rights of parents, and provides that the father of the minor, or if there be no father, the mother, if a suitable person, respectively, shall have the custody of the person and the control of the education of the minor.

Was Leslie McCune a resident of Lawrence county at the time of the appointment of Dean, to-wit: January 20, 1888? and to satisfactorily determine that question it must first appear that the right of the mother as a parent to the custody of the child was in some way taken away or lost. The record shows that the mother was a resident of New York, and that the child had been taken away from her while living with her there, by trickery, and brought to Ohio, and placed in the hands of Dean as guardian. If the child had been an abandoned one, and was found in the county of Lawrence, no question would probably be raised here. Leslie McCune was born in 1877, while the father and mother were living in Ironton. About 1880 Mrs. McCune separated from her husband and went with the child to Kansas City, and soon afterwards applied for divorce. In 1882, by agreement, the mother having an engagement to travel as a player, met the father at Columbus, O., and surrendered Leslie to him to be taken to the grandmother at Ironton, with whom the father resided, and there Leslie remained with the father until his death in 1887. Soon thereafter the mother sought to obtain the child by legal process, but meeting with resistance abandoned the same, and on January 19, 1888, she visited Ironton and forcibly carried the child away to her own home in the city of New York. The next day after this last mentioned occurrence, to-wit: January 20, 1888, Dean secured his appointment as guardian, and at his instance and connivance Leslie was taken by detectives from New York without the knowledge or consent of the mother, and returned to his (the said Dean's) custody as guardian, and he has at all times since denied the mother access to the child, or even information as to its whereabouts. This record disproves the statement that the mother had ever any intention of deserting her daughter. On the contrary, at the time of the appointment of the guardian she was struggling with all the intensity of a mother's affection for the custody of the child.

The jurisdiction of the probate court of Lawrence county to appoint Dean guardian depended upon the residence of the minor in that county. The statute excludes the idea of non-residence. If Leslie's parents were entitled to her custody, then upon the death of the father the domicile follows that of the mother. See Jacob's Law of Domicile, sec. 238, note 3. 1 Schouler's Domestic Relations, sec. 230, and Lamar v. Micon, 112 U. S., 470, where it is held that the father, and after his death the

widowed mother, is the natural guardian, and the person from whom the ward derives his domicile.

Our own Supreme Court has determined "that to give jurisdiction over a minor so as to authorize the appointment of a guardian for him, such minor must at the time of the appointment have an actual or constructive residence within the county." (See *Maxsom v. Sawyer*, 12 Ohio, 195). In that case it was shown that John Maxsom, having a legal settlement in the county of Geauga, and seized in fee of certain premises, died, leaving Polly Maxsom his widow, and a son about two or three years of age. The next year the widow intermarried with Peter Seeley, with whom she resided until the following winter, when she left Seeley, taking her minor son with her, and in 1831 intermarried with Hiram Niles, in the county of Ashtabula, with whom she lived in said county until 1835, Seeley, her lawful husband, being alive until 1843.

Prior to going to Ashtabula county and taking up her residence with Niles, the mother of the Maxsom minor bound him by indentures of apprenticeship to one Patterson, of the Commonwealth of Pennsylvania, and where and with said Patterson said minor lived continuously until the year 1840.

In the year 1835, at the April term of the court of common pleas of Ashtabula county, Hiram Niles, with whom the mother was then living, unlawfully, was appointed guardian of said minor until he should arrive at the age of fourteen years. At the November term following of said court said Niles, as guardian, made application for authority to sell the land of which said minor was seized, which authority was granted. Subsequently the title to the land in the purchaser (Sawyer), under the proceedings authorizing the sale, was questioned, and it was claimed as against the purchaser that Niles was not in fact guardian, because the minor was not at the time of the appointment a resident within the county of Ashtabula, and that the court had therefore no jurisdiction to make the appointment.

The court said, under sec. 1 of Swan's Statutes, 430, that it was essential at the time of the appointment that the minor should be within the county to confer jurisdiction, and if the record found the fact it could not be disproved in a collateral proceeding, but as it did not, it was open to inquiry. The question then before the court "was the minor then within the county at the time of the appointment?" The court, at page 209, says: "We suppose it to be law that the legal settlement of the husband draws to it the legal settlement of the wife. Peter Seeley had his place of legal settlement in Mentor, in Geauga county, in 1830, when his wife, the mother, taking with her the plaintiff's lessor, left him and went to the county of Ashtabula. She could acquire no legal settlement there, neither by her marriage with her adulterer, nor by her actual residence, because Peter Seeley, her lawful husband, is still living in Mentor, and his place of legal settlement is consequently hers. She did, however, actually reside in Ashtabula county for several years, and when this appointment of guardian was made. Did not her actual residence then draw to it the constructive residence of the plaintiff's lessor? We are of the opinion that it did. It is true she had by her covenant bound him to Patterson where his actual residence was. That covenant, however, was of no validity. It was the covenant of a *feme covert*, not sanctioned by the husband, and in which he had not joined. The father is the natural guardian of his minor children. On his death the mother is by nature guardian of those of tender years and

entitled to their custody and control. \* \* \* It seems, then, to us, to follow that as her covenant with Patterson was of no obligation, the mother of the plaintiff's lessor, he being of tender years, had the right at any moment to call him to her. Her actual was his constructive residence, and he was, therefore, when the guardian was appointed, constructively with his mother in the county of Ashtabula."

The effect of this decision is to make the residence of the mother the residence of the child, although absent from her domicile for the time being; and as deciding that the question as to the jurisdiction of the court making the appointment of guardian as open to inquiry, where the record of appointment is silent as to the place of residence of the minor.

Also see *Buchanau v. Roy's Lessee*, 2 Ohio St., 251, where it was held that "want of jurisdiction of the cause, equally as much as want of jurisdiction of the person, may render a judgment or decree void."

In *Spier v. Corll*, 33 Ohio St., 236, 243, the court, in passing upon the question whether there was error in excluding the exemplifications of the record and of judgments of another county offered in evidence, and which record contained an unauthorized entry of an appearance by an attorney in confession of judgment, said: "Assuming that the evidence offered and received fully showed a general authority conferred on the prothonotary by the laws of this state to enter judgment, as by confession on cognovits or upon warrants of attorney duly executed by a defendant, and purporting to authorize such confession of judgment, yet the jurisdiction of the tribunal entering a judgment in any particular case may always be inquired into, when such judgment is sought to be made the foundation for an action, either in a court of the state in which it was rendered, or of any other state. As was said in *Pennywit v. Foote*, 27 Ohio St., 600, 615: 'Every judgment depends for its force and validity upon the competency and authority of the tribunal which pronounces it, and may be assailed by showing a want or failure of jurisdiction over the subject-matter or the person, even though absolutely conclusive in other particulars.'" The court goes on to say: "And that in case it was held that 'neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, nor the acts of congress passed in pursuance thereof prevents an inquiry into the jurisdiction of a court by which a judgment offered in evidence was rendered.'"

It is insisted that the record of the probate court of Lawrence county precludes all inquiry into the matter of residence of the minor at the time of the appointment, and reference is made to the case of *Shroyer v. Richmond*, 16 Ohio St., 455, wherein it was held that "plenary and exclusive jurisdiction is given by law to the probate courts for the appointment of guardians, and jurisdiction attaches in any given case whenever application is duly made for its exercise, and the steps necessary to be taken for the appointment of a guardian are proceedings *in rem*, not *inter partes* or adversary in character, and the order of appointment made in the exercise of such jurisdiction binds the ward, and the presence of the ward is not necessary, unless, by reason of his right to choose a guardian for other cause, the statute so requires; and an order of probate court appointing a guardian made in the exercise of such jurisdiction can not be collaterally impeached; and when the record shows nothing to the contrary, it will be conclusively presumed in all collateral proceedings that such order was made upon full proof of all facts necessary to authorize it."

The court further says: "All questions necessarily arising in the case become *res adjudicata* by the final order of appointment, which binds all the world until set aside or reversed by a direct proceeding for that purpose."

In the case at bar the inquiry in no way questions the right of Dean to rely upon his appointment as guardian as between the parties interested therein, except in a proper proceeding. The position of the plaintiff in error relates to the personal conduct of Dean in matters growing out of such appointment.

In the case of *Scobey v. Gano*, 35 Ohio St., 550-553, the question was whether an administratrix of an estate in which a minor was interested was under the act of 1858 (1 S. & C., 671, sec. 3) ineligible to be appointed guardian of the estate of such minor, the minor having become the resident of another county, and the probate court of that county having power to appoint another guardian, although no order vacating the former appointment had been made, and in the record of the appointment of the guardian, facts which would disqualify the person appointed did not appear.

Judge Okey says in the opinion of the court at page 553: "Clearly, as it seems to us, the facts show that Amanda's (the second guardian) appointment was within the prohibition of the statute, however it may be construed; but the question remains whether such appointment can be regarded as void in a collateral proceeding. We fully recognize the rule stated in the well considered case of *Shroyer v. Richmond*, 16 Ohio St., 455, as to the character of the jurisdiction of the probate courts, and the verity which is imparted by their records; but it does not conflict with another well established general rule, that the jurisdiction of a court is a matter into which inquiry may be made even in collateral proceedings where the record contains no finding of facts expressly showing jurisdiction, and cites *Maxsom v. Sawyer*, 12 Ohio, 195; *Moore v. Starks*, 1 Ohio St., 369; *Buchanan v. Roy*, 2 Ohio St., 252; *Fowler v. Whiteman*, 2 Ohio St., 270; *Callen v. Ellison*, 13 Ohio St., 446; *Pennywit v. Foote*, 27 Ohio St., 615; *Speir v. Corll*, 33 Ohio St., 236.

The lengthy reference to cases involving inquiries in collateral proceedings in relation to the jurisdiction of courts of record is not made in the nature of a material inquiry, whether the professed determination of the rights of parties is what it assumes to be, or whether the record is so much waste paper, but as the plaintiff relies upon his appointment of guardian to escape the charge of kidnapping, and it is of the falsity of the statement that he was guilty of perjury in making application for appointment, and was falsely and fraudulently appointed guardian of Leslie McCune that he complains, the defendant is granted the privileges of not attacking collaterally the record (for it is not a party to it), but of asserting against Dean as an individual that the statements made by him before the probate court were untrue, and that the judgment of the court under color of which the plaintiff acted is founded upon falsehood.

The record in this suit shows that Leslie McCune was constructively a resident of the city of New York, the domicile of her mother, at the time of the appointment of Dean as guardian, and that the appointment was obtained by falsely representing to the court that the minor was a resident of Lawrence county, and, further, the record shows that the appointment is *coram non judice*. So far as the world is concerned and this controversy, Dean is still the guardian of the person and estate of Leslie McCune. That is not the issue here. It is, did the plaintiff



obtain his appointment by a false showing? If he did, the reference to it by this defendant and its assertion of the truth of the charge, is its privilege. The jury were entitled to pass upon that question, and it was error in the court to refuse the presentation of the question in the form set forth in the special charges requested by the defendant.

We can hardly see how a person can set up a decree of a court to estop another from asserting that in procuring the decree a false statement was made, and that a statement inducing a wrong finding.

Judgment reversed and new trial ordered.

SAYLER, J., concurs; HUNT, J., dissents.

Thornton M. Hinkle, for Commercial Gazette Company.

J. F. Follett and T. H. Kelly, for Dean.

## MECHANIC'S LIEN LAW.

277

[Hamilton Common Pleas, 1891.]

\*ALBERT TOLLHEIS V. W. D. JAMES ET AL.

1. The act should be liberally construed to protect an owner who has in good faith made payments before any subcontractor's notice has been served on them.
2. R. S. sec. 3194, requiring the owner, on due notice, to detain payments for the security of claims that may intervene before the next payment is due or within ten days thereafter, should be construed to require him to hold an unpaid but overdue payment for ten days after the first notice.
3. A subcontractor waives his right to stop the fund by not giving notice within sixty days from performance of the claimant's work.
4. An assignment by the contractor of an unaccepted order by him on the owner, given to a prior creditor, cannot prejudice the subcontractor's right to stop the fund, and reaches only the balance after they are paid.

SHRODER, J.

James agreed to build a house for Tollheis to be paid for when completed. Part payments were made prior to September 8, 1890. During the progress of the work, on September 8, 1890, James gave to the Sowles Lumber Co. an order on Tollheis for \$500 on account of his contract. Tollheis neither accepted the order nor promised to pay it; he only took notice of its existence.

The order was given for a pre-existing indebtedness for lumber, of which a part only went into the house. John Griem & Son did the plastering contracted for by James; Geisinger & Bros., the painting and Evans R. Parry, the plumbing. Upon the completion of their work, September 15, 1890, Griem & Son filed with Tollheis their sworn account under the mechanic's lien law; and Parry and Geisinger filed theirs respectively on December 30, 1890, and January 20, 1891, each within sixty days after the performance of their work.

The house was completed and accepted December 1, 1890, when Tollheis had remaining on his hands a balance due to James, which sum, being insufficient to pay in full the above named party-claimants, he brought into court, by his petition in interpleader, filed December 23, 1890, praying for distribution among them according to law and equity. The Sowles Lumber Co. claims priority by virtue of the order it holds, and the several sub-contractors assert a like claim by virtue of their

\*For opinion of the circuit court upon appeal, see 4 Circ. Dec., 646.

notices filed with Tollheis under the mechanics' lien law as amended March 5, 1887. (84 O. L., 48.) The court held:

1. That under the circumstances the Sowles Lumber Company could not hold Tollheis as upon an implied acceptance of agreement to accept *Sherwin v. Brigham*, (39 Ohio St., 137); that the company was the equitable assignee of the debt due and to accrue to James from Tollheis under the contract, on and after September 8, 1890, to the extent of \$500, and was entitled to the balance which remained in the latter's hands, on December 1, 1890, unless the sub-claimants by reason of their notices acquired a priority under the act of March 5, 1887.

2. That in determining the sub-claimant's right this act ought to be liberally construed so as to accomplish its purpose of giving a security to laborers and material men for their claims, and of affording indemnity to property owners who in good faith made payments due under contracts, before notice of any of the claims had been filed with them. *Bullock v. Horn* 44 Ohio St., 420-429.

3. That it is the purpose of the act to prescribe the rights and priorities, as among themselves, of the owner, contractor, sub-contractor, laborers and material men.

(a) As between owner and the claimants, described in the statute, it releases him from further payments, if he makes actual payment, when due, to the contractor or his assignee before notice of any claim under the statute. (b) As between principal contractor and such claimants, the debt due to him from the owner will not be bound as security for any claim, of which notice has not been properly filed with the owner within sixty days from the performance of the claimant's work. The right to a lien or security is waived by the delay after sixty days. (c) As among the described claimants, the owner, for the security of intervening claimants, must retain the fund in his hands, after first notice is filed, for a period of ten days after payment is due; or, if past due, for ten days after first notice is filed. This construction is in conformity with the intent and purpose of the statute. The primary object of the statute is to subject the principal contractor's claim to the payment of his indebtedness to sub-claimants for work done and material furnished under his contract; and a different construction, without being necessary for the indemnity of the owner, would diminish the security of the sub-claimants for the benefit of the principal contractor, who, of all the parties referred to in its provisions, is least entitled to such discrimination in his favor. The construction here adopted would give full effect to the sixty days limitation, which is prescribed for his benefit as against dilatory claimants without giving him an advantage over vigilant claimants inconsistent with the purpose and object of the law.

4. That the claims of the assignee or garnisheeing creditors of the contractor's dues, are subject under the statute to those of the sub-claimants acquired by the prescribed notices (Rev. Stat., sec. 3203; *Sherwin v. Brigham*, *supra*).

In accordance with these principles, the court ordered the fund to be distributed to the payment in full of the claims of Griem & Son, Geissinger Bros. and Parry, and the residue, if any, to the Sowles Lumber Company.

Goss & Cohen, for plaintiff and Parry.

Huntington & Holmes, for Geissinger.

David Davis, for Griem.

Granger & Hunt, for Sowles Lumber Co.

## LEGACIES.

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[Franklin Common Pleas.]

\* SUSAN DEAN V. WILLIAM NICHOLAS ET AL.

SAME V. CASPER LOWENSTEIN ET AL.

1. A general direction, attached to a power of sale, for re-investment of the proceeds in other lands, where the re-investment is to be made by the donee of the power, and the details thereof as to time, place, etc., are left to his discretion, does not charge the lands to which the power extends with liability for such re-investment, or affect the title to the lands in the possession of a purchaser from the donee of the power. Nor is the title to the lands, in such case, affected by an express provision, that "the purchaser shall be answerable for the appropriation of the proceeds in manner aforesaid."
2. Legacies may be a charge upon real estate by implication, such implication depending upon the intent of the testator, as gathered from the whole will. The payment of legacies so charged upon real estate, out of the proceeds arising upon a sale of such real estate, is a proper application of those proceeds.
3. Legatees, and others directly interested in the administration of an estate, are presumed to know the course of administration, as shown by records duly made in the proper court, and after a great lapse of time, (in this case more than forty years), without their having objected thereto, they will be held as assenting to such course of administration. A fortiori, legatees, who have received payment of their legacies through such course of administration, are estopped from objecting to sales of real estate from which the money to pay their legacies was obtained by the executor, and from which alone it could be obtained, even though such sales were irregularly made.
4. Plaintiffs in these actions, having joined in another action and recovered therein, by decree of the court, certain lands, upon the theory that the same were purchased, and title thereto taken, in accordance with the provisions of the will now in question, and the requirement for re-investment in said will contained, are estopped from denying the regularity of such re-investment, or any fact essential to the validity of the same.

PUGH, J.

The equities of the plaintiffs in these cases, their right to relief, if any they have, depends, in part, upon the true construction of the sixth item of the last will and testament of John Brickell, Sr., deceased. Barring this sixth item, the will is not of the kaleidoscopic class, as most wills are; it reads and means the same every day of the year.

The sixth item expressly imposed upon the person who might buy the real estate in dispute of testator's son John, the duty of seeing to the appropriation of the purchase-money to the purchase of other lands, and to the vesting of the title thereto in the names of the latter's children, who might be living at his death.

It is difficult to dismiss the impression that these cases should be decided in favor of the defendants, upon the hypothesis that Lincoln Goodale, the purchaser, was not obliged to obey that direction.

By the fourth item of the will, the testator devised a life estate in this and other land which will be mentioned, to his son John, and the remainder in fee to those of John's children who might be living at their father's death.

By the sixth item, the power to sell the land in fee was conferred upon the life tenant, but it was not an unlimited power of sale, which would have enlarged, by implication, the life estate into a fee. It was conditioned, upon these contingencies or events.—First, that John should "think proper to remove from this quarter of the country;" second, that he should invest the proceeds of the sale in other real estate, the title of which was to be taken in the names of his children who might survive him, and the rents and profits of which John was to enjoy dur-

\*This case was heard by the circuit court, on appeal, and a similar judgment entered; opinion 3 Circ. Dec., 597.

[\*About twenty other cases involving the same questions were heard at the same time, and are now decided.]

ing his natural life. And then the purchaser was made answerable for the appropriation of the purchase-money as the will ordained.

It was argued that the power of sale was limited to the sale of John's life estate. But that conclusion can only be reached by emasculating the sixth item. The important words "in fee," would have to be expunged from the item, which would not be allowable. John had the right to sell his life estate without express power, the *ius disponendi* being an incident to the estate. For that purpose an express power of sale would have been a supererogation.

If the obligation to attend to the application of the purchase-money were not expressly enjoined in the will, the conclusion would be inevitable that there was no such duty resting upon the purchaser.

But did this provision require the performance of any greater obligation than equity would have exacted from him, in the absence of such a provision? It used terms which were familiar in equity law, and which were limited in their signification. It is questionable whether these terms should be expounded to require more of the purchaser than equity would have demanded of him, without such a requirement in the will.

What did equity demand? The doctrine is that, when a trustee has a power to sell land and re-invest the proceeds, the land in the hands of the purchaser is subjected to a constructive trust, which compels the purchaser to look after the proper application of the purchase-money. The practical inconvenience and hardship of the rule has been frequently noticed by courts. It has been vigorously and hotly antagonized in several states.

In England, and in several of our states, it has been abrogated by statutes. Judge Story says "eminent jurists and judges" have lamented the existence of the rule. Warvelle, in his work on Vendors, observes that the rule was formerly "very intricate and profound," "and abounded in nice distinctions and subtle gradations, and is only administered in cases of fraud, in which the purchaser was a participant." Butler in a note to Coke upon Littleton, says, that the rule has been "more productive of inconvenience than good; that it has retarded and impeded the progress of business; that it has involved parties in litigation, and is a useless expense."

The hardship of the rule being thus recognized, a limitation was attached to it, long ago, by Lord Thurlow, I believe. By his master hand the keynote was struck and echoed by his successors, and the harmony on the subject among the authorities has been controlled by it. The rule is limited to cases where the trust is special, and the sale is for a special purpose, or for the satisfaction of a particular debt or debts. Where the trust is general and undefined in its character, the purchaser does not owe the duty to see that the purchase-money is properly applied.

Feideman's Real Property, sec. 516; *Duffy v. Calvert*, 6 Gill, 488; *Spaulding v. Shillman*, 1 Vern., 301; Warvelle's Vendors, 577.

The rationale of the unlimited rule was, that he who buys with notice of a trust buys subject to the trust. The obligation does not exist when an investment is to be made which involves the exercise of discretion, skill and judgment by the trustee, or when the fund is designed for the use of a person not in being, or not competent to bind himself; or when it is to pay creditors, generally, whose names, and the amounts of whose claims are not stated. Such trusts are general and undefined. When the *cestui que* trust is yet unborn, it would be manifestly inequitable to require the purchaser to see to the application of the purchase-money.

Trusts, or power trusts, for sale and re-investment, are within the purview of the rule as thus limited; because every investment implies the exercise of discretion in the sale and choice of the security, or other property; and because it must be necessarily delayed till a proper opportunity presents itself; and hence it has been adjudged that where trustee is authorized to sell and re-invest for the same purposes, the purchaser will be discharged from responsibility for the application of the purchase-money by the receipt of the trustee.

Without this qualification of the rule, it would have nothing to commend it to equity. It would embarrass and clog the sale of real estate.

This view is in harmony with the fundamental conceptions of American jurisprudence touching real estate. The tendency is to abolish the distinctions between real and personal property, by which the former is made superior to the latter.

The power-trust conferred on John Brickell was obviously a general one in its character. The reasons for this are plain.

(1.) There was no time prescribed when he should "think proper to remove from this quarter of the country." It was left to his judgment to determine.

(2.) The time when, after the sale, and the place where, he should re-invest the proceeds, were not determined by the will. It was competent for him to do it in one year, or ten years, or in any other period, and in the adjacent township, or county or state, or in any other state, and perhaps, in any foreign country. Suppose he had chosen to re-invest the proceeds in California? If the contention of plaintiff is sound, the purchaser would have been obliged to have gone with him in order to see that they were invested in obedience to the command of the will.

(3.) The title to the land so bought was required to be vested in the names of persons who might be then unborn.

These features of the trust clearly made it a general one; and it is questionable whether Goodale was bound to see to the application of the purchase-money, notwithstanding the will required it.

Two questions were argued, which, so far as this court is concerned, were settled in the case of Black, Administrator v. Stickle et al., to which the plaintiffs were parties. It was argued that the fee devised to John Brickell's children was a vested remainder. If that was the true construction of the will, these cases, as Judge Harrison suggested, could, and would, be speedily decided against the plaintiffs. A testamentary gift which has once vested in the donee will go to his heirs, or personal representatives, should he die before he is placed in actual possession of it.

The converse of the rule is, that, if the donee should die before the gift can vest at all, it will lapse. If the donee dies before the will takes effect, the gift will lapse. This is also true of a contingent devise or legacy. If the devisee or legatee dies after the will is made, and after the death of the testator, but before the happening of the event upon which the gift is to become absolute, the devise or legacy lapses. Whether a legacy or devise is vested or contingent depends upon the testator's intention expressed in the will.

If a legacy is payable at a given time, certain to arrive, the interest in it will vest at the death of the testator; and if the legatee dies before it is paid him, it will go to his personal representatives he having died intestate. But if the legacy is given at a certain age, "or if, when, in case, or provided the legatee attains such age, or any future period; or, if time is annexed to the substance of the gift, so that it depends on his being alive at the time fixed, it is a contingent legacy."

In short a legacy is vested, if the contingency is annexed to its payment, and it is contingent, if the contingency is annexed to the gift itself. Exactly the same tests determine whether a remainder in real estate is vested or contingent.

These rules being applied to these cases, the remainder in John Brickell, Jr.'s, children was obviously contingent.

It is true the English law favors the vesting of devises and legacies, at the death of the testator. There the will speaks always as of the death of the testator, unless a contrary intention is clearly expressed. Gifts to a class must be ascertained at the death of the testator. A devise to a parent for life and remainder to his children creates a vested remainder in the latter living at the death of the testator, which opens to let in after-born children; and if there is no child living at the death of the testator, an executory devise is created which vests in the children as they come into being. And the same rules apply when the devise over is to the children of a third person. Theoretically, these rules are recognized in this country. But American courts have engrafted exceptions upon them in cases like these under consideration. Therefore, when a devise is made to a class of persons which may be subject to fluctuations by increase or diminution in numbers, in consequence of future births and deaths, and the distribution or division is to occur at the happening of a future event, or at a subsequent period, the interests vest in such persons only, as, at the time, fall within the description of persons constituting such class. The intention of the testator is based upon the single fact that the distribution or division is postponed by the will to that time.

In the Brickell will it was substantially provided, that the division of the remainder should occur at, or after, the death of John, and among his children, who should survive him.

The decision in *Gilpin v. Williams et al.*, 25 Ohio St., 283, sustains this conclusion.

From the death of John Brickell, Sr., to the death of John Brickell, Jr., the fee in the latter's moiety of this land, and in that substituted for it, was in the residuary devisees of John Brickell, Sr.

What disposition was made of the proceeds of the sale of this land? is the next question. The plaintiffs charge that they were not applied as the will di-

rected; that they were misapplied; and that their misapplication was a fraud upon them, in which Lincoln Goodale participated.

The defendants deny this charge, and claim that most of the proceeds were used to pay the legacies given by the will, and that the residue, or its equivalent, was invested in a tract of land in Mifflin township, in conformity with the requirements of the will.

The primary fund for the payment of the debts and legacies is the personal estate. When a legacy is given in a will, and it is not provided who shall pay it, or how it shall be paid, the presumption of law is, that it was intended to be paid out of the personal estate only. If that was insufficient, it would lapse. (*Geiger v. Worth*, 17 Ohio St., 564.) But the real estate may be charged with the payment of debts and legacies, when the testator intended it to be so. The intention may be expressly declared in the will, or it may be inferred from the language used, or from the general dispositions made in the will,—“from the mode in which the real and personal property are donated.” 3 *Pomeroy's Eq. Juris.*, sec. 1247; *Reynolds v. Reynolds, Exrs.*, 16 N. Y., 257; *Lupton v. Lupton*, 2 *John Ch.*, 614; *Eaverson's Appeal*, 84 Penn. St., 172.

In England there are several definitely settled rules for determining when debts and legacies are, by implication, charged, for their payment, upon the real estate. One is, when a gift of legacies, or a direction to pay debts, is succeeded by a gift of the residue of the real and personal estate; that is construed to evince an intention on the part of the testator, that the legacies and debts shall be paid out of the real estate, as well as the personal estate; because, if this were not true, there would be no residue of the real estate. They thus become a charge on the residue of the real estate.

*Cole v. Turner*, 4 *Russ.*, 376; *Greville v. Browne*, 7 *H. L. Cas.*, 689; *Wheeler v. Howell*, 3 *K. & J.*, 198; *Gyett v. Williams*, 2 *J. & H.*, 429; *In re Beler's Trust*, *L. R.* 5 *Ch. D.*, 162. *In re Brooke, L. R.*, 3 *Ch. D.*, 630; *Hassell v. Hassell*, 2 *Dick.*, 527; *Bench v. Biles*, 4 *Maud.*, 187; *Kidney v. Coursemaker*, 1 *Ves. Jr.*, 4-6.

But under this rule, property specifically devised, or bequeathed, is not charged with the legacies, and cannot be appropriated to pay them.

*Castle v. Gilbert, L. R.*, 16 *Eq.*, 530.

In some of the states the rule has not been accepted; in others it has been adopted without any qualification whatever. In the highest court of New York, no decision on the question has been rendered. In her lower courts there is discord, which is not at all phenomenal. The Supreme Court of the U. S. has given the great weight of its authority to the support of the rule. *Lewis v. Darling*, 16 *How.*, 1.

The leading law state, Mass., has done likewise. *Wilcox v. Wilcox*, 13 *Allen*, 252; *Smith v. Fellows*, 131 *Mass.*, 230; *Adams v. Brockett*, 5 *Met. (Mass.)*, 280.

Our own Supreme Court adopted the rule without modification, in *Moore v. Beckwith*, 14 *Ohio St.*, 129, and in *Clyde v. Simpson*, 4 *Ohio St.*, 455. *Pennsylvania*, *Mississippi*, *North Carolina*, *Rhode Island* *New Jersey* and *Virginia* have also accepted it. *Davies' Appeal*, 83 *Pa. St.*, 378; *Robinson v. McIver*, 63 *N. C.*, 426; *Hart v. Williams*, 77 *N. C.*, 426; *Knotts v. Bickey*, 54 *Miss.*, 235; ——— *v. Clapp*, 10 *R. I.*, 543; *McLanahan v. Wyant*, 1 *Pa.*, 96; *Downman v. Rust*, 6 *Rand.*, 587; *Whitman v. North*, 6 *Bin.*, 395.

The philosophy of the rule is thus expressed by Judge *Folger*, in *Hoyt v. Hoyt*, 85 *N. Y.*, 142: “Hence, when, from the provisions of a will prior to the gift of legacies, it is seen that the testator must have known that he had already so far disposed of his personalty as that there would not be enough left to pay the legacies, it is reasoned that the bare fact of giving a legacy indicates an intention that it shall be met from the real estate.”

This rule applies to the cases at bar. In the *Brickell* will, there was a direction to pay debts. There were two general pecuniary legacies given to a daughter and granddaughter. Specific bequests were given to *Cyrus* and *John*, which, under the rule, could not be appropriated to the payment of legacies. There was a specific devise of real estate to *John Brickell* in fee, which could not be diverted to pay legacies.

There was a devise of a fee to *Cyrus* in a moiety of the residue of the real estate, and there was a devise of a life estate in the other moiety to *John*, and of the remainder in fee to that moiety to his children. Then, and lastly, there was a gift of all the residue of real and personal estate to *Cyrus*, *John*, *Susan* and *Evaline*. The evidence shows that there was not sufficient personal estate to pay debts and legacies. The specific legacies to *John* and *Cyrus*, and the specific devise to *John* being exempt, it was competent to subject the residue of the real estate to sale for the payment of legacies. There was also a provision in the will that the

legacies should be paid by the executor as soon as he could convert any part of the estate into money, without sacrificing it, in his opinion. It was proved, not positively, but circumstantially, that most of the proceeds of the land in dispute were applied to the payment of debts and legacies. Only \$128.00 and a fraction were so applied. Of this, therefore, it can not be found, that there was any misapplication.

Moreover, the action of this court, settling the accounts of the executor, in the exercise of its probate jurisdiction, can not be challenged collaterally. The residuary devisees were presumed—conclusively presumed—by law, to know what the provisions of the will were, and that in a certain contingency, they would be entitled to the fee in John's moiety. They had a right to challenge the proceedings of the executor. They neglected it. It is too late now for them, or those claiming under them, to impugn the validity of his acts, and especially his settlement.

Again; it was claimed, by plaintiffs, that before the executor could apply the proceeds of the sale to the payment of legacies, he should have had the license of some court of probate, or equity, to sell it, and then, that he should himself have sold it; and at the same time they emphasized the claim that the executor made no sale of it; and that the recital in his deed to Goodale was fraudulent and a snare.

If the executor did not sell the land, there was no need for a previous order of court to sell. If he did sell it, the court is of opinion that the will bestowed abundant power on him to sell it, and an order of court was not needful. The question is not about the validity of the sale, but about the disposition of the proceeds. I assume that the sale was made by John Brickell, and not by the executor. The executor, however, was entitled to have the lands sold to pay the legacies. He could have done that himself, or he could have obtained an order of court for the purpose. It was proved that most of the proceeds of the sale were applied to the payment of legacies. There was no legal impediment to John Brickell voluntarily paying over, or causing to be paid over, to the executor, part or all the money arising from the sale, to be applied to that purpose; nor was there any to the executor receiving it for that purpose. Indeed a conclusion that it was other than an unimpeachable legal proceeding, on their part, would proceed from extreme inaccuracy of legal perception. A court of equity will consider that as done which ought to have been done. It will look behind the external forms of things and "consider the real facts, the beneficial truth."

If the executor had applied to court for an order to sell the property, and had sold pursuant thereto, or if he had sold under the authority derived from the will, the same result would have been produced that was effected in the irregular way.

There is, therefore, no reason for a court of equity to declare the proceedings void.

There is another fact which must be considered. Evaline Brickell, under whom the plaintiffs claim, and Susan Dean, one of the plaintiffs, received the payment of their legacies, in part, out of the proceeds of the sale to Goodale. The price which Goodale paid was fair and adequate. It would be inequitable to give them the land also. In a court of equity this fact must be weighed against them.

The interests of the "four helpless children" of John Brickell, Jr., are not involved in these cases. It is not legally true that the plaintiffs stand in their places, as their successors. If plaintiffs' hypothesis be sound, they have their standing in these cases, and in this court, because one of them is a residuary devisee under the will, and the others and that one are heirs of the residuary devisees, who are dead. And if they are entitled to recover, it would be on their relationship to the will and the residuary devisees. Hence the frequent allusions to the "four helpless children" of John Brickell, Jr., and the implications that these plaintiffs are standing in their shoes, were legal anachronisms.

The next question is, was the money which John Brickell received of the proceeds of the sale, invested by him in conformity with the requirements of the will? It was proved that John, in conjunction with his brother Cyrus, acquired a tract of land in Miffin township. Most of it was paid for by the exchange of the tract of land near the penitentiary. After deducting the lot given to John, the undivided moiety of that tract belonged to his children. There was \$1,000 in money which had to be, and was, paid.

It was not proved by positive evidence who paid the \$1,000. It was proved to have been paid; and it is not extravagant to infer that John paid one-half. It is a presumption which it is proper to draw. One-half of it exceeded the money which he realized from the land in dispute. It was not essential that he should have invested the identical money which he thus received. If he invested its equivalent, he complied with the conditions of the will, and the purchaser was

thereby discharged. From the facts and circumstances proved, the court is entirely satisfied that was done.

It was contended that the purchase of the Mifflin township land, and the investment of the money in it, was not in accordance with the spirit or letter of the will. But that point has been settled against the plaintiffs. In the case of Black, Administrator, v. Stickle et al., upon their contention, or at least at their instance, the court held that John Brickell did execute the power, by purchasing the Mifflin township land, and investing therein the proceeds of lands sold under the will.

The plaintiffs have no right, in good conscience, to challenge that decision here. It cannot be done. The law of estoppel is founded upon reason and justice. The acts and conduct of persons are binding on, conclusive against, them, whenever it should be so. They will not be permitted to make any assertion to the contrary. In this they made the law for themselves. By their acts and conduct, in the case mentioned, the plaintiffs made the law for this case upon this point. The court will not and cannot review its decision in that case made in their favor, and at their instance. Besides, I am convinced the conclusion was sound.

The other defenses made were not considered.

Decree for resisting defendants, in each case, and petitions of plaintiffs dismissed at their costs.

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## AGENCY.

[Superior Court of Cincinnati, Special Term, February, 1890.]

## ANTIOCH COLLEGE V. THOS. P. CARROLL.

1. In a loan upon real estate security, the fact that the borrower pays the fee for examining the title, does not make the attorney rendering the service the agent of the borrower in the transaction.
2. Authority to collect the principal debt, evidenced by a note is not implied from authority to make the loan and collect the interest unless the agent has possession of the principal note when due.
3. The maker of a principal note who, relying on the statement of the lender's agent in making the loan and collecting interest that he has the principal note and authority to collect it, pays to such agent an amount equal to the debt, without requiring the production of the note, does so at his peril, and cannot charge the lender with the payment, if it, in fact, appears that such agent did not have either the note or authority to collect the same, and that the money paid never came into the lender's hands.

This is an action to foreclose a mortgage given by the defendant upon three pieces of real estate, to Frank Evans, treasurer of the plaintiff's board of trustees, to secure a note for \$6,000 between the same parties, dated September 20, 1884, due in two years from date, and extended until September 20, 1887. The defense is payment. The case is one of many, involving the fraudulent acts of the late Charles A. Kebler, and raising the usual question who must bear the loss of his thefts. The facts are substantially as follows: In the year 1884, Carroll was the owner of a livery stable on Mt. Auburn, with whom Charles A. Kebler stabled his horses. Carroll intended building a new brick stable, and Kebler, learning of this, besought him to borrow the necessary money of Antioch College, through him, stating as an inducement that he might reduce the debt in partial payments from time to time, and that the expense of getting the money would be nothing. At this time, John Kebler, the father and law partner of Charles, was one of the trustees of Antioch College. Frank Evans was another trustee, and its treasurer. Antioch College was a sectarian college at Yellow Springs in



this state, the conduct of whose affairs, financial and otherwise, was placed in a board of trustees. The funds of the college were in the custody of a regularly elected treasurer. The resident members of the board in Cincinnati constituted an executive committee which, by the rules of the board, had general supervisory power over the finances of the college. As a matter of fact, this committee did little with respect to investments, except to hear the report of them after they had been made by the treasurer. It was the well known practice to entrust the entire discretion in the placing and collecting of loans to the treasurer. The treasurer had some years before given bond for the performance of his duties, but the evidence seems to show that no bond was given to cover the period covered by the transactions in this case. The treasurer received no salary. The amount of money entrusted to him for investment was in the neighborhood of \$50,000. At the time of the Carroll loan, a number of investments in mortgage securities for the college had been made to various persons through the firm of Kebler, Kebler & Roelker. When the Carroll loan was spoken of, Evans told Kebler that he had not the full amount on hand, and that he could only pay it to Carroll in installments. This was communicated by Kebler to Carroll, who was satisfied to receive the money in this way, because he needed it only as the building progressed. On September 9, 1884, Evans gave Kebler \$700 to invest in the Carroll loan. On September 11, Kebler, as attorney for Evans, treasurer, collected on a mortgage loan overdue \$3,358.35. On or about September 20, Kebler gave Carroll \$1,500 as the first installment, and either a day before or a day after, took from him the mortgage and the note, which is the subject of this action. With the principal note, Carroll executed also four interest notes for \$180 each, due six, twelve, eighteen and twenty-four months after date. Neither the notes nor the mortgage gave Carroll any right to make payments on them, before maturity. Carroll went to the office of Kebler, Kebler & Roelker to get the first \$1,500 above referred to, and while waiting for Charles Kebler, was told by John Kebler, who was then a trustee of Antioch College, that his son Charles had all to do with college money and college affairs. On October 31, 1884, Evans gave Kebler \$1,590, on December 31, \$1,000; on October 16, 1884, by return of Kebler's individual note \$505.80, and on January 16, \$246.60. Evans charged these items to Kebler, Kebler & Roelker, and credited the same firm with \$100 as a fee for services; with \$750.75 for a payment by Kebler, Kebler & Roelker on account of the college; with \$550 cash paid Evans by the firm, and with \$6,000 paid by the firm to Carroll. Thus, as between Evans & Kebler, the Carroll loan was fully placed January 16, 1885. Kebler's payments to Carroll covered a longer period, and never reached the full amount of \$6,000, lacking \$125 of that figure. The last payment was between January and March, 1885. In March, 1885, Carroll paid the first interest note for \$180, and received it from Kebler with the word "paid" written across it in Kebler's handwriting. At the time Carroll gave the note and mortgage, he received the following paper from Kebler:

"Cincinnati, September 20, 1884.

"T. P. Carroll has borrowed of Frank Evans, treasurer, through us, \$6,000, and giving notes of the date secured by mortgage. Said Carroll is to take the money as he needs it, but is only to pay interest on the same as he receives it. The dates and amounts as he receives it are put on this paper.

"Kebler, Kebler & Roelker."

1884—September 20, paid on account.....	\$1,500
1884—October 4, paid on account.....	600
1884—October 10 paid on account.....	150
1884—October 11, paid on account.....	500

In September or October of 1885, Carroll paid the twelve months' interest note for \$180.00, and received it from Kebler marked "paid." Carroll made no further payments on account of interest. On the eighth of October, 1885, Carroll gave Kebler \$1,000, and on March 3, 1886, \$500, as partial payments on the note of \$6,000 for which he received the following receipts:

"Cincinnati, October 8, 1885.

"Thomas P. Carroll borrowed of Antioch College the sum of six thousand dollars, for which he has given his note, and semiannual interest notes for \$180.00 each.

"He has this day handed to me the sum of one thousand dollars as a credit on said note, and by reason of which only five thousand dollars will have to be paid by him in payment of the principal, and \$150.00 interest instead of \$180 for each interest note as they respectively become due.

"Charles A. Kebler.

"1886—March 3. Also \$500 on account as per above, leaving interest \$135.00 every six months."

On August 17, 1886, Carroll paid Kebler another \$1,000 and got the following receipt:

"Cincinnati, August 17, 1886.

"Received of T. P. Carroll one thousand dollars, to be applied in part payment of his \$6,000.00 mortgage note on account of which \$1,500.00 has already been paid, so that on his interest note at 24 months he pays only \$4,500 on this date, and from date on \$3,500.

"C. A. Kebler,  
"for Antioch College."

On January 17, Carroll paid Kebler one thousand dollars more, and got the following receipt:

"Cincinnati, January 17, 1887.

"Received of T. P. Carroll one thousand dollars account mortgage loan, he to hold this receipt until he is handed receipt of trustees of Antioch College.  
"\$1,000.00.

C. A. Kebler,  
"for Antioch College."

Carroll testifies that on some time in May or June he paid Kebler \$1,000, for which he received no receipt, and although he importuned Kebler for it, he could not get it, and was obliged to be satisfied with Kebler's promising to make it all right at the settlement.

On August 3, 1887, Carroll paid \$900 more, and got the following:

"Cincinnati, August 3, 1887.

"Received of T. P. Carroll, nine hundred dollars on account his mortgage debt.

"Antioch College of Yellow Springs, Greene county, Ohio.

"by C. A. Kebler."

The last payment made by Carroll was of \$600 on the nineteenth of November, 1887. It was evidenced as follows:

"Cincinnati, November 19, 1887.

"Received of T. P. Carroll, six hundred dollars to be applied to mortgage indebtedness.

"\$600.

C. A. Kebler."

On this payment, Carroll demanded his papers, *i. e.*, his note and mortgage from Kebler. Kebler promised to bring them to him on Monday, November 21st. He failed to do so. Carroll tried to find him on Tuesday at his office, but could not. On Wednesday morning, Kebler

committed suicide, and within two days the information that he was a forger and embezzler became public. Kebler had made no payments to Evans of any of the sums given to him by Carroll in reduction of the principal debt. Evans held the principal note, and knew nothing of these payments. The only endorsements upon the notes are of payments of semiannual interest March 20, 1887, and September 20, 1887. Kebler obtained from Evans an extension of the note from September 20, 1886, to September 20, 1887. This extension was endorsed on the note, but Carroll knew nothing of it. Kebler paid the interest due after September 20, 1885, without Carroll's knowledge.

All of Kebler's payments of interest were in advance of the time for payment. Charles Kebler, upon his father's death in 1885, became a trustee of Antioch College, and a member of the executive committee, and continued as such until his death. The relations between Evans and Kebler were exceedingly intimate. They were constantly in consultation over Antioch's investments. Whenever a debt was much overdue, and it became necessary to threaten or take legal proceedings, Kebler was employed for the purpose. All or practically all the loans made in this city were made on Kebler's advice, and after his examination of the title. Evans had little, if any, knowledge of the value of the securities. Collections were made either through the bank, or through Kebler. Kebler told Evans that certain of the borrowers preferred to have the collections made through him, and not through the bank. When interest or principal was about to fall due from one of these, Evans, would notify Kebler of the fact, and Kebler would notify the debtor to make payment. The money would be given to Kebler. When the debtor received the note is a matter of dispute. Evans says he did not give the note to Kebler until he got the money. There is other evidence tending to show instances of a different practice, and some of those in Carroll's case. Carroll says when he paid interest to Kebler, Kebler had the interest notes, and delivered them to him at once. Carroll's only knowledge of Kebler's authority was what he gathered from Kebler himself, and the conversation with John Kebler, the father, the fact that he learned from a catalogue of Antioch that Charles Kebler was a trustee; the inferences he drew from payments to him and from him, and from having seen Evans and Kebler once together. At the annual meeting of the trustees of Antioch College in June, 1887, Evans was not able to be present, but sent a report. The securities were not produced. The absence of the securities was commented on with some severity by Captain Hosea, a member of the board, and the investigation of them was referred to a committee of three, of whom Kebler was one. They went to the Safe Deposit Company's vaults with Evans, and checked over the list given in the report with those in the treasurer's box, and found them to correspond. Among them was the Carroll note and mortgage, and several forged notes and mortgages given by Kebler to Evans, then supposed to be genuine.

TAFT, J.

The question in this case is whether when Carroll paid Kebler the installments on the principal note, he was paying Antioch College. The discussion may be decided by answering three questions:

First—Was Kebler Carroll's agent in receiving these installments? If he was, of course Antioch College could not be charged with the payment.

Second-- Was Kebler the agent of Antioch in receiving the installments? If he was, then the payments were payments to Antioch, and the college must bear the loss.

Third--If Kebler was the agent of neither party, has Antioch or its treasurer so enabled Kebler to commit the fraud as that the equitable doctrine applies that where one of two innocent parties must suffer a loss, that one must lose who enabled the wrongdoer to commit the fraud?

First--It seems to me that there is no room for discussion on the first question. Carroll says that he treated Kebler as Antioch's agent, and that Kebler represented himself to be such. The conclusive evidence of the truth of these statements is found in the receipts themselves. In two of them Kebler signs himself expressly as agent for the college, and the wording of all of them is only consistent with the relation between Carroll and Kebler, of borrower and lender, and not of principal and agent. It is doubtless true that Carroll and Kebler had dealings together, and it may be that Carroll at one time employed Kebler as his attorney in another matter; but these things do not even tend to show that Kebler was Carroll's agent in this matter. It is quite clear that Kebler planned the fraud from the beginning, and it was necessary to its success, that he should select as a borrower some one who would look to him alone as Antioch's agent, and not make dangerous inquiries. The suspicions of one who was friendly with him, and with whom he came constantly in contact, he might easily allay, and therefore such a one was selected. I find then that Kebler was not Carroll's agent to receive these payments.

Second--Was Kebler Antioch's agent to receive payment of these installments? In reaching an answer, it should first be noted that complete power was given to Frank Evans, treasurer, to make investments and collect loans. He was not paid for his services. Much labor and attention was necessary in carrying and renewing investments aggregating \$50,000 as these did. It was absolutely necessary that a lawyer should be employed to examine titles and to advise as to securities. Considering all the circumstances, I am quite clear that within the scope of the treasurer's wide discretion in the matter of making and collecting loans was the authority to delegate collection of them to a bank or to a reputable attorney, whose opportunities for a convenient collection, because of the nature of its or his business, would be greater than that of the treasurer. I think we may narrow the question to be answered then to the question whether, when Kebler took these installments from Carroll he was Frank Evans' agent in taking them. We find that Evans and Kebler consulted about the Carroll loan, and that Kebler examined the title for Evans. Before any papers were executed at all, Evans gave Kebler seven hundred dollars on this account, accompanying the charge on his day-book and ledger with the legend "to invest." \$3,300 of the \$6,000 was furnished by a collection made by Kebler for Evans, coming into Kebler's hands some ten days before the execution of the note and mortgage. Kebler drew the note and mortgage, and did not deliver them to Evans until after \$1,500 had been paid Carroll on account of them. Can there be any doubt that in this transaction Kebler acted for Evans? I think not. It is said Evans paid him nothing for his services. That is true; but in transactions of this kind, that circumstance is not conclusive, and often is not of any value in showing where the real relation of agency exists. In lending money, the borrower frequently pays all the expenses necessary to a completion of the loan. Where one has money to lend, he looks to the borrower to provide assurance of title to

the security, and selects his own attorney for the purpose. Because the borrower pays the fee, is not any evidence that the attorney was his agent. Evans doubtless knew that to Kebler it was a source of profit to be able to lend this money and understood that he made his fee out of the borrower; but he regarded Kebler as his agent in examining the title as he had a right to do. But he went further and entrusted Kebler with \$4,000 of the money before Carroll executed a paper, or, in fact, entered into the contract of loan. If Kebler had embezzled this \$4,000 before the note was made, could Carroll be charged with the loss? Clearly not. The circumstances of this particular loan seem to me to show conclusively that Kebler was Evans' agent to make this loan. This result is enforced by the conduct of Evans and Kebler with respect to other loans, tending to show a general agency of Kebler to make loans, for, all the loans in this county, and there were fifteen or twenty, were placed through Kebler. He examined all the titles, and so implicit was the confidence of Evans in Kebler with respect to his judgment as to the sufficiency of the security and wisdom of the loan, that Kebler was able to pass off upon Evans some six or eight forged mortgages. In a letter to Kebler in 1887 Evans says he will soon have \$2,000 to loan, and he hopes Kebler "can get something good." Evidently this indicates that he relied upon Kebler to get investments for him.

It does not follow, however, from an agency to place loans that authority is conferred to collect them. It is circumstance to be considered, but not a determining one. Kebler made many collections for Evans—where he did act as his agent. This is admitted. Evans says they were of interest or principal overdue, and where it was necessary to have an attorney. It is certain that Kebler did not make all of Evans' collections. Many, perhaps the larger part, were made through the bank. As to several, and Carroll's among the number, Evans, says that Kebler told him they preferred to pay through him, and so, when anything was about to fall due, Evans notified Kebler to have them pay. It is not very clear whether for such collections Evans sent the interest and principal notes to Kebler, or not. Evans says he never did. But he is contradicted in this by Carroll as to his case, and by at least two other instances. Carroll says that when he paid his interest in March '85 and on September '85, Kebler had the notes, and turned them over to him at once. I am inclined to credit Carroll's statement. In two of the letters from Evans to Kebler, he asks Kebler to return notes and mortgages. Evans explains the reference to mortgages by saying that Kebler took mortgages up to be recorded, and did not return them, although often requested. He can not say, however, what the notes were. In this lapse of memory, I must think that his statement that he never entrusted any notes to Kebler except such as were to be put in suit, is not strictly accurate, and is outweighed by the positive statement of Carroll and the other witnesses, that some notes to be paid, were in Kebler's possession before payment. Considering the great confidence reposed by Evans in Kebler, and their intimacy in Antioch matters, this seems quite probable. Carroll's statement as to his interest notes, is borne out in some degree by the dates. Evans credits him with interest \$180, March 25, 1885, and October 9, 1885, a delay in one case of five days, and in the other of three weeks. It is quite likely that not receiving the money at once, Evans sent the notes to Kebler and allowed Kebler to return them to Carroll on payment. But as I shall show by reference to authorities, an

agency to collect interest does not imply an agency to collect the principal. What is the fact as to the principal note? There is nothing at all to contradict Evans' statement that he never authorized Kebler to collect the principal note. It must be conceded that Kebler did not have the note. Carroll admits that he never saw it, although he inferred from what Kebler said that he had it. If Kebler had had it, he would have shown it to Carroll. Evans had it when Kebler died, and that was three or four days after Carroll's last payment. These circumstances establish the correctness of Evans' statement that he never had given this note to Kebler after first receiving it. The note was not due until September 29, 1886, and was then renewed for a year. There could be no reason for Evans to authorize Kebler to collect it. Evans thought he was getting interest from Carroll regularly, down to and including September 20, 1887. He was not looking for payment. It is quite clear that he never gave any special authority to Kebler, to collect the principal of the note. Nor had he general authority including such a power, because authority to place loans and to collect interest does not authorize collection of the principal, in the absence of the possession of the note. This rule is established by an abundance of authority: *Smith v. Kidd*, 68 N. Y., 130; *Curtis v. Robb*, 1 Molloy, 487; *Cooley v. Willard*, 34 Ill., 68; *Williams v. Walker*, 2 Sanford's Chancery, 325; *Wostenholme v. Davies*, *Freeman Ch. R.*, 289. Story on Agency, section 98-104.

It is said that the rule as to the inference to be drawn from the presence or absence of the note in the agent's hands is only a matter of evidence, which may be rebutted by other circumstances. This is undoubtedly true. If express authority be given to collect, the absence of the note can not affect it, and any circumstances tending to show express or intended authority to collect might, if strong enough, overcome the presumption of a want of authority from the absence of the note. Such was the case of *Wilcox v. Carr*, 37 Fed. Rep., 130. There the note was not present in the agent's hands, but the court found the other circumstances that the alleged principal intended the agent to collect the money on his behalf, and so held the principal bound by payment to the agent. But here the fact is, Evans did not intend Kebler to collect the principal note, and there are no circumstances tending to rebut the presumption arising from the withholding of the note.

Third--There was then no actual authority to collect the principal note. Was there an apparent authority justifying Carroll in making the payment? This brings us to an answer to the third question in the case, whether Antioch College, or Evans, has so acted as that either of them can be said in law to have enabled Kebler to commit the fraud on Carroll.

The fraud committed on Carroll was in Kebler's representing that he had authority to collect for Antioch when he in fact had not. Did Antioch or Evans do anything from which he had a right to infer that Kebler's statement was true? Kebler was seen with Evans by Carroll. That could certainly mean nothing more than that he was consulting about the loan. John Kebler told Carroll that Charles had all to do with college money and college affairs. Though John Kebler was a trustee, he had no power to appoint an agent for the college. That was the duty of the board or its treasurer. He had no power to make admissions to bind the board. Thereafter Charles was a member of the board, but that fact did not make him an agent to make statements as to his own agency to collect Antioch's money. Now we have found that Kebler's agency to place the loan or to collect interest did not imply an authority to collect the

principal in the absence of the note. Carroll must be charged with knowledge of that rule. He says he thought Kebler had the note, from Kebler's statements, which he believed. How can Antioch be said to have enabled Kebler to lie to Carroll about the custody of the note? Had Carroll demanded the production of the note, whenever he made a payment, he would have saved himself from loss. Failing to do so, he trusted Kebler's word, and he trusted at his peril. All this is true whether the real contract of loan made contemplated partial payments before maturity or not. But the case is still stronger as to \$2,500 of the payments because they were made before the note fell due. The conversation between Kebler and Carroll before the note was made, of course could not vary the terms of the note. The first receipt recites a modification of the terms of the note, by permitting partial payments before maturity. But Kebler had no power after placing the note in Evans' hands to change its terms. This is certainly not included in the agency to place loans, and can not be inferred from it. Kebler did not produce the note. If he had produced it, his agency to be implied from this would only be to collect at maturity. See Meacham on Agency, sec. 380, and cases cited in Note 1. For these reasons, I think Kebler was given no apparent authority by Evans, to collect the installments on the principal note.

Only one question remains to be answered. Did Antioch College ratify Kebler's acts in taking Carroll's money by appointing him on the committee to go over the securities held by Evans when, among those securities, was the Carroll note? It is said that as Kebler had notice of Carroll's payments on the note, the committee had notice of it through his knowledge, and by failing to repudiate the Carroll payments as payments to Antioch, they ratified them. It is not claimed that any one of the trustees actually knew of Carroll's payments other than Kebler, but it is sought to invoke the general rule that notice to a director of a corporation is notice to the corporation, and so charge Antioch College with Kebler's knowledge. This rule has no application when the facts, notice of which is sought to be charged, are of such a character that it is to the individual interest of the director, as opposed to that to the company, to conceal them. See *Alt v. Weber*, 10 Dec. Re. 371.

This case is a hard one upon an innocent man. To decide against either party would work a hardship. Carroll paid, I have no doubt, the full \$5,000 to Kebler, and he can have no advantage from that payment. Question is made as to the truth of his statement that he paid \$1,000 and got no receipt for it. It is entirely credible even though he got receipts for subsequent payments. Kebler's motive to reduce the evidence against him of the payments was quite strong enough to prompt such action. The very peculiarity of Kebler's conduct, and of the story, stamps it as true; for while it is quite in accord with Kebler's conduct toward Frank Evans as to the delivery of mortgages, no person of Carroll's information would have concocted such a story.

On the whole case, the plaintiff is entitled to a decree for foreclosure and sale. Carroll will be entitled to a credit of \$125 on the note for the money which he never got from Kebler. In paying the money to Carroll, Kebler I have found to be Evans' agent. Therefore, Antioch College can only recover for the amount paid Carroll.

Decree accordingly.

Joseph Wilby, and A. B. Champion, for plaintiff.

Mallon, Coffey & Mallon, for defendant.

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## DOW TAX.

[Superior Court of Cincinnati, April, 1891.]

†VAN NEST V. BROOKS, TREAS.

A payment of the Dow tax under protest to escape addition of a penalty, by a person not liable to the tax, is not voluntary, and can be recovered back.

SAYLER, J.

The plaintiff was a whiskey broker, and was assessed last December as though he were liable under the Dow law. He objected to paying the tax, but on being told that unless he did so a penalty of fifty per cent. would be added to the amount charged against him, he went on the last day and paid the amount of the Dow tax under protest, and the next day sued to recover it back.

The court held, on the evidence, that the plaintiff was not engaged in the business of trafficking in intoxicating liquors within the purview of the Dow law; and also that the payment made under protest to avoid the proceedings against him authorized by the Dow law, was not voluntary. In referring to the recent decision in *Whitbeck v. Minch*, 48, O. S., 210, Judge Saylor said:

"This case clearly states propositions of law contravening the doctrines established by previous decisions of the Supreme Court. It does not refer to such cases, and does not indicate that it is the intention to overrule or modify any of the former decisions. The decision is correct as applied to the facts of the case as is shown by the printed record. I do not think it was the intention of the court to overrule the former decision, and I will therefore hold that as to the case at bar such former decisions are binding, and that the plaintiff may recover."

Judgment was for plaintiff for the amount claimed and interest.

Wilby & Wald appeared for plaintiff.

Foraker, Black & Bosworth and F. S. Spiegel, county solicitor, for defendant.

## †Explanatory—

As to the recent decision of the Supreme Court in *Whitbeck v. Minch* referred to by Judge Saylor, it is a short *Per Curiam*, which reads as follows:

"A party who pays an illegal assessment upon his property, cannot recover it back in a suit against the treasurer, unless the payment was an involuntary one. To constitute the payment an involuntary one, it must appear that the treasurer was about to levy a distress upon the property of the party charged with the assessment; a simple protest against the validity of the assessment, with notice to the treasurer that the party intends to bring suit to recover it back, is not sufficient. In such case the general rule applies that, if litigation is intended, it must precede payment, where, as in such cases, the party has a plain remedy provided by statute, sec. 5848, Rev. Stat., and may resort to the same, and thereby avoid a distress to his property.

"Judgments of both courts reversed, and cause remanded to the common pleas for further proceedings."

Judge Saylor in his decision, declining to apply the rule here laid down to the case before him, says that this decision of the Supreme Court clearly states propositions of law contravening the doctrines established by previous decisions of the Supreme Court, "but that the decision is correct as applied to the facts of the case as shown by the printed record."

The facts as they appear from the record in *Whitbeck v. Minch* are as follows: *Minch* filed his petition in the common pleas of Cuyahoga county, in which he sets forth that on September 11, 1882, the city council of Cleveland passed an or-



dinance by which they levied a district sewer tax on all real and personal property in sewer district No. 7 of 4 5 mills on the dollar; that said tax was certified to the county auditor and placed on the tax duplicate for collection and was collected by the treasurer. This sewer district tax plaintiff says is illegal and void. On December 16, 1882, said sewer district tax being as aforesaid on said tax duplicate for collection and said defendant refusing to receive the other taxes levied on the said property of plaintiff unless said district sewer tax was paid, and threatening unless it was paid to add a penalty thereto, and afterwards, if still unpaid, to collect all said taxes and penalty by summary proceedings, this plaintiff was compelled to, and did under protest, pay to said defendant the first half of said district sewer tax on his said personal property, said first half amounting to \$187.85, no part of which has been repaid, and plaintiff asks judgment for this amount with interest.

A second cause of action states the same facts, i. e. the levy of the sewer district tax, on the real and personal property of Geo. Judson, and alleges that on December 19, 1882, under the same facts as alleged in the first cause of action he paid the tax, \$14.00, and under protest. And that Judson has assigned his claim against the county treasurer for a refund of the tax so paid by him to plaintiff Minch.

A third cause of action sets out the payment under protest on December 19, 1882, by Alexine B. Judson, of \$11.61 on account of same tax levy, and assignment of her claim to plaintiff Minch.

A fourth and fifth cause of action sets out the payment under protest, on October 24, 1882, by C. Rewell, of \$53.80 first semi-annual installment, and of \$53.80 on June 11, 1883, also under protest, of second semi-annual installment of the same tax, and assignment of his claim to plaintiff.

For a sixth and seventh cause of action, payment, under protest, by Mary Rewell, on October 24, 1882, of the first, and on June 11, 1883, of the second installment of that tax, of \$5.04 each, and assignment by her of her claim to plaintiff.

The eighth cause of action, payment, under protest, on December 20, 1882, by M. A. Bradley of the tax, \$7.50, and assignment of his claim to plaintiff, and ninth cause of action, payment, under protest, on December 20, 1882, by Alvah Bradley of this tax, \$669.88, and assignment to plaintiff.

The prayer of plaintiff is for judgment against defendant treasurer for \$1,008.53 and interest, etc.

To this petition there was a demurrer, which was overruled and exceptions by defendant, who then filed an answer denying the illegality of the tax, also denying that defendant threatened if it was not paid, to add a penalty to all said taxes, and if not then paid, to collect all said taxes and penalty by summary process.

Also, "he denies that said plaintiff and others named in this petition was compelled to, and did pay, under protest, to defendant, the several or any portions of said district sewer tax as alleged in petition."

The evidence offered at the trial which was embodied in the bill of exceptions, and of which the following is of importance. Geo. Judson testified:

"I recollect paying the taxes in December, 1882, for myself and wife. I went into the treasurer's office a day or two before I paid the taxes and got what the taxes were. On examining the amount I found they were too high, and at the time I paid the taxes I told them that I protested against paying this sewer tax.

I found, when I got home, that it said on the tax receipt, "protest as to personals only," but I told them that I protested against paying the sewer tax. On examining the receipt now shown me, I see I was wrong about its saying: "protest as to personals."

I have transferred my right also to recover this tax to plaintiff.

On cross-examination, witness said: "When I paid my taxes at the treasurer's office in December, 1882, I said to them, 'I protest against paying this sewer tax.' I generally make it a rule to protest every time I pay taxes, as they are almost always illegal taxes."

"I have received nothing for my claim, but my wife said she had received full pay for both her claim and mine."

Capt. Rewell testified:

"I have transferred to plaintiff my right to collect back this sewer tax. The signatures attached to the written assignments shown me are those of my wife, Mary, and myself. I paid one-half the taxes for myself and wife on the twenty-fourth day of October, 1882. I went back the next day after paying them, and said to

the clerk or deputy in the treasurer's office, 'that I wished to protest against paying the sewer tax on my chattel property.' He said all right, and entered the protest on the tax receipt and on the duplicate." (Exceptions by defendant.)

On cross-examination, witness said; "I sold my claim to plaintiff for \$1.00. There was no understanding or agreement, express or implied, between us, but if Mr. Minch wants to make me a present I shan't object. If he gives me anything it will be because he chooses, not because he is under any obligation. When I made my second payment in June, I said, 'I wished to protest against paying the sewer tax on my chattel property.'"

The tax receipts of these parties, with their protests noted thereon, and the tax duplicate of the treasurer, on which the fact of payment under protest by these parties was noted, were introduced.

The judgment of the court of common pleas was as follows: That the court found that said district sewer tax was wholly illegal, and wholly in excess of the amount allowed to be levied by the city of Cleveland. The plaintiff, and C. Rewell and Alvah Bradley had paid the amounts of said sewer tax, levied upon their personal property, involuntarily and under protest, and that said George Judson and Alexine B. Judson had paid the amount levied upon both their real and personal property, involuntarily and under protest, and that plaintiff was entitled to recover of defendant for so much of said tax as had thus been paid involuntarily and under protest, and found and decided that there was due plaintiff, on account thereof, the sum of \$953.00, the same being agreed upon by the parties as the amount so paid, and held that the sums paid by C. Rewell, Mary Rewell and Alvah Bradley for the district sewer tax on their real estate, and by M. A. Bradley on his personal property, was not paid involuntarily and under protest, and that no part thereof could be recovered, to which plaintiff, by his counsel, then and there excepted.

Defendant filed notice for a new trial, which was overruled, and the petition in error filed in the circuit court assigning the following errors:

1. That the verdict and decision therein rendered is not sustained by sufficient evidence. 2. That said verdict of decision is contrary to law. 3. That there were errors of law occurring at the trial and excepted to by plaintiff in error. 4. That said court of common pleas erred in overruling the motion of said plaintiff in error for a new trial in said action.

The judgment of the circuit court is as follows:

"March 8, 1877. To court: This cause came on to be heard upon the petition in error, the original papers and pleadings and the transcript of the docket and journal entries in the court of common pleas, and was argued by counsel, and the court being fully advised in the premises, finds as matters of fact that the district sewer tax referred to herein was wholly illegal and void and wholly in excess of the amount allowed to be levied by the city of Cleveland. That defendants in error, C. Rewell, Mary Rewell, Alvah Bradley, M. A. Bradley, Alexine B. Judson and George Judson, each paid at the time set forth in the petition filed in the court of common pleas the sums therein stated, on account of said district sewer tax, the same having been levied on the property, situated and of the kind alleged in said petition, by said city of Cleveland. That said defendants in error, Alvah Bradley, George Judson and Alexine B. Judson, paid the said district sewer tax on their personal property involuntarily and under protest. That said Alexine B. Judson and George Judson paid the said district sewer tax on their real estate involuntarily and under protest. That said C. Rewell and Mary Rewell paid the said district sewer tax on both their real and personal property with their other taxes, without knowing that said district sewer tax was included therein; and, on finding next day that this tax was included, asked the treasurer to, and he did, note on both receipt and duplicate that this tax on their personal property was paid under protest. That no objection was made by said C. Rewell, Mary Rewell and Alvah Bradley to paying the district sewer tax on their real estate, or by M. A. Bradley to paying it on his personal property. That, therefore, said payments by C. Rewell and Mary Rewell on both real and personal estate, by Alvah Bradley on his real estate, and by M. A. Bradley on his personal property were not involuntary and could not be recovered back; but the rest of the payments were involuntary and could be recovered back. That the right to recover all said payments had been assigned to plaintiff. The court therefore finds error in the proceedings of the court of common pleas, in so far as it found that said payments by C. Rewell and Mary Rewell on their personal property was involuntary and included such payments in the sum for which judgment was rendered against plaintiff in error, but that in other respects said judgment was right. The judgment of the said court of common pleas is therefore reversed so far as it gives judgment

against plaintiff in error for sums paid by C. Rewell and Mary Rewell; in all other respects said judgment is affirmed. The plaintiff in error excepts to so much of said finding and order as finds and orders any part of said judgment of the court of common pleas right, and affirms the same. And the defendant in error excepts to so much of said finding and order as finds and orders any error in said judgment and reverses any part thereof. And thereupon, the court proceeding to render such judgment as the court below should have rendered, it is considered that the defendant in error recover of plaintiff in error the sum of nine hundred and ninety-six dollars and thirty-eight cents and his costs made in the court below, and that each party pay one-half of the costs made in this court."

The case was then taken to the Supreme Court by Whitbeck, where counsel (Brinsmade, Burns & Reynolds, city solicitors,) in their brief, stated the question in controversy:

"Are the entries on the several exhibits as shown in the record herein, of the payment of said taxes under protest, sufficient to warrant a finding of the court that said payments of taxes were involuntary? In the absence of acts amounting to duress or coercion, and where there is no legal compulsion or at least proceedings legally instituted by such county treasurer, for distraint or to subject the property upon which the same was levied to sale for the collection of the tax, or a threat to institute such proceedings and thus subject the parties to costs and expenses—can the party making such payment under such circumstances be said to be acting in an involuntary manner? If not, then there can be no recovery to this case."

Where the parties in the absence of such process or threatened process of law, and without availing themselves of the remedies of a court of equity in enjoining the collection of such taxes as are claimed by them to be illegal; can they of their own volition and choice pay the same, and yet preserve a right of action to recover back by the mere entry of "payment under protest" upon their tax receipts and the general duplicate? In other words, does such a state of facts constitute an involuntary action in the payment of such tax?

Where the protest is general and does not specify the reasons for such protest, but is made merely in pursuance of a habit of the party of protesting against the payment of taxes generally, in the hope that some illegality or irregularity may be found thereafter to exist in the levy of the same, does such habitual or general protest save the rights of the parties, as and for payments involuntarily made? Upon this point cited 60 Mich., 79.

There is no statutory provision giving effect and force to a protest such as is under consideration, and the mere entry of the words "paid under protest," or other words of similar effect, cannot stand as a conclusive indication of involuntary action. If the entry of these or similar words are to have any force or effect, they should be entered with definite reasons then existing and known to the party. 60 Mich., 532; 98 U. S., 541.

The entry of these or similar words upon the tax receipt and general duplicate, if they indicate anything, merely show the party's indisposition to the payment of taxes at all, and it seems to us, in no way indicates an action of the party that is not consistent with entire freedom, choice, intent, consent or agreement. Burrell's Law Dictionary; Bouvier Law Dic.

Counsel for plaintiff in error then distinguish the case at bar from *Western Union Tel. Co. v. Mayer, Treas.*, 28 Ohio St., 521, showing that in that case, the record shows that the protest was presented at the time of payment, in writing, specifying its objections to certain items of the taxes imposed. The notice is printed in full in the record of the case.

This notice of protest sets out in plain terms the reasons to be thereafter relied upon as the foundation for the suit to recover back the money paid. The penalties provided for in the act under which the tax so paid by the *Western Union Telegraph Company* had been levied, were extraordinary and unusual, and were such as the business of the company specially required, should be avoided. The said act made an unlawful and oppressive discrimination in favor of telegraph companies whose principal office was in Ohio, and against telegraph companies which did business in the state of Ohio, but whose principal office was in another state or country.

The law provided for a taxation upon the business of said company, and was therefore a tax upon the commerce and against public policy. The law provided for the personal liability of the agent, for his examination in the probate court touching the business and income of the company and his own financial responsibility and liability, and also for his arrest and punishment for misdemeanor in

case of his refusal or neglect to pay said taxes within a period of twenty days from their maturity.

The act also provided for the extraordinary penalty of 50 per cent., and the prohibition against other telegraph companies transmitting any message for such company as should be in default in the payment of such tax.

These were all penalties and forfeitures such as did not exist in the present case, and they tend to the establishment of the involuntary character of the act of payment of the tax provided for by that law. In the case at bar no such conditions, either of law or fact, existed. Further, the time at which the taxes mentioned in the case at bar, became delinquent, had not yet arrived at the time or times when the same were paid. By sec. 2855, R. S., the delinquent personal tax list could not have gone into the treasurer's hands for collection before the fifteenth day of September, 1893, almost a year after the first half of the taxes for 1882 were so paid. Citing *Baker v. Big Rapids*, 31 N. W., 810 Sup. Ct. Mich., 1887. See in this connection, secs. 2844 and 2855, R. S. Counsel further cite *Dear v. Varnum*, S. C. Cal., 1889, 22 Pac. Rep., 76; *Dunnell Mfg. Co. v. Newell*, 13 A. & E. Corp. Cases, 225; *Sexton v. Pepper*, 28 Hun., 31, 2 *Desty Tax.*, 791; *Baker v. City of Cincinnati*, 11 Ohio St., 534; *De Baker v. Corillo*, 52 Cal., 473; *Bucknall v. Story*, 46 Cal., 580; 26 Minn., 543; 5 Kan., 412; 8 Kan., 436; 46 Wis., 210; 16 N. W. Rep., 625; 4 Gill., 425; 98 U. S., 543; 97 U. S., 181; 8 Kan., 431; 22 Wall., 444; 62 Ga., 538; 11 S. E. Rep., 705; *Tatun v. Town of Trenton, Ga.*, May 7, 1890; 46 Cal., 556; 52 Cal., 73; *Dillon on Municipal Corp.*, 3rd ed., sec. 940; 97 U. S., 181; 98 U. S., 541; *Wilson v. Pelton*, 40 Ohio St., 311; 46 Ind., 552; *Town of Ligonier v. Ackerman*, upon the subject of voluntary payments and duress.

Counsel in an addition to their brief, call special attention to the recent case of *Dela Cuesta v. Ins. Co.*, decided by the Supreme Court of Pennsylvania, as covering the principal point in this case very fully.

Counsel finally claim that in all but two instances these taxes were paid before they became due; in the two remaining instances they were paid on the first date they became due under the law; that therefore, it is claimed they were not only not delinquent, but their payment was actually anticipated. They had not been demanded, and no steps had been taken or threatened to enforce their payment by the county treasurer, therefore, were paid voluntarily in every instance, without request, threat, compulsion, or duress, either of person or property; paid almost a year before a penalty for delinquency could attach, and before a delinquent list of the same could have gone into the hands of the treasurer to enforce payments; paid before the parties had invoked any of the remedies which the law affords to prevent the collection of illegal taxes. For these reasons it is claimed that their payment was what the law recognizes to be the free, voluntary, and unenforced action of the parties paying the same.

White, Johnson & McCastin, for defendant in error, within brief contend:

That so far as concerns the payments now in question, there is the conjoint of the common pleas and circuit courts, on the evidence, that they were paid under such circumstances that they could be recovered back; that they were involuntary payments. Before this can be reversed this court must be able to find as matter of law that the payments were voluntary.

It is then disputed that the taxes were paid before they were due. Taxes are due and payable as soon as the duplicate is delivered to the treasurer, R. S., sec. 1088, which, in Cuyahoga county, at the time of the payments in question, had to be on the first day of October, R. S., sec. 1042, *Hoglen v. Cohan*, 30 Ohio St., 436, 442-4. If not paid by the twentieth of December it was the duty of the treasurer to issue a distress warrant on the twenty-first day of December to collect the taxes and five per cent. penalty thereon. R. S., sec. 1004.

Alvah Bradley's tax, which forms three-fourths of the whole, was paid at the time when the treasurer had the power to add a penalty of five per cent. and collect the whole by the summary process of distress. It is denied that the personal taxes could not have been collected until after September 15, 1883. Sec. 1004, which applies to both real and personal taxes, in the case of taxes on personalty imposes the further penalty of making the whole personal tax delinquent, and collectible, with an addition of five per cent. on the whole, by distress, if the first half is not paid on or before the twentieth of December.

The treasurer introduced no evidence. Plaintiff introduced no evidence but the tax receipt and treasurer's book, showing entries that payments were made under protest as to the district sewer tax. These entries on tax receipts and duplicates were made by the treasurer. There being no other evidence, can this

court say, as matter of law, that there was no evidence that the payment was involuntary?

The taxpayer pays under threat that if he does not pay, the law will be carried out. As soon as the tax duplicate was placed in the hands of the county treasurer, he had to publish notice that the taxes were payable, and be ready to receive them. R. S., sec. 1087. The publication of this notice is a demand for payment of the taxes. This duplicate had all the force of an execution, and gave the county treasurer the same protection in collecting the taxes thereon that an execution on its face, would give a sheriff. *Loomis v. Spencer*, 1 Ohio St., 153; *Thompson v. Kelley*, 2 Ohio St., 647; *Champaign Co. Bank v. Smith*, 7 Ohio St., 42; *Stone v. Viele*, 38 Ohio St., 317. On October 1st the taxes were due and payable. R. S., secs. 1088, 1042, *Hoglen v. Cohan*, 30 Ohio St., 436, 442. If not paid on or before December 21st, it was the duty of the treasurer to collect all such taxes appearing on the duplicate, with five per cent. penalty thereon, by distraint, if possible. R. S., sec. 1094. The language of the act is imperative. "The county treasurer shall proceed to collect by distraint or otherwise." The "otherwise" is pointed out by sec. 1097 et seq. The tax duplicate shows there was in Cuyahoga county far more than enough personal property of the parties to this case to pay all these taxes. If he can collect the delinquent taxes in the way pointed out by these sections, the treasurer must do so. It is only when he cannot do so that he can sell the real estate, for the statute provides that, as a preliminary to the tax sale, he must return a list to the county auditor, "a list of all such taxes as such treasurer has been unable to collect," "and shall note thereon the several reasons assigned by such treasurer why such taxes could not be collected." R. S., 1043. If this is not done, the sale of the land for taxes is invalid. *Stambaugh v. Barlin*, 35 Ohio St., 209. It follows from these considerations, all these defendants having enough property in the county to pay these taxes, that, on the morning of December 22d, it would have been the duty of the treasurer, as he had the power, to declare the whole personal tax due; to add a penalty of five per cent. to the first half of the real, and to the whole of the personal tax; to issue a distress warrant for this real and personal tax and penalty; and on this warrant to summarily seize and sell the personal property of the taxpayers. The law giving the new power and making it the duty to exercise the power, there could be no question that the officer would act. If the taxes were not voluntarily paid by December 20, nor collected by distress by the fifteenth of February, R. S., sec. 1043, the law imposed a penalty of fifteen per cent., R. S., sec. 2844. The payments then were made when the persons paying were thus threatened by law, and the treasurer, with this penalty, seizure and sale. They were made to a person who did not have to resort to a court of law, but who had in his hands the power to seize and sell. It is claimed that payments made under such circumstances to a person clothed with such powers are not voluntary payments.

It has been adjudged that this district sewer tax, although levied under color of law, was wholly illegal. The treasurer ought not to have collected it. The city, which is bound to indemnify the treasurer in this case, ought not to keep it. It is said that, as every one is bound to know the law, so the taxpayer, when he paid, was bound to know this district sewer tax was illegal. The same remark applies with the same, or greater force, to the treasurer and the city. The city council then, when they levied the tax and ordered the city auditor to certify it to the county auditor for collection, knew the tax was illegal. The city auditor knew it when he certified the tax to the county auditor, and ordered him to put it on the tax duplicate; the county auditor knew it when he put the tax on the duplicate and ordered the treasurer to collect it. The treasurer knew it when he took the duplicate, when he threatened to distraint, when he got the money, when he noted on the receipt and duplicate that the payment was made under protest, and when he handed over the money to the city. The city knew it was getting money it had no right to, when it received the money, and knows it now when it is resisting this suit.

When the question arises between private persons, standing on terms of equality with each other, we shall find in the best considered cases the question is stated as it was in *Valpy v. Manly*, 1 C. B., 602, that a voluntary payment was "where money is voluntarily paid, with full knowledge of all the circumstances, the party intending to give up his right."

A number of decisions cited by the other side hold, that to make a payment voluntary, there must be a duress of person or goods. This is not law as between private persons. It is sufficient there that the person to whom the payment is made has power, if the payment is withheld, to injuriously affect the rights of the person paying, and that from his course of conduct, or the rules of his business,

it is apparent that he will exercise the power if the payment is not made. *Peters v. Railroad Co.*, 42 Ohio St., 286; *Baker v. Cincinnati*, 11 Ohio St., 534.

As to the decisions outside of Ohio, it is admitted that some of the language of the cases cited by the solicitor do sustain his position. But it is claimed that in many of the states a tax on real estate can only be collected by a tax sale of the land; that the courts say a tax of real estate, the tax being illegal does not create even a cloud on the title, and hence they make a broad distinction between real and personal taxes as to whether a payment is voluntary or not. This is true of Michigan, and several of the other states cited by counsel. Under our system, and especially under the facts of this case, there is no ground for the distinction. Many of the cases were based on a misconception of a Massachusetts case. The *Boston and Sandwich Glass Co. v. Boston*, 4 Met., 181. Instead of this case being an authority to sustain the cases cited by counsel for the city it is a strong and pertinent case to show that the payments in the case at bar could be recovered back.

Further cited, *Preston v. Boston*, 12 Pick., 7, 14; *Allen v. Burlington*, 45 Vt., 202; *Babcock v. Granville*, 44 Vt., 325; *Union Nat'l Bank v. New York*, 51 N. Y., 638; *Bank of the Com. v. The Mayor etc.*, 43 N. Y., 188-9; *Peyser v. Mayor*, 70 N. Y., 407, 501; *Pursell v. Mayor*, 85 N. Y., 330, 332-3; *Bright v. Halloman*, 7 Lea., (Tenn.), 300, 312.

The declaration that the treasurer's tax duplicate, if regular on its face, had in his hands all the force of a judgment, or execution, on a regular judgment, in the hands of the sheriff, has been repeatedly made in Ohio by this court. *Loomis v. Spencer*, 1 Ohio St., 153, 158, et seq.; *Thompson v. Keily*, 2 Ohio St., 647, 650; *Champaign County Bank v. Smith*, 7 Ohio St., 42, 51; *Stone v. Viele*, 38 Ohio St., 317; *Atwell v. Zeluff*, 21 Mich., 118, 119; *Cade v. Perrin*, 14 S. C., 1, 4; 3 Col., 349, 351; *Parcher v. Marathon county*, 52 Wisc., 388, 392; 16 Kans., 587, 596, 597-8, 600.

The case of *Railroad Co. v. Commissioners*, 98 U. S., 541, is the strongest case cited by counsel. But with all deference to the court deciding that case, it must be said that, if the case is to be considered an authority in the case at bar, it is a distinct overruling of the earlier decisions of that court, viz.: *Philadelphia v. Collector*, 5 Wall., 720; *Collector v. Hubbard*, 12 Wall., 13, and *Erskin v. Van Arsdale*, 15 Wall., 75.

As to Ohio decisions counsel cites *Baker v. Cincinnati*, 11 Ohio St., 534. That case materially limits *Mays v. Cincinnati*, 1 Ohio St., 268, and holds in accordance with the cases we have cited, that it is not true as held in the cases cited by the city solicitor that a protest does not affect the voluntary character of the payment. *Stephan v. Daniels*, 27 Ohio St., 527, 532-546; *Western Union Telegr. Co. v. Mayer*, 28 Ohio St., 521, 527-8; *Catoir v. Watterson*, 38 Ohio St., 319.

In conclusion it is said:

"We conclude, therefore, that reason, authority outside of Ohio, and the statutes and decisions in Ohio, prevent this court from reversing as matter of law the finding of fact by the common pleas and circuit courts, that the payments in question were involuntary, and that as a question of law and fact, those findings were right.

"We also hope that the court will put a quietus on these attempts to unsettle the settled law of the state, and enable lawyers with confidence to advise clients whether payment can be made with safety, or resort must be had to an injunction; for we repeat, it is simply a question who shall have the money pending the inevitable litigation—the state, if the suit to recover back taxes can be maintained, or the citizen, if resort is had to an injunction."

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## DEVISE.

[Hamilton Common Pleas, April, 1891.]

\* AUGUSTA HELFFERICH v. FRANCIS HELFFERICH, JR.

1. A will give all the property to B for life, with power to dispose of the same as she deems advisable, and at her death devising all property to C. and D. equally, and if either die before B., his portion, "that is, one-half of my estate," shall go to his children. Held, the power of disposition did not enlarge B.'s estate to a fee, but the remainder vested immediately in C. and D. in fee, subject to the power to sell.

\*A fuller opinion in this case will be found, post 303.

2. This power was only to sell for money and not to convey on mere equitable or moral considerations, and a conveyance on such considerations was wholly void, though on the face of the deed accompanied by a pecuniary consideration. The power was not one beneficial to B., but executorial in its nature.

For partition of the realty of Francis Helfferich.

The plaintiff was the widow of Jacob Helfferich, and his sole devisee. Defendant was a brother of Jacob Helfferich. Their father, Francis Helfferich, devised all his property to his widow, Sybilla Helfferich, for her natural life, and at her death it was to be divided equally between their two sons, or if either of the sons was dead, his share was to go to his children, subject, however, to the life estate of the testator's widow. The death of Jacob was subsequent to that of the testator. He left no living children. Following his death his mother, Sybilla, conveyed the realty in fee simple to his brother Francis, receiving back a lease for her natural life. The conveyance was made "by the power and authority of the will," the consideration being one dollar, love and affection. The petition for partition of the plaintiff, who is Jacob's widow, of this realty was resisted by the defendant on the ground that Jacob Helfferich at his decease had no estate under his father's will, but his mother, Sybilla, took a fee simple title under the will, and if not then, she had the power to make the conveyance to the defendant, vesting in him the absolute fee simple title to the property. This, by virtue of provisions in the will giving to Sybilla "power to sell and dispose" of the property "as she shall deem advisable."

SHRODER, J.

1. The intention of Francis Helfferich, Sr., as evidenced by his will, was to dispose of his whole property, giving his widow a life interest and the remainder to his two sons equally. Jacob, at his father's decease, took an undivided one-half fee simple estate in the remainder. If the face of the will left this in doubt, the technical rules of construction would lead to the same result. *Collins v. Collins*, 40 Ohio St., 353, 364.

2. The provision for the children of either of the sons, in case of their death during the life of the testator or his wife, in an executory devise to such children, if any there were, which would have the effect of divesting the remainder in fee simple. But the will omitted to provide for the case of testator's sons leaving no children. In such case there was no executory devise over, and the estate in fee simple in the deceased son was unaffected by that provision. Hence Jacob, at his death, was vested with the remainder, subjected to be divested by the lawful exercise of the power of sale given to his mother. *Collins v. Collins*, supra.

3. By its terms the will does not direct for whose benefit this power of sale was to be exercised. The testator having made other provision for the support of his widow, which he evidently considered sufficient, it would appear that this power was executorial in character only, and its exercise was to be only for the purpose of changing the form of the property by converting it into money, to be held for the same interest as the realty had been held. *Baxter v. Bowyer*, 19 Ohio St., 490, 499.

4. The power was to "sell and dispose." The power to sell means to sell for money for what it would fetch in the market. *Cleveland v. Bank*, 16 Ohio St., 236, 267.

5. The conveyance to Francis Helfferich was not in the exercise of the power to "sell and dispose." The money consideration was nominal, and the consideration of love and affection was not within the purview of the testator's intent when he conferred this power to sell. 3 Hill., 361, et seq. The effect of the conveyance to the defendant was merely to transfer to him Jacob's portion under the exercise of the power to sell. This was illusory. The conveyance was not only voidable, but void. *Harker v. Smith*, 41 Ohio St., 237.

6. The plaintiff, being the owner of Jacob's interest, is entitled to a partition. But her share is subject to a change in favor of the defendant under the dissolution of partnership contract made by Jacob with the defendant and their mother.

7. Although the petition is for a statutory partition, yet the case was submitted upon the pleadings and upon evidence requiring the aid of the court in construing the will and passing upon the question of account, and the cause ought therefore to be regarded as one for equitable partition. *Linton v. Laycock*, 33 Ohio St., 128; *Byers v. Wackman*, 16 Ohio St., 441, 443.

Decree accordingly.

Pugh, Dustin & Von Martels, for plaintiff.

Irwin & Murphy, and Emil Rothe, for defendant.

## TRADE MARKS.

[Superior Court of Cincinnati, 1891.]

## LLOYD BROS. V. MERRILL CHEMICAL CO.

1. When a party adopts a new word as a trade-mark to distinguish the goods he manufactures or sells, in order that they may be known as his in the market for which he intends them, it is no objection that the new word is at the same time suggestive of a quality of the article.
2. As soon as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of the firm.
3. A misrepresentation in connection with the property protected by a trade-mark, must be of a material fact, to bring it within the class of cases as to which a court of equity refuses to give its aid
4. In April, 1887, L. Bro. adopted the word "Asepsin" as a trade-mark for a substance having, among other properties, an antiseptic property; they placed such name on the label and sold the substance under that name, and the article became known on the market as "Asepsin." In the fall of the same year The W. S. M. C. Co., by an analysis learned the nature of the substance, manufactured it, and commenced selling it under the name "Asepsin." In April, 1889, L. Bro. notified The W. S. M. C. Co. that the word "Asepsin" was their trade-mark, and that they proposed to protect themselves in its use, and thereupon brought suit to enjoin The W. S. M. C. Co. from its use, and asked for general relief:—Held, that L. Bro. were entitled to an injunction, but that the delay in seeking relief precluded them from obtaining an account of gains and profits.

SAYLER, J.

The plaintiffs file their petition against the defendant, in which they aver that they are, and for a long time have been, engaged in the manufacture of a certain new drug, containing valuable medicinal and surgical properties, known as "Asepsin," which word was coined as a name for this newly discovered drug at their request; that they have sold this drug in bottles labelled with the name "Asepsin" as a trade-mark, which name was adopted and used by them ever since the —— day of July, 1887; that said drug has acquired a great and valuable reputation, by reason of its excellence, and has been, and is, the source of great profit to plaintiffs, and is known to the public and buyers thereof by said name, device and trade-mark "Asepsin;" that, well knowing the plaintiff's rights, the defendant for the past six months, and in disregard of their said rights, and without their consent, has made and offered for sale, and sold and still sells a drug in imitation of plaintiff's drug, which it has put up, and sold and still continues to sell, in bottles, and has labelled said bottles with the word "Asepsin," in imitation of plaintiffs' name and trade-mark; that said imitation is calculated to deceive, and does deceive the trade and the public generally, and has induced many persons to purchase defendant's drug, thereby greatly diminishing plaintiffs' profits; that by reason of said wrongful acts by defendant, plaintiffs have been irreparably damaged; that defendant is about to, and will, continue to infringe on plaintiff's rights, as aforesaid, unless restrained by this court. Wherefore the plaintiffs pray that a restraining order issue restraining the defendant from further use of the word and trade-mark "Asepsin" in derogation of plaintiffs' rights; and that on final hearing said injunction be made perpetual, and for all other proper relief.

To this petition the defendant files an answer setting up four defenses:



First—It admits it is a corporation organized under the laws of Ohio, and that it is engaged in the manufacture of an article called "Asepsin," and denies each and every other allegation in the petition contained.

Second—For a second defense, the defendant says that the word "Asepsin" is of similar origin to the word aseptic, meaning "non putrefactive," and is adapted from said word "aseptic," and that "asepsin" is not such a word as can be used as a trade-mark, said word being merely descriptive of the qualities of the article to which it is applied.

Third—For a third defense defendant says that the business of the plaintiffs in the manufacture and sale of said "Asepsin" is a fraud and imposition upon the public, in that the label affixed to the packages containing the article alleges that said article was "discovered and manufactured only" by plaintiffs; that said statement is untrue, and has a tendency to mislead the public and induce the public to believe that the article can be obtained from plaintiffs only.

Fourth—For a fourth defense, the defendant says that the article has become known to the commercial world, and is designated by the word "Asepsin," and that it was so known and designated before plaintiffs manufactured the same for market, and before plaintiffs claimed any right or title to said name as a trade-mark.

From the testimony it appears that in the early part of the year 1887 the plaintiffs manufactured a substance, being a white crystallin powder, which they placed in the hands of Dr. Howe for the purpose of being experimented with, to find its uses, with the information that it was made from wintergreen, largely, if not wholly. Dr. Howe made various experiments with it, and found that it had properties called antiseptic; something that opposes putrefaction and fermentation. Some time later—probably in April, 1887—Dr. Howe saw Dr. Lloyd in regard to it, and told him that it was a very valuable or efficient antiseptic; and thereupon Dr. Lloyd asked him to give it a name, and Dr. Howe suggested that they call it "Asepsin."

Dr. Howe says: "that in making up a name like that there is something comes into your mind by association or suggestion, and this came into my mind, and I gave it off-hand, free, without giving any thought to it, any further than just to have some kind of a name to represent the uses that it might be applied to," and being asked what he meant by his answer, the Doctor says further: "the word 'Asepsin' is utterly manufactured out of a suggestion, idea, that it may be antiseptic. Asepsin is not a word that is found in any dictionary, nor could be. It can't be analyzed as meaning anything. It does not apply to any chemical compound, or any element of mineralogy, or anything that would come out of botany, or anything of that kind. It is a name that has no meaning at all, only as it may be suggestive in regard to sepsis or antiseptis; but the word Asepsin is such a peculiar word. We have sepsis and asepsis. The 'a' there is the signification, in Greek, of the word 'prevent,' or 'not;' a negative word. Now, sepsis is a poison; asepsis is, anti-poison. I hardly could analyze it in that way, and asepsin is a word that does not have any scientific meaning at all, any more than it would be to say the name of my dog, a name to know him by. That is all. \* \*

\* The definition of asepsis or aseptic, suggested to my mind to call this something alike, or akin to these, and my mind run on Asepsin."

Whereupon, and in April, 1887, Dr. Howe told Dr. Lloyd that he might use the name for said substance, and in May, 1887, Dr. Howe

wrote and published an article in the Medical Journal concerning Asepsin; referring to it as a discovery of Prof. Lloyd.

The plaintiffs adopted the name of "Asepsin" for the substance so manufactured by them, and labelled the packages—bottles—containing it with the name Asepsin in connection with their own name, *i. e.*, "Lloyd's Asepsin." The plaintiffs put the substance up for sale in square bottles—about six inches high and one and one-half inches square. The labels then adopted and used on these packages had in large letters at the top, the name "Lloyd's Asepsin," with description, test and directions for use in small type under the name, and at the bottom: "Discovered and Manufactured only by Lloyd Brothers, Manufacturing Chemists, Cincinnati, Ohio."

The plaintiffs made a sale of the substance under the name of Asepsin, wrapped in paper, on April 13, 1887, and the first sale in packages labelled as above was made on May 4, 1887. Following that the plaintiffs advertised it extensively, principally by circulars, and thereby created a good sale for the article which was profitable to them.

The plaintiffs issued three circulars which were distributed during the first year, and probably wrapped around the bottles containing the substance. Each of these circulars had at the top in large letters the name "Lloyd's Asepsin." One of the circulars under the head of properties, states: "This substance is not a mixture, but a definite crystalline chemical discovered by us. We named it to show its characteristic properties after the manner in which other well known bodies were named."

Another of these circulars describes its antiseptic qualities with many certificates of physicians as to its value.

Another of these circulars describes its antiseptic qualities; refers to J. U. Lloyd as its discoverer, and states that: "In an impure condition it has been known to us for several years. However, it is only during the past year that it has been obtained in crystals, dry and pure. The substance was then placed in the hands of Prof. A. J. Howe, M. D., to investigate therapeutically. In accordance with the fact that it proved in Prof. Howe's hands to be of peculiar value, at Prof. Howe's suggestion, the condensed name Asepsin was used. This expressive term informs physicians of its properties as understood at present. Prof. Howe gave it a slight notice in the E. M. Journal, May, 1887, p. 241, and then Prof. J. A. Jeancon, M. D. investigated the subject, both clinically and chemically. He considers it a hydrated dioxy--methylo benzoate of sodium, which name is too cumbersome for common use, and we prefer Asepsin. \* \* \* Prof. Howe gave it the name 'Asepsin' to show its properties by one brief name. Both the substance and the name are original."

On two of these circulars the name "Lloyd's Asepsin" is followed by the name "Nascent Wintergreen" in parenthesis; and these circulars state that such term is used for the reason that if Asepsin is added to acetic acid, or a dilute mineral acid, it immediately decomposes, pure winter green oil separating in globules. While these circulars especially describe the antiseptic properties of the substance, they also describe it as having other valuable therapeutic properties.

In July, 1887, Prof. Jeancon published an article in the Eclectic Medical Journal of Cincinnati, in regard to this substance, describing its various properties and saying that it is highly antiseptic, and that Prof.

Howe hit the nail squarely on the head when he gave it the name "Asepsin."

In October, 1887, Prof. Lloyd published an article in the medical journal in regard to the substance, claiming that he had discovered how to make it.

On May 14, 1888, Prof. Howe, at the instance of the plaintiffs, wrote and delivered to the plaintiffs a paper as follows:

"Cincinnati, O., May 14, 1888.

"Messrs. Lloyd Bros.: 'Some months ago, Prof. J. U. Lloyd put in my hands a white salt, and requested me to experiment with it and to report results. I used solutions of the drug in my surgical practice, and found it to be an excellent antiseptic; and being asked for a name to indicate the uses of the medicinal agent, I called it Asepsin; the name I assigned to you as trade-mark and would be pleased to have the designation as associated with its original method of manufacture, continued and protected.'

"Very respectfully,

"A. J. Howe."

In May, 1888, the plaintiffs made application to have the trade-mark "Asepsin" registered under the act of congress, and it was duly registered in April, 1889.

On April 25, 1889, the plaintiffs changed the form of label used on the bottles. The label then adopted, and from that time used, contains at the top in large letters, the name "Lloyd's Asepsin," with the words "trade-mark" printed in small type and in parenthesis just under the name, and among other things contains the following: "We discovered this substance, introduced it and own the name, which is a registered trade-mark." And at the bottom: "Manufactured by Lloyd Brothers, Cincinnati, Ohio."

It will be remarked that the words "manufactured only by," as contained on the first label, are changed to "manufactured by," on this label.

Neither this substance nor the name was known in the commercial trade prior to 1887, and when introduced in 1887 as above stated, the plaintiffs considered it a new chemical compound.

Commencing in the summer of 1887, and during the summer and fall of that year, the defendants, procuring the said substance manufactured by the plaintiffs, caused the same to be subjected to repeated and exhaustive analyses. The president of the company testifies that said analyses were made for the purpose of establishing the fact that the substance so made by the plaintiffs was not a new substance, but was the same substance which had been made so far back as 1844, and that, therefore, the statements of the plaintiffs, that they had discovered the substance, was not true.

But it is clear from the evidence that these analyses were made by the defendant for the purpose of learning what the substance was, to the end that the defendant might manufacture it.

The attention of the defendant was called to the name and substance by the said article published by Prof Howe, in the spring of 1887, and by the substance made and put on the market by the plaintiffs. Prior to that time the president of the defendant had not heard of the name, and had not known of the substance as a commercial article. He says it was known to chemists, and that the defendant had known it was manufactured by chemists for years; but it is evident his knowledge and

the knowledge of the defendant was confined to what was reported by the books hereafter stated.

Following up the knowledge so obtained by such analysis of the substance manufactured by the plaintiffs, the defendant began in the fall of 1887 to manufacture a substance claimed by the defendant to be identical with the substance so made by the plaintiffs, and advertised it by circulars and in the Medical Journal, and put it on the market for sale under the name "Asepsin."

The defendant put it up in round bottles, smaller in size than the bottles of the plaintiffs, using labels on the bottles with the word "Asepsin" at the top in large letters, and under the name in small letters and in parenthesis the words "Commercial Name," and under that the words "Chemically—Methyl Salicylate Sodium," and under that in four lines, and partly in large letters: "Laboratory of the William S. Merrill Chemical Co., Manufacturing Chemists, Cincinnati."

It is evident that the defendant called the name "Asepsin" the commercial name, for the reason that the name had already been given a standing in the commercial world by its use by the plaintiffs.

The defendant issued circulars advertising its article, with the word "Asepsin" in large letters at the head, and stating that it is an old remedy, first prepared in 1844, and mentioned in the "Annales de Chemie et Physique," and further that it has a place in therapeutics, but whether superior to other well known antiseptics, time and experience will determine, and then follows long extracts from the articles published by Prof. Howe and Prof. Jeancon in relation to the substance made by the plaintiffs as above set out.

In the advertisement of the defendant in the Medical Journal, the name "Asepsin" is placed in large letters at the head, then follows: "This is a very old remedy, recently resurrected. Through the recommendation of Professors Howe and Jeancon (see recent numbers of Eclectic Medical Journal) it is again brought into notice as an antiseptic; and is now offered to the medical profession by different manufacturers, but at such an exorbitant price as to limit its sale. This preparation has been named 'Asepsin' by Prof. Howe, and his colleague refers to it as 'Nacent Wintergreen.' The Wm. S. Merrill Chemical Co. now have it in stock, and offer it in small vials at forty cents per ounce."

On April 25, 1889, the plaintiffs wrote a letter to the defendant, notifying the defendant that they had registered their trade-mark "Asepsin" in April 3, 1889, and that they proposed to protect themselves in the use of this trade-mark according to the protection afforded by the trade-mark laws.

To this letter the defendant wrote an answer on April 27, 1889, in which the defendant questioned the right of plaintiffs to the word, as their exclusive property, but promised to look into the matter.

It appears that in the "Annales de Chemie et de Physique," published in 1844, an article was published by Auguste Cahours, and in which Cahours describes a substance called by him, "Silicylate of Methyl" or "Gaultheric Acid."

In an article published by Carl Graebe in the "Annales der Chemie und Pharmacie," (1866), the description of such substance as given by Cahours is referred to, and a reference is made by Graebe, which would indicate that he—Graebe—had made the substance.

In Watt's Dictionary of Chemicals, (1868) the article of Cahours is again referred to and the process given.

Roscoe and Schorlemmer in their treatise on chemistry, (1888) refer to Cahours' article, and Beilstein, a Russian chemist, also refers to it.

I think the evidence establishes the fact that the substance described by Cahours in 1844 was known by some chemist, but the substance was never made as mercantile commodity, neither was it ever used as a medicine or as a remedy. It was described, known to a few, probably made experimentally, but that was the limit.

It is claimed by the defendant that the substance made by the plaintiffs is identical with the substance described and known by Cahours.

An analysis of the substance made after the description given by Cahours, and of the substance made by the plaintiffs produces the same results, but it is claimed by the plaintiffs that such evidence is not conclusive that the two substances are the same. Experts are at fault because they do not know the formula after which the plaintiffs make their substance.

This evidence could be given by the plaintiffs, but is withheld, and I think, therefore, that the court is justified in finding that the substance made by the plaintiffs is identical with the substance described by Cahours; 10 Ch. App., 281.

But I do not think there is any evidence which shows or tends to show (unless it is assumed that the plaintiffs knew all the literature of chemistry) that the plaintiffs had knowledge, when they made the substance in 1887, that they had made the substance described by Cahours in 1844. They made a substance, the exact nature of which they were ignorant and they thought they had made a new substance, and they submitted it to experts, so that its nature could be determined.

Its remedial quality as an antiseptic, depends on moisture, and such effect of moisture on the substance was not known till 1887.

The defendant learned of the substance and of the name by reason of the manufacture of the substance, and the sale of the same by the plaintiffs, under the name, and by reason of the articles published by Profs. Howe and Jeancon; the defendant then procured some of the substance made by the plaintiffs, caused the same to be analyzed, and by repeated analyses learned its nature, and then commenced to manufacture it, and sell it under the name "Asepsin," advertising it by circulars and otherwise, calling especial attention to the published articles of Profs. Howe and Jeancon with reference to the substance made and sold by the plaintiffs prior thereto, under the name "Asepsin."

The defendant claims that the name had become public property, and justifies such analysis on the ground that they always analyze any new substance produced.

It seems to me what the court say in the case of Selchow et al. v. Baker et al.: 93 N. Y., 65, is very much in point, viz:

"It is difficult to conceive what motive the defendants could have had in adopting it (the name), other than to appropriate to themselves the benefit of the popularity which the plaintiffs had obtained for their products, by advertising and other means, and to divert their trade to themselves. We think the word adopted by the plaintiffs, constitute a valid trade-mark. It cannot be true as a general proposition, as contended on the part of the defendants, that when a manufacturer has given to his products a new name invented by himself for the purpose of distinguishing them as his, and the article becomes generally known to the trade and to the public by that name, the name becomes public property,

and everyone has a right to use it. That proposition can be sustained only in respect to names which are descriptive of the article and incapable of being appropriated as trade-marks. The value of the trade-mark consists in its becoming known to the trade as the mark of the manufacturer, who has invented or adopted it, and in being known to the public as the name of an article which has met with popular favor. It cannot be that the very circumstances which give it value, operate at the same time to destroy it."

In the case of *Buckland v. Rice*, 40 Ohio St., 526, 527, the court especially note that the defendants in error, who were wrongfully appropriating the name "Trommer," as one manner of deception, had published extracts from a work written in regard to the original Trommer's extracts of malt in such manner as to indicate to the ordinary reader that what these authors had written was in regard to their extract of malt.

It is clear to my mind, from the foregoing statement of the case, that the plaintiffs are entitled to an injunction, restraining the defendant from the use of the name "Asepsin," as prayed for in the petition; provided the word "Asepsin," as used by the plaintiffs, may be appropriated as a trade-mark, and provided further the plaintiffs have not disintitiled themselves to its use as a trade-mark.

"Every manufacturer and every merchant for whom goods are manufactured, has an unquestionable right to distinguish the goods he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior reputé as his, may be the means of gaining. His trade-mark is an assurance to the public of the quality of his goods, and a pledge of his own integrity in their manufacture and sale, \* \* \* The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to an exclusive use of any words, letters, figures or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality." 2 Sand., 605, 606.

The word "asepsin" was undoubtedly suggested by the words "asepsis," "aseptic," "antiseptis" and "antiseptic."

"Asepsis"—a noun—from the Greek "*a*" negative, and *σηώς*, putrefaction, means the absence of living germs of disease.

"Aseptic"—adjective—from the Greek "*(a)*" negative and "*σηπτικός*," septic, means free from living germs of disease.

"Antiseptis"—noun—from Greek "*ἀντι*" against and *σηώς*, putrefaction, means the more or less complete exclusion of living microorganisms from bodies in which they produce disease.

"Antiseptic"—as an adjective—from Greek "*ἀντι*" against, and "*σηπτικός*," septic, means anything which destroys the microorganisms of disease.

As the name "asepsin" was suggested by these words, so this word "asepsin" is undoubtedly suggestive of the condition or quality as indicated by these words, *i. e.*, the absence of living germs of disease, or a destroyer of living germs of disease.

The word "asepsin" was never used before. It was a new word. Does the fact that it is suggestive of an absence of living germs of disease or of a destroyer of living germs of disease, make it a word merely or only descriptive of the substance, to which it was applied, as an antiseptic so

as to bring it within the inhibition—if I may so use the word—of the trade-mark law?

It becomes very clear—after an examination of the authorities—that whether a name claimed as a trade-mark is subject to the objection of being descriptive, or whether it is an arbitrary or fancy name, must depend upon the circumstances of each case as it arises (93 N. Y., 64). Yet I think the authorities, when considered with reference to each other, do indicate a process of reasoning, which may lead to what is probably a correct result.

And in the 93 N. Y., 59, the court say, on p. 69, "that where a manufacturer has invented a new name, consisting either of a new word, or a word or words in common use which he has applied for the first time to his own manufacture or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of the name," and held that the name "sliced animals," as applied to puzzles consisting of pictures of animals on pasteboard cut into strips or pieces (the puzzle consisting of putting the pieces together so as to form the original picture) to be a valid trade-mark.

"Valvoline" being a new word made by complainants and adopted as their trade-mark for lubricating oil, held to be a valid trade-mark, although it meant valve oil, 38 Fed. Rep., 922.

The court says in 39 Fed. Rep., 777: "If, as it seems highly probable, the word 'Bromidia' is used, and is regarded by the public more as a description of the qualities and an ingredient of the article to which it is affixed, as containing bromine, than as indicative of the origin and ownership of the article, it cannot be appropriated as a trade-mark."

But in the case of *Battle & Co. v. Finlay et al.* decided April 2, 1891, by Judge Pardee, in U. S., Circuit Court, E. Div. of La., and report in the St. Louis Nat. Digest of April 15, 1891, the court held the word "Bromidia" to be an arbitrary word, descriptive of nothing unless it is of the complainant's goods, and that it was a good trade-mark, although it was claimed that the word was descriptive of the chief component part of the preparation.

"Boviline," as applied to a pomade, and clearly suggestive of ox-marrow, was held to be a valid trade-mark in 2 Daily, 521.

"Cocoaïne," as applied to a hair wash in which coconut oil is a principal ingredient, was sustained as a trade-mark in 5 Abb. Pr. (N. S.) 212.

"Granade," signifying pomegranate, was sustained as a trade-mark for a syrup made of juice of pomegranates, in 61 Barb., 435.

In 39 Fed. Rep., 903, the court, speaking of the words "Cough Cherries," as applied to a confection, and after quoting from 93 N. Y., 59, say "The words 'Cough Cherries' are not properly merely descriptive of the qualities of the thing manufactured and sold, but are, to a large extent, arbitrary and fanciful, quite as much so as 'sliced animals,' applied to pictures of animals in parts or sections, \* \* \* when the words adopted are simply descriptive of the qualities of the article sold, they will not be sustained as a trade-mark, on the principle that what is already the common property of everybody, cannot be exclusively appropriated as the property of any individual."

And the court in 10 N. Y., Supplement 224, speaking of the word "Hygieniques," as applied to suspenders, say: "At the outside, such words is descriptive only in a modified or indirect sense, and, as it does not monopolize a part of the language essential or appropriate to describe the article, it may become the subject of a valid trade-mark. Words which are but inferentially or remotely descriptive, indicating neither origin nor ownership, but merely some special quality or peculiarity of the article itself, may properly be regarded as fanciful or arbitrary in the legal sense."

And in 8 Bissell, 398, the court, in speaking of the word "Parabola," as applied to a needle, say on page 400: "It is frequently the case that by close analysis and ingenuity, you can find in almost any trade-mark a designation of some quality connected with the goods."

On the other hand:

Words merely descriptive cannot be appropriated as a trade-mark. Neither can words which are only used to denote quality. 101 U. S., 54, 55; 128 U. S., 520, 521, 11 Sup Court Rep., 400.

Neither can old words or phrases which have been in common use and which indicate the character, kind, quality and composition of the thing. 58 N. Y., 223.

In this case (58 N. Y., 223) the court held the words "Ferro-Phospat Elixir of Calisaya Bark" not a good trade-mark, because the phrase is formed of words in use before the adoption thereof and they were indicative of quality and composition.

And in 59 N. Y., 331, the court refused to protect the name "Gold Medal" as a trade-mark, because it was descriptive of an article for which a medal had been awarded.

In 35 Fed. Rep., 524, the court refused to sustain the words "Acid Phosphate" as a trade-mark, because these words were the chemical names of a product obtained by partly neutralizing phosphoric acid with a base. The name was common in chemistry, and was not invented by the complainants.

In 37 Fed. Rep., 695, the court refused to sustain the words "Indurated Fibre" as a trade-mark for wares made of wood pulp, because the word fibre in the sense in which it is used by complainant means "wood fibre" and that "indurated" designates the hardening process to which the article is subjected. The words, therefore, are only descriptive, and are words in common use.

In 25 Fed. Rep., 625, the word "Cresylic" was not protected as a trade-mark, because cresylic acid was used in making the product.

In 31 Fed. Rep., 453, and 37 Fed Rep., 360, the court refused to sustain the words "Iron Bitters" as a trade-mark, because they were indicative of the composition of the article.

In 27 Fed. Rep., 492, the court refused to sustain the word "Astral" as a trade-mark for refined petroleum, because the word had been in long use to distinguish an oil burning lamp.

And in 35 Fed. Rep., 150, the court held the words "Taffy Tolu" as the proper designation of a chewing gum, and therefore no trade-mark.

In 67 Ga , 561, the court refused to sustain the words "snow flake" as a trade-mark for bread or crackers, because in its common or ordinary sense it is understood to be descriptive of whiteness, lightness and purity; words, which of necessity belong to the public, common alike to all.



When applied, therefore, to crackers and biscuit, it affirms unquestionably that they are "white, light and pure."

In 93 N. Y., 331, the court held that letters or figures which, by the custom of traders or the declaration of the manufacturers, are only used to denote quality or grade, are incapable of exclusive appropriation as trade-marks, and therefore held that the word "Royal" could not be so applied because, it had by a prior use come to indicate quality.

In 101 U. S., 51, the court would not protect the letters "A. C. A." as a trade-mark for sheeting, because it was "clear from the history of the adoption of the letters "A. C. A." as narrated by the complainant, and the device within which these are used, that they were only designed to represent the highest quality of ticking which is manufactured by the complainant, and not its origin."

It appeared that the complainant had for years designated the quality of his ticking by letters.

And in the case of Lawrence Mfg. Co. v. Tenn. Mfg. Co., 11 Supreme Court Rep., 396, the court held that a trade-mark could not be acquired in the letters "L. L." as applied to sheetings, as those letters had been generally understood and used by different manufactures for many years, as signifying a particular grade or quality of sheeting.

In 128 U. S., 686, the court refused to protect the word "Normandi," as a trade-mark applied to cigars as against the word "Normanda," because the court found that the word "Normanda" had been used as a brand for cigars for several years prior to the time the plaintiff had adopted the name "Normandi."

In the English cases, I think the line is more strictly drawn. And in the case of Waterman v. Ayres, 39 Ch. Div., 29, the court say on p. 35: "To be registered, it must be a fancy word; and in order to come within that description, it must be a word which obviously cannot have reference to any description or designation of where the article is made, or of what its character is," \* \* \* it "must be obviously meaningless as applied to the article in question."

And the court held the word "reversi" applied to a game, as not coming within such description of a fancy word.

In 59 Law Times Rep., 820, the court citing 39 Ch. Div., 35, held the word "Herbalin" to be something else than non-descriptive, and therefore should not be registered as a trade-mark.

And the court held in a similar way with reference to "Satinine" in 43 Ch. Div., 604.

The English courts had held in 7 Ch. Div., 834, "Linoleum" as applied to a floor cloth could not be appropriated as a trade-mark, as it directly or primarily means solidified oil. And in the 35 Ch. Div., 248, that the word "gem" as applied to a gun could not be registered as a trade-mark, because the word was a word in common trade use as descriptive of a particular kind of air guns.

From the consideration of these authorities, I think the conclusion may be fairly drawn that when a person adopts a new word as a trade-mark to distinguish the goods he manufactures or sells, in order that they may be known as his in the market for which he intends them, it is no objection, under the American trade-mark law, that the new word is at the same time suggestive of a quality of the article.

I am of opinion, therefore, that the word "Asepsin" may be adopted and appropriated as a trade-mark.

It is claimed, however, that the plaintiffs stated in their circulars that the name indicates the properties of the substance, and that such statements indicate the intention of the plaintiffs, in adopting the name, to adopt it as a descriptive name.

If I am right in the law of the case, I do not think the statements made in the circulars, and in the letters from Prof. Howe, will defeat the right to claim the name as a trade-mark. If the new word may indicate a quality of the substance, there can be no harm in saying so in a circular.

The fact that by subsequent use the name may become the common appellation of the substance is of no moment. 32 Fed. Rep., 98.

It is further claimed, that by its adoption by the plaintiffs for the substance, they made a generic word of it, and that, therefore, they cannot claim an exclusive right to it; citing 17 Fed. Rep., 621; 23 Fed. Rep., 276; 7 Ch. Div., 834; 39 Ch. Div., 29.

As I find that the substance manufactured by the plaintiffs, is the same substance described by Cahours, and by him named gaultheric acid, and as the plaintiffs accompanied the name "Asepsin" with a descriptive name "Nascent Wintergreen," I do not think it necessary to consider this claim further.

It is claimed that the plaintiffs did not adopt the word as a trade-mark until after the defendant had made and sold the substance under the name for some time.

But the evidence is clear that the plaintiffs did use the word at the first sale of the substance in April, 1887, and that they continued to use it.

As soon as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of the firm. 59 Law Times Rep., 821.

I think the weight of the evidence is that they used it as a trade-mark from the first sale, and that they at no time abandoned it to the public.

It is claimed that the plaintiffs have no standing in a court of equity, because of false statements contained on the label, viz: on the first label, that they discovered the substance, and that it was manufactured only by them; and on the second label, that they discovered the substance.

In the case of *The Leather Cloth Co. v. The American Leather Cloth Co.*, 4 DeG. J. & S., 142, 143, quoted in *Manhattan Medicine Co. v. Wood*, 108 U. S., 223, 225, the Lord Chancellor says that if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity.

In 23 Fed. Rep., 430, the court held that when one person adopts a trade-mark for an article, and then transfers the right to another person to manufacture the article, and to use the trade-mark, the assignee should indicate in the use of the trade-mark that he is an assignee, otherwise, the public are misled into purchasing the goods of another manufacturer or vendor as those of the original proprietor.

And to the same effect 93 N. Y., 268, and 108 U. S., 218.

This would clearly be a very material misrepresentation.

So in 15 App. Cases (L. R.) 252, the misrepresentation was material, viz: that the "fruit salt" sold by Dunn was the "fruit salt" well known as manufactured by Eno.

And so in the 122 N. Y., 65, viz.: that the business of the plaintiff was a banking business.

And so in 17 Atlantic Rep., 499, viz.: that the tea was a genuine imported tea.

And so in Buckland v. Rice, *supra*, viz.: that the extract of malt defendants in error made was the original Trommer extract.

And so in 14 Blatch., 262, viz.: that there was a medicine called "capcine" which plaintiffs used in their "Benson's Capcine Plasters."

In 10 Ch. App., 276, the court held that the fact that defendant had misrepresented itself as the original inventor of the Hop Supplement, etc., disentitled the defendant to any favor of the court. But in that case the plaintiffs were the original inventors, and their article was well known, and the misrepresentation of the defendant led the public to believe it was the plaintiffs' article, and therefore material.

I think, therefore, the misrepresentation must be of a material fact to bring a case within the class as to which a court of equity refuses to give its aid.

In the case at bar the plaintiffs said they discovered the substance. It cannot be claimed that any other persons who before the time have known of the substance was making it or offering it for sale. The substance was never in the market until the plaintiffs made it; the public was therefore not led to believe they were buying any article other than they in fact did buy. Even after the defendant commenced to manufacture and sell the substance—the public was not misled by the statements of plaintiffs—as the plaintiffs were not making an imitation of the defendants' article, but the defendant was making an imitation of the article manufactured and sold by the plaintiffs.

When the plaintiffs commenced to use the trade-mark and label, they were the only persons who manufactured the substance, and the representation that it was manufactured only by them was true, and remained true until the defendant had learned its nature by analysis and succeeded in manufacturing it. The right of the defendant to manufacture and sell it is undoubted, but such acts were accompanied by the wrongful act of selling it under the name "Asepsin." I doubt, therefore, whether the defendant would have a standing in court to raise the question. But the statement was omitted by the plaintiffs from the second label used. The defendant was some time in learning the nature of the substance and although it commenced to sell it in the fall of 1887, it may not, as yet, have been able to manufacture a substance identical with that of the plaintiffs, and I consider it a matter immaterial to the public that the plaintiffs allowed the statement to remain on the label till the new label was used.

It is claimed that the trade-mark of the plaintiffs—if they have any—are the words "Lloyd's Asepsin," and that the defendant by the use of the word "Asepsin" does not infringe.

I think from the evidence plaintiffs adopted the word "Asepsin" as the trade-mark, and that whether the plaintiffs or defendant used the name "Asepsin" with an accompanying name or without one, would make no difference. 128 U. S., 514; 38 Fed. Rep., 584.

It is further claimed that no person can be misled by the name used by the defendant. As the label shows in large letters that the substance sold by them is made at the laboratory of The Wm. S. Merrill Chemical Co.

But I think, if the plaintiffs are entitled to the use of the name as a trade-mark, this fact would not excuse the defendant in its use. 8 Bissell, 401; 128 U. S., 514; 2 Brewster (Pa.), 316.

Judge Pardee in deciding the case of *Battle & Co. v. Findlay et al.*, *supra*, quoting from 8 Bissell, says: "In regard to the last point made, that by reason of the defendants using their own name upon the wrapper or envelope, the public are not deceived, it would perhaps be enough to say that, when goods acquire a specific name, the purchaser rarely looks to see who have manufactured the goods by that name."

In the 11 H. L., 523, it was not a question of a name, but of a stamp, and the court found the two stamps to be so dissimilar that any person with reasonable care must see the difference, and not be misled.

The plaintiffs pray for an injunction and for all proper relief. And on the hearing it was intimated that should an injunction be granted, an account would be asked for under the prayer of equitable relief.

The defendant commenced to manufacture and sell the substance under the name "Asepsin" in the summer and fall of 1887.

No protest was made by the plaintiffs till April 25, 1889, and suit was not brought till May 11, 1889.

I am of the opinion that this delay in seeking relief should preclude the plaintiffs from obtaining an account of gains and profits. 96 U. S., 245; 128 U. S., 523; *Browne on Trade-marks*, sec. 497.

A decree may be taken restraining the defendant from the use of the word "Asepsin," as prayed for in the petition. The defendant to pay the costs.

Crossley & Bailey and Kittredge & Wilby, for plaintiffs.  
 Matthews & Cleveland, for defendant.

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## HABEAS CORPUS.

[Clark Probate Court.]

STATE OF OHIO EX REL. NILES V. L. E. NILES ET AL.

In a habeas corpus proceeding by the mother against the father, for the custody of infant children, other things being equal, they will be awarded to the mother.

HABEAS CORPUS.

ROCKEL, J.

This is an action in the nature of a *habeas corpus* proceeding by the mother against the father for the custody of two infant boys, aged sixteen months and three years respectively. In many respects it presents a most remarkable and difficult case. Five days have been consumed in its hearing. Acrimony and bitterness on both sides have been manifest, not alone confining itself to the parties, but in their friends, and even in their counsel has it been seen. Counsel, able, ingenious, industrious, have thrown their full power and skill in behalf of their clients in the trial of this cause. A large number of witnesses have been called and given conflicting testimony as to the conduct and habits of the father and mother, as between themselves and toward their children.

Paula Niles, the plaintiff, has had a sadly romantic life; born in France of respectable, if not noble, Spanish parentage; receiving a good education in the universities of that country; at an early period of her young womanhood, brought to this country by a guardian or pretended

friend, and deserted and left to take care of herself without money or friends. It was supposed by some, believed by herself, perhaps, that she was the heiress to a claim or estate of considerable value. In this condition she was found in a convent in Wheeling in 1884, where, at the early age of nineteen, and under the care of the Bishop in charge of that institution, she was teaching French. In that year, while in the dentist's chair in the office of Dr. Morrison, of Wheeling, she first met Dr. L. E. Niles, her future husband, a student in that office and a recent graduate of Dartmouth college, of New Hampshire. He fell in love with her, as he says in his testimony. Within the next year, after they had met but four or five times, they were married.

Whether the sweet face of the convent teacher stole his heart, or the rumors of an heiress' fortune induced him to seek her hand, or the lonely, helpless condition of the orphan French lady led him to offer her his name and love, are subjects of conflicting testimony. He was without fortune other than that which young manhood and a diploma of a learned institution could give him, and was then engaged in the not very creditable business of manager of a traveling museum.

Thus this unfortunate and ill-mated couple started in married life.

From Wheeling they went to various places, and finally, about four years ago, landed in Springfield, where they have ever since resided, he having abandoned the museum business, and followed his profession in which he has been reasonably successful. They lived together as man and wife until last February, when she, with his consent, went to New York for the purpose of getting employment. In fact it was known, and had often been discussed by Mr. and Mrs. Niles, that they were an ill-mated couple, and that they could not always live together.

As to what was to be done with the children there is a conflict of testimony, she claiming that the Doctor was to send her the children as soon as she got a situation—he denying it. When she got to New York the grief, as she says, of being without her children compelled her at once to return. But she never again became an inmate of her husband's family. Soon thereafter the husband placed the children in the care of Mrs. Batcheller, co-defendant herein, whose care, as a nurse is not questioned, yet the children have been ill almost the entire time while in her charge.

As long as permitted, Mrs. Niles visited the children, until the beginning of these proceedings.

The testimony generally shows that she was a kind and affectionate mother and he a kind father; that the children were generally neatly clad and well cared for.

Some evidence has been adduced to show that she was in the habit of getting intoxicated, and that he failed to provide properly for his family. Neither of these have, in our opinion, been shown to be true. The chastity or morality of either husband or wife has never been questioned. But that both the Doctor and Mrs. Niles are very quick-tempered people is conclusively shown, and from this fact almost solely have their troubles arisen. They did not understand each other. Their rearing had been widely different. She a French girl in a convent school; he an American boy in a parental home and an American college. She was a Catholic; he, if he had any religion at all, a Protestant. They were poor—the fortune they expected never came. While, perhaps, never in actual want, yet always in rather straightened circumstances.

Much testimony has been offered to show ill-treatment by the Doctor of Mrs. Niles some of which is denied and other explained away. That there was some harsh treatment is hardly to be doubted. How much of it was due to her temper is difficult to decide.

But let these matters be as they may, it is patent to my mind that they could not live together as man and wife should, and that separation was justifiable.

This brings us to the vital question at issue in this case—who is to have the custody of these infant children? As was well and most eloquently said by Justice Brewer in *Butler v. Cantwell*, 15 Cent. Law J., 369, "It cannot be said that the child is illegally restrained of its liberty, deliverance from which, as counsel well says, was in the first instance the purpose and object of *habeas corpus*. Yet, as to the children, at least, the scope of the writ has been largely extended. Beyond the mere matter of forcible restraint of technically illegal confinement, the court will inquire whether the surroundings of the child are such as to make for its highest welfare, and do for it that which such welfare compels in such cases; it is, in fact, the petition of the child, and I know of no duty more delicate and responsible than that which such petitions place upon the judge. \* \* \* " By this petition in effect the child says, "My feeble steps are just commencing the walk of life; I know nothing of the world and its ways; I cannot tell what is best for me; I appeal to you to take the place of father and mother, to decide for me, who am too young to decide for myself and to place me where I can receive the highest advantages, and where the surroundings of my life shall win for it its best and highest fruition, and so when I reach my years of manhood, I can look back to this hour and this decision and say, 'I thank you.' "

Do I demean myself by saying I shrink from this responsibility?

The whole matter to be considered is the welfare of the child, and where it is of young and tender years, the harsh rules of the common law have been completely reversed, and they are generally given to the mother, as was said in a celebrated case. *Hurd on Habeas Corpus*, 432.

The reputation of the father may be as stainless as crystal; he may be afflicted with the slightest mental or moral, or physical disqualification from superintending the general welfare of the infant; the mother may have separated from him without the shadow of a pretense or justification, and yet the interests of the child may imperatively demand the denial of the father's right, and its continuance with the mother. In this case, "the tender age and precarious state of the infant's health," makes the vigilance of the mother indispensable to its proper care; for not doubting that paternal anxiety would seek for and obtain the best substitute which could be secured, every interest of humanity unerringly proclaims that no substitute can supply the place of her, whose watchfulness over the sleeping cradle or waking moments of her offspring is prompted by deeper and holier feelings than the most liberal allowance of a nurse's wages could possibly stimulate."

In this case the child was between two and three years of age, and the mother was given custody of it.

The case of *McKim v. McKim*, decided by the Supreme Court of Rhode Island in 1879, 10 Cen. L. J., 389, bears some similarity to the one under consideration. The testimony in that case showed that Charles F. McKim, the father, was a gentleman of excellent character. He married his wife in October, 1884. She lived with him in New York

until May, 1875. She then lived with him in Newport until January, 1876. Their child was born in Newport in 1875. In January, 1876, they returned to New York, where they resided in a house which was provided and partly furnished for them by Mrs. McKim's father until May, 1877. Since then she has lived apart from him, and for the most part in her father's house at Newport. \* \* \* Mrs. McKim attributes their estrangement to her husband's character and conduct. She accuses him of harshness and untruthfulness, and a low standard of moral sentiment. Her charges, however, except in a single instance, are vague and indefinite, though she intimates that he has been guilty of misconduct, as yet undisclosed, by which he forfeited her respect, and which renders it impossible for her to live with him again as his wife. No testimony has been submitted to show any misconduct on his part which legally justifies her desertion of him." "We think" continues the court, "the petitioner is morally fit to have the custody of the child, and that he is entirely competent to provide for her education and physical wants. But, on the other hand, the child will doubtless enjoy equally good advantages where she now is \* \* \* and she will have the affectionate care of a mother, who, whatever her idiosyncracies, is evidently a lady of superior moral and mental endowments; whereas, with her father, she will probably have to be confined to a hired nurse or servant." In this case the child was four years of age, and the mother was permitted to retain her.

Another instructive and applicable case is that of *The State v. King*, 1 Geo. Decis., 93, in which the court makes use of the following language:

"When the cause came on for hearing a mass of evidence was produced relating to the various causes which produced the separation; and evidence was also adduced in relation to their capability as parents to discharge their duties to their children. \* \* \* In the first place the conduct and character of the father is that of a good man, and no objection can be raised against him as a father.

"On the part of the mother there has been a mass of evidence showing some improper conduct about their money matters, and some imprudent expressions at times when laboring under feelings of despondence, and from which, and from the appearance of the wife, the court believe that she is at times subject to feelings of great despondence, and was induced to make imprudent expressions, which she never intended to execute and which she has not attempted to fulfil; and so far as relates to her fondness for her children and her anxious care about them, and her industry to maintain them, the evidence is ample in her favor, as well as for her chasity; and that by her labor she can support them; and that both father and mother have to live by their labor." Here were two children, a boy and a girl, aged one year and two years and four months respectively—the court awarded the children to the mother.

In the case at bar like the one quoted from, neither of the parents have means of support except by their own labor; the testimony showing that the mother can earn as a teacher of French and music from \$7 to \$15 per week. The father that of a physician in ordinary practice.

Besides it is not entirely improbable that even if the custody of these children is given to the mother, but that the father may still be compelled to aid in their maintenance. *Pretzinger v. Pretzinger*, 45 Ohio St., 452.

In *ex parte Shuman*, 6 Rich., 344, the child was a girl between four or five years old, and the court refused to take her from her mother and

deliver her to her father. In *Commonwealth v. Addicks*, 5 Binn., there were two female children, aged respectively seven and ten, and the court refused to transfer them to the father. In *State v. Paine*, 4 Humph., 523, there were three children, a girl aged five and two boys aged seven and nine. 'The court transferred the eldest boy to the father, but left the girl and the youngest boy with the mother, solely on the ground that they were of too tender an age to be removed from the protecting care of the mother.

In *State v. Stigall*, 2 Zahr, 266, there were three children, aged five years and three months, three years and five months, and thirteen months, respectively. The two younger children were given to the mother, the eldest to the father.

In the matter of *Gregg*, 6 Penn. Law. J., 528, it is said in the opinion: "Where a child is found in the custody of its mother, of tender years, or of feeble and of delicate health, and when the necessity of maternal care is evident, the law will not interfere to remove it from such custody and could not do it without shocking the common sense and feelings of mankind."

The children in this case are awarded to the custody of the mother, not as punishment to the father, nor to cast odium or reflection on him. He is a physician of character and honorable standing in his profession, a gentleman of intelligence and cultures—striving to secure a competence and honorable name in his profession.

They are awarded to the custody of the mother, not for the mother's sake, but because they are children of young and tender age, almost babes, needing that care and that love which only a mother can feel and know how to bestow; and because in the light of adjudicated cases considered by courts and judges of eminent learning and ability, it is that disposition of these infants which the law demands and requires.

The custody of the children is therefore until age or other conditions change their circumstances, awarded to the mother, and they shall not be placed in any convent under forfeiture of this decree, and the costs of this action are to be paid by the defendant, Dr. L. E. Niles.

John L. Zimmerman, Esq., Hagan & Hagan, for plaintiffs.

Wallace & Coleman, for defendants.

### 337 FORECLOSURE AFTER ASSIGNMENT FOR CREDITORS.

[Hamilton Common Pleas, 1891.]

After an assignment for creditors, as all a mortgagee's rights can now be worked out in the probate court, foreclosure need not be brought in the common pleas.

MAXWELL, J.

After an assignment in the probate court, a suit to foreclose a mortgage need not be filed in the common pleas court. All the rights of creditors can be worked out in the probate court. Judge Maxwell's decision is in line with the holding of the Supreme Court in *Sayler v. Simpson*, 45 Ohio St., 141; 1 Circ. Dec., 370.—[Editorial.]



## CHANGE OF VENUE.

366

[Franklin Common Pleas, 1891.]

## \*STATE OF OHIO V. ELLIOTT.

1. To authorize a change of venue in a criminal case, on the motion of the defendant, he must prove, by clear, explicit and convincing evidence, that a fair and impartial trial in the county where the indictment was found, can not be obtained.
2. Newspaper denunciations of the defendant and of his alleged crime, are not alone sufficient to warrant a change of venue.
3. It is no abuse, but may be a wise exercise, of the discretion conferred by the statute, for the court to postpone, or overrule, for the time being, the motion, till it is ascertained by an examination of jurors whether a constitutional trial can be had.

ON motion for change of venue.

PUGH, J.

The defendant moves the court to change the place of trial from this to some adjoining county. He insists that there is bias and prejudice existing against him in this county which will prevent him from obtaining a fair and impartial jury to try the case. The constitution guarantees to him a fair and impartial trial. That means that the court and jury which try him will be governed alone by the law and evidence, and that they will not be swayed by passion, prejudice or ill will against him. It also means that the verdict and judgment must not be the "reflex of the clamor of the populace." Without these elements his trial would be a mockery of justice, a judicial farce.

I see by some of the newspaper extracts in evidence that there were some advocates of the application of the New Orleans Method to this case. In a state like this, where bribery of juries and miscarriages of justice by subornation of witnesses and officers are rare, the person who advocates lynch law is just as disloyal to law; he is just as flagrant a violator of law as the man whom he would have lynched. It is the duty of the court to see that the defendant gets a fair and impartial trial. "The spirit and tone of the court must be the spirit and tone of the people at their best moments," Mr. Bryce has well said. It is the duty of the defendant to establish by the evidence that there is such a deep and intense prejudice pervading the county against him that a fair and impartial jury cannot be impaneled, or that a fair and impartial jury could not dispassionately weigh the evidence and render a verdict, or that his witnesses would be prevented from testifying freely and fearlessly. Either of these conditions of facts would entitle him to a change of venue. Another rule is that the state should, by affidavits, negative, clearly and explicitly the grounds upon which a change of venue is sought.

In all the affidavits filed by the defendants, except possibly his own, there is only one ground for a change stated, namely, that there is a prejudice against him which will prevent the impaneling of a fair and im-

\*For opinion of common pleas on motion for new trial see post 333. The judgment of the common pleas was affirmed by the Supreme Court, unreported, January 19, 1892. Bradbury and Minshall, JJ., dissented, on the grounds, (1) That the defendant was not tried by an impartial jury within the meaning of the constitution of the state, and (2) That the court erred in not allowing the motion for a change of venue.

partial jury. The other grounds are not relied upon. None of the affidavits for the state deny the existence of the prejudice; they simply deny, in an affirmative way, the claim that a fair and impartial jury cannot be impaneled. But an analysis of the affidavits for the defendants, except his own and those of Squire Gallaghers, Innis and Burns, shows that no facts are detailed. They do allege that the affiants have heard people express opinions about the case and about the defendant; but they utterly fail to say what the opinions were; whether they were all of one kind, or how many were adverse, and how many were favorable to the defendant.

These affidavits, therefore, only state opinions. The existence of a prejudice is a fact, but the conclusion of the affiants that it exists, may not be warranted by the facts. It must be remembered that there are nearly 130,000 people in this county. No one man, or a dozen men, can exactly say what the sentiment of even a majority of the people is on a given subject, unless they are deeply moved by it. If this was a small county, where some men would know nearly every man in the county, it would be reasonable that some men could accurately say what the prevailing opinion was in regard to the case.

The affidavits of the defendant, and of Gallagher, Innis and Burns, state an additional fact, namely, that the publication of the adverse testimony of the witnesses under oath and not under oath, in the newspapers, has created a prejudice against the defendant. The publications are not made parts of the affidavits, but it is assumed they allude to the publications which were put in as separate evidence. At least these are all the court can consider. I have carefully examined these extracts submitted by the defendant. Most of them are only ordinary newspaper accounts of the alleged crime, of his arrest, of the examination of witnesses at the inquest, and of statements of persons who saw the transaction. They contain no denunciations, invectives, appeals to passions, or efforts to excite prejudice. If they did create prejudice it is simply because the matters stated are not popular in this county. It does not follow that because these *ex parte* statements were made, that a jury could not make a calm and impartial inquiry into the case, and could not weigh the defense that the defendant may have to make.

I have said that the most of the contracts submitted by the defense were of this character. Some of them, I am sorry to see, are of a different character. There are denunciations and invectives in these, and some of them tended clearly to create prejudice. The extracts from the Dispatch, Post, News and Herald are free from this criticism, but those from the other papers are not. There is no justification for such publications, but some palliation. It must be remembered that the defendant's version of the affair and the version of his witnesses had not been heard, and have not yet been heard. The papers told the story as the witnesses for the state related it. Upon this story they denounced the defendant's conduct.

Newspaper denunciations of the defendant and of his alleged crime are not, in themselves, sufficient to warrant a change of venue. Reading newspaper accounts of an alleged crime or even sworn evidence published in the newspapers, does not, as matter of law, constitute actual bias, or an absolute disqualification, which renders the reader unfit to be a juror. As such disqualification, it was abolished by the Pruden law, enacted in 1884. 81 Ohio Laws, 53.

There was not in this case sufficient evidence of public expressions to prove that the newspapers have unduly affected public opinion. See *People v. Sharp*, 5 N. Y., Crim. Rep., 155.

Again, after giving all the significance to these publications that the counsel for the defendant attach to them, it is obvious from the extracts from newspapers published in Madison, Pickaway and Licking counties, submitted by the state, that the defendant would encounter the same prejudice in those counties. The same causes would produce the same effect there as here. The papers there have been as hostile as the papers here.

I am sustained by high authority in saying that a change of venue in many criminal cases has been "a positive disadvantage to the defendants. Not infrequently an impression is created unfavorable to the defendant from the fact that he felt it necessary to ask for a change, and this impression accompanies the case into the county to which the change is made." The remedy is, in many cases, a thorough sifting of the jury.

Concluding on these branches of the subject, the court is of the opinion that while the affidavits tend to show that it will be difficult to impanel a jury, still they do not prove that it will be impossible.

But the ruling will not be rested entirely on these considerations. The power vested in the court is discretionary. There is a line of authorities which establish the rule that the court may in such a case prudently postpone or overrule, for the time being, such a motion till it is ascertained by the examination of jurors whether a fair and impartial jury can be impaneled. It is not an abuse of discretion for the court to do that, even when the affidavits for the defendant make a showing that would justify a change of venue. The court would be guided by these authorities even if the defendant's affidavits showed cause for a change. *State v. Gray*, 8 Pac. Rep., 456; *State v. Millain*, 3 Nev., 433; *People v. Plummer*, 9 Cal., 299; *People v. Mahoney*, 18 Cal., 181.

It was charged that the affiants for the state were enemies of the defendant, but as that is unsupported by the evidence the court cannot regard it as of any weight. The motion is overruled.

## FORECLOSURE OF MORTGAGE.

375

### \*CINCINNATI HOTEL CO. v. CENTRAL TRUST AND SAFE DEPOSIT CO.

[Superior Court of Cincinnati, General Term, April 9, 1891.]

1. A service of summons on a corporation "by delivering a true copy of this writ with all the endorsements thereon to J. H. B—, secretary of the company, no other chief officer being found," is a compliance with the statute which prescribes the manner of service on a corporation when its chief office is not found in the county.
2. It is the spirit as well as the language of the code that all pleadings shall be liberally construed, with a view to substantial justice between the parties, and it is a sufficient allegation of the execution and delivery of certain bonds when it

\*Motion for leave to file petition in error, allowed by Supreme Court, and another motion for leave to file a petition in error was overruled, June 9, 1891, the decree of the court below modified, by striking out of it the provisions requiring the plaintiff in error (Hotel Co.) to pay the expenses and commission of the trustee, and cause remanded for a resale in default of payment by plaintiff in error, within a short day to be named by the court below, of the amount due on the mortgages, and costs of suit, and for further proceedings; April 28, 1891.

- is averred that they were issued, and also that they were secured by certain mortgages then outstanding. When such bonds and coupons have been issued, i. e., put into circulation, there is no presumption of law that they were not signed, nor is there any such presumption of fact.
3. The allegation of presentation and offer to surrender of such bonds and coupons is unnecessary unless made so under the conditions of their issue, and the averment of a failure to pay is a sufficient averment of a breach; nor is it necessary that the petition should allege that bonds and coupons were presented for payment at the place where they were payable if the terms of the bonds and mortgages are specifically set forth in the petition, and there is the further averment of non-compliance with the terms and the breach of the obligation.
  4. Safe deposit and trust companies contemplated by secs. 3821a and 3821b of the Rev. Stat. of Ohio have power to receive and hold money and property in trust, and can act as trustees under a mortgage in a case germane to the purposes of their incorporation. The Fidelity Safe Deposit and Trust Company, organized under the act of the general assembly, passed April 17, 1882 (Ohio L., vol. 79, p. 191), had corporate power to take the mortgages described in the petition, and to act thereunder as trustee.
  5. A stipulation in a mortgage that in case of the default in the payment of any of the quarterly installments, and that interest should remain unpaid for sixty (60) days from the date the same became due, etc., the principal of each and every one of said bonds might be declared by the trustee, by the trustee for the time being, or a majority in interest of the holders of all bonds outstanding, to be due, and the same should thereupon become due and payable, notwithstanding the time limited for the payment thereof had not elapsed, which declaration should be made by an instrument in writing under seal, and a copy served on the party of the first part, is a valid one; and the finding of the court below that the principal became due and payable on the declaration made by the trustee, the party being in default, is a finding which the court had a right to make upon the facts alleged in the petition and the proof to support it, and will not be reversed on error.
  6. When a court orders a sale subject to certain leases, it will not be presumed that the court in special term, with all the evidence before it, directed a sale to take place which would injure the legal rights of any party to the action, nor will such decree be set aside on the claim that it grants relief not prayed for in the petition, in ordering the sale of the property involved, subject to certain incumbrances mentioned, but not specifically described in the petition.
  7. A recital in a mortgage making the bonds payable upon default in interest at the election of the trustee or the bond holders, does not cut down the interest upon the principal after such precipitated maturity to six per cent., but leaves the interest to run at the promised rate, and such rate may be computed by force of the Rev. Stat., sec. 3179 and 3180, as interpreted in the case of the Hydraulic Co. v. Chatfield, 38 Ohio St., 575, 577.
  8. The reversal of a judgment in error will not be justified unless the record affirmatively shows, not only that error has intervened, but that such error was prejudicial to the party seeking such reversal. *Scovern v. The State*, 6 Ohio St., p. 288.
  9. The decision of a court is the judgment; the entry by the clerk is evidence of it. One is a judicial, the other a ministerial act. The judgment is as final when pronounced by the court, as when it is entered and recorded by the clerk. And if it appear satisfactorily to the court that an order was actually made at a former term, and omitted to be entered by the clerk, the court may at any time direct such order to be entered upon the records, as of the term when it was made.

HUNT, J.

This is a proceeding to vacate a judgment of the superior court of Cincinnati, entered at the December special term, 1890. The petition on which the decree was founded was filed May 21, 1889. The allegations of the petition were not put in issue by any pleading on the part of the plaintiff in error. A motion was also filed by the defendant below on January 12, 1891, to vacate the entry of judgment and order for sale for

mistake, neglect and omission of the clerk and irregularity in obtaining said judgment and order, in that the entry of judgment and order was not made until after the close of the December term, A. D., 1889. It is also the understanding of the court that the motion will be considered in connection with the petition in error. It should be stated that the name of the Fidelity Safe Deposit and Trust Company, of Cincinnati, Ohio, was changed to the name of The Central Trust and Safe Deposit Company of Cincinnati, Ohio, by a decree of the court of common pleas for Hamilton county, Ohio, in case No. 82,585 at the November term, 1888.

The plaintiff in error, the Cincinnati Hotel Company, on the twenty-fifth day of February, 1888, issued three hundred (300) mortgage bonds for five hundred dollars (\$500) each, numbered one (1) to three hundred (300), inclusive, bearing date the first day of March, 1888, payable to the Fidelity Safe Deposit and Trust Company, of Cincinnati, Ohio, trustee, or bearer, all of which bonds were payable on the first day of March, A. D. 1898, and bore interest from and after the first day of March, A. D. 1888, at the rate of seven (7) per cent. per annum, payable quarterly: said bonds having each of them coupons attached for the interest, payable quarterly on the first day of June, September, December and March of each year, but reserving the right on the part of the Hotel Company to pay each and all of the bonds at any time after five years from their date, all of said bonds to be of equal priority and without preference among the holders thereof.

Each of said bonds further contained the provision that it would become secured by the mortgage hereinafter referred to, when the certificate endorsed on said bond was signed by The Fidelity Safe Deposit and Trust Company, as trustees under said mortgage. There is a finding by the court that each of said bonds to the number of three hundred (300) was duly certified by said trustee.

In order to secure the payment of the bonds and the interest coupons, without any preference or priority of one bond over another, the Cincinnati Hotel Company, on the twenty-fifth day of February, 1888, duly executed and delivered to The Fidelity Safe Deposit and Trust Company, as trustee, its mortgage deed of the same date, conveying certain premises fully described in the first and second causes of action in the petition, with certain conditions; and on the sixth day of March, 1888, at 8 o'clock, A. M., this mortgage was left for record at the recorder's office of Hamilton county, Ohio, and was duly recorded in book 551, page 226 of the Mortgage Records of said office, and afterwards, on the seventh day of May, 1889 the mortgage was again duly left for record at the recorder's office of said county, and was again duly recorded in book 575, page 160 of the Mortgage Records of said office.

The trusts created in and by said mortgage were duly accepted by The Fidelity Safe Deposit and Trust Company.

There were certain express conditions in the mortgage that if the Cincinnati Hotel Company, its successors and assigns, should well and truly pay or cause to be paid unto the holders of the bonds to be issued, the principal and interest to become due thereon, to said holders at the times and in the manner stipulated in the bonds and interest warrants according to the true intent and meaning thereof, and should cause to be promptly and fully performed all and singular the other obligations, covenants and conditions thereof, then these presents, and the estate and rights granted should cease, determine and be void, otherwise to be and remain in full force.

The mortgage contained, among other things, certain covenants and conditions to the effect that in case of default in the payment of any quarterly installment of interest accrued on any of said bonds when such interest should become payable according to the true tenor and effect of the bonds, or the terms of any of the interest coupons thereto attached, and if such interest should remain unpaid and in arrears for a period of sixty (60) days from the date the same become payable, or in case default should be made by the Cincinnati Hotel Company in any of the covenants and obligations by it made and assumed, by and under any of the leases held by such Hotel Company on premises described, or in case of default by it in the performance of any covenant, agreement or stipulation or condition therein contained on the part of the Cincinnati Hotel Company to be observed, done, kept or performed, and if any such default should continue for the period of sixty days, then, and in either, or any, or every such case, the principal of each and all of such bonds might be declared by the trustees for the time being thereunder, or by a majority in interest of the holders of all of the bonds then outstanding, at their option to be due, and the same should thereafter become due and immediately payable, notwithstanding that the time limited therein for the payment might not have elapsed, which declaration must be made by an instrument in writing, signed by said trustee under seal, and a copy served on the Cincinnati Hotel Company, or by the action of a majority in interest of the holders of bonds at the time unpaid, which action must be signified by an instrument in writing signed by a majority in interest of bondholders; provided always that no act or omission of such trustee or of the bondholders in respect to any default in interest which may have happened should be held to impair or exhaust the option granted or to extend to or affect any subsequent default, or to impair the rights which would otherwise arise therefrom.

There was a further provision that in case of foreclosure of the mortgage and sale of property, or any part of it, the proceeds, after paying the necessary costs and expenses of such foreclosure, should be applied to pay the series of mortgage bonds according to their tenor and effect; but the Fidelity Safe Deposit & Trust Company, or trustee, might foreclose in case of default only upon the written request of one-third in amount of the bondholders of bonds then unpaid.

The Cincinnati Hotel Company of Cincinnati sold and delivered all of said bonds secured by the mortgage. On the third day of May, 1888, however, \$75,000 par value of said bonds secured by said mortgage, to-wit: bonds No. 42 to No. 150, inclusive, No. 251 and No. 271, inclusive, and No. 281 to 300, inclusive, were redeemed and canceled by the Cincinnati Hotel Company, and such redemption and cancellation was duly entered in the Recorder's Office of Hamilton county, Ohio.

The Cincinnati Hotel Company, on the first day of March, 1889, failed to pay the interest coupons on the \$75,000 of said mortgage bonds, then outstanding, in accordance with the terms and conditions of said bonds, coupons and mortgage, and failed to pay the interest coupons for more than sixty days before the filing of the petition in this case, to-wit: May 21, 1889, and the interest coupons still remain unpaid, and it is claimed that by reason of such default, there became due thereon and unpaid the sum of \$1,312.50 for the interest coupons which fell due March 1, 1889, with interest on said sum of \$1,312.50 at the rate of six per cent. per annum from the first day of March, 1889, until paid, which

interest up to the entry of the decree, to-wit: January 4, 1890, amounted to \$66.28.

It is alleged that on the second day of May, 1889, the holders of more than one-third in amount of said mortgage bonds then unpaid, notified the Fidelity Safe Deposit and Trust Company, in writing, requesting and demanding that it should, as trustee under said mortgage, proceed forthwith to foreclose the mortgage and cause the premises to be sold in accordance with the terms and conditions of the mortgage, and that afterwards, on the sixteenth day of May, 1889, as said interest coupons due March 1, 1889, still remained unpaid and unsatisfied, the Fidelity Safe Deposit and Trust Company, as trustee under said mortgage, declared the principal of each and all of said \$75,000 of mortgage bonds then outstanding to be due and immediately payable, which declaration was duly made by an instrument in writing signed by the Safe Deposit and Trust Company, by its proper officers under seal, and a copy thereof was duly served on the Cincinnati Hotel Company, as required by the terms of said mortgage. The Cincinnati Hotel Company failed to pay the principal of said bonds, to-wit, the sum of \$75,000, with interest thereon from the first day of March, 1889, at the rate of 7 per cent. per annum until paid, which interest up to the fourth day of January, 1890, amounts to the sum of \$4,418.75.

The court finds that the said mortgage is the first and best lien on the premises described in the first cause of action, set out in the petition; that the condition of defeasance of said mortgage has been broken; that said mortgage has become absolute and that the Central Trust and Safe Deposit Company is entitled to have the equity of redemption of the Cincinnati Hotel Company in the premises foreclosed and the premises sold and the proceeds applied to the payment of said indebtedness.

On the sixteenth day of April, 1888, the Cincinnati Hotel Company issued two hundred and eighty-eight (288) negotiable second mortgage bonds, two hundred and eighteen of which for \$1,000 each, and seventy of which were for \$100 each, in manner as in the petition alleged, numbered consecutively from 1 to 288 inclusive, bearing date from the first day of March, 1888, payable to the Fidelity Safe Deposit and Trust Company, of Cincinnati, O., trustee, or bearer, all of which bonds were payable on the first day of March, A. D., 1888, and bore interest from and after the first day of March, 1888, at the rate of six per cent. per annum, payable semi-annually, said bonds having each of them coupons attached for the interest payable semi-annually on the first days of September and March of each year; but reserving the right on the part of the Cincinnati Hotel Company to pay each and all of said bonds at any time after ten years from their date; all of said bonds to be of equal priority and without preference among the holders thereof.

Each of said bonds, too, further contained the provision that it would become secured by the mortgage hereinafter referred to and known as the second mortgage, when the certificate endorsed on said bond was signed by the Fidelity Safe Deposit and Trust Company, as trustee under said mortgage, and subsequently each of said bonds to the number of 288 was duly certified to by said trustee.

In order to secure the payment of the bonds and the interest coupons so issued without any preference or priority of one bond over another, the Cincinnati Hotel Company, on the twenty-fifth day of April, 1888, duly executed and delivered to the Fidelity Safe Deposit and Trust

Company, as trustee, its mortgage deed of the same date, which mortgage deed, however, was to be subject and subordinate to its first mortgage deed conveying the premises described in the second cause of action in the petition, with certain conditions, and that on the twenty-sixth day of April, 1888, at eleven o'clock A. M., this second mortgage was duly left for record at the Recorder's Office of Hamilton county, Ohio, and was duly recorded in book 555, page 27 of the Mortgage Records of said office. The trusts created in and by said mortgage were duly accepted by the Fidelity Safe Deposit and Trust Company. The mortgage was executed and delivered upon the express condition that if the Cincinnati Hotel Company, its successors or assigns, should well and truly pay or cause to be paid unto the holders of the bonds to be issued thereunder, the principal and interest to become due thereon, to said holders at the times and in the manner stipulated in the bonds and interest warrants according to the true intent and meaning thereof and should cause promptly to be performed all and singular the other obligations, covenants and conditions thereof, then these presents and the estate and rights thereby granted, should cease, determine and be void. The second mortgage contained a similar provision in regard to the default of any semi-annual payment of interest, and, further, that the principal of each and all of the bonds might be declared by the trustee for the time being, or a majority in interest of the holders of all the bonds then outstanding, at their option to be due and payable.

The mortgage contained a provision that in case of foreclosure of this mortgage and sale of said property, or any part thereof, the proceeds, after paying the necessary costs and expenses of such foreclosure, should be applied (1) to pay the series of first mortgage bonds then outstanding and unpaid and the interest due and unpaid thereon, and (2) the series of second mortgage bonds then outstanding and unpaid thereon, according to the tenor and effect of said first and second series of bonds respectively, but the Fidelity Safe Deposit and Trust Company or trustee, should foreclose in case of default only upon the written request of one-third in amount of the holders of the first and second mortgage bonds then unpaid.

The Cincinnati Hotel Company sold and delivered all of the bonds secured by the second mortgage, amounting to the sum of two hundred and twenty-five thousand dollars (\$225,000.)

On March 1, 1889, the Cincinnati Hotel Company failed to pay the interest coupons on the \$225,000 of the second mortgage bonds then outstanding, in accordance with the terms and conditions of the bonds, coupons and mortgages, and failed to pay the interest coupons for more than sixty days before the filing of the petition herein. The interest coupons still remain unpaid, and there became due thereon and unpaid, according to the claim of the defendant in error, the sum of \$6,750 for interest coupons which fell due March 1, 1889, with interest on said sum of \$6,750 at the rate of 6 per cent. per annum from the first day of March, 1889, until paid, which interest amounts to \$340.88 to January 4, 1890.

On the second day of May, 1889, the holders of more than one-third in amount of said mortgage bonds thus unpaid, notified the Central Trust and Safe Deposit Company in writing, requesting and demanding that it should, as trustee under said mortgage, proceed forthwith to foreclose the same and cause said premises and property to be sold, in accordance with the terms and conditions of said mortgage, and that afterwards, on the fifteenth day of May, 1889, the holders of more than one-third in



amount of the first mortgage bonds, then unpaid, issued by the Cincinnati Hotel Company also notified the Central Trust and Safe Deposit Company, in writing, requesting and demanding that it should, as trustee under the second mortgage, proceed forthwith to foreclose the second mortgage, and cause the premises and property described to be sold in accordance with the terms and conditions of said second mortgage.

Afterwards, on the twenty-first day of May, 1889, as the interest coupons due March 1, 1889, still remained unpaid and unsatisfied, the Central Trust and Safe Deposit Company, as trustee under the second mortgage, declared the principal of each and all of said \$225,000 of second mortgage bonds then outstanding to be due and immediately payable, which declaration was duly made by an instrument in writing signed by the Central Trust Company by its proper officers, under seal, and a copy thereof duly served on the Cincinnati Hotel Company of Cincinnati as required by the mortgage.

It is alleged that notwithstanding such declaration, the Cincinnati Hotel Company failed to pay the principal of said bonds, and that there became due for the principal of said bonds the sum of \$225,000, with interest thereon from the first day of March, 1889, at the rate of six per cent. per annum until paid, which interest computed to January 4, 1890, amounts to the sum of \$11,362.50.

There is a finding by the court that the second mortgage is the next after the lien for the mortgage set out in the first cause of action; that the condition of defeasance of said mortgage has been broken; that said mortgage has become absolute, and that the Central Trust and Safe Deposit Company is entitled to have the equity of redemption of the Cincinnati Hotel Company foreclosed and said premises sold, and the proceeds applied to the payment of said indebtedness.

The property described in the first and second causes of action is the same, and consists of the real estate in fee simple and the leasehold estate on which the Grand Hotel in Cincinnati is located.

The court adjudged that unless the Cincinnati Hotel Company should within thirty (30) days from the entry of the decree pay the costs, and to the Central Trust and Safe Deposit Company its expenses herein and such compensation as might be fixed by the court, and to the Central Trust and Safe Deposit Company, as trustee, the sum hereinbefore found to be due for the use and benefit of the holders of the bonds and coupons secured by the first and second mortgages, that the equity of redemption of the Cincinnati Hotel Company, of Cincinnati should be forever barred and foreclosed, and the said premises sold, free and clear of all claims of all parties to this suit, and that an order of sale issue to the sheriff of Hamilton county, directing him to sell said premises as upon execution at law, and to bring the proceeds into court for further order.

It was further ordered that all sales made of the premises be subject to the lease for ten years from July 1, 1888, held by Charles Reed, defendant, recorded in Book 89, page 384, Hamilton County Records, for the store and cellar known as 247 West Fourth street, and also to the lease held by the defendant, The Marmet Company, for five years from September 20, 1888, recorded in Book No. 90, page 520, Hamilton County Records, for that certain room at the southwest corner of Fourth street and Central avenue.

The amended petition in error filed January 12, 1891, alleges that there is error in the record and judgment in that (1) no proper service or summons was made upon the Cincinnati Hotel Company, (2) that the

petition does not allege that the bonds, or any of them, were endorsed by the said trustee as requested by the terms of the bond, nor that the coupons were signed by the Cincinnati Hotel Company, nor that the trustee issued said bonds or coupons, nor any of them, nor that they were transferred to or were held by any persons lawfully acquiring the same according to the tenor and effect of the same, (3) that there was error in the record in rendering a decree in favor of the defendant in error instead of for plaintiff in error, (4) that the Central Trust and Safe Deposit Company had no legal capacity to sue or corporate power to take mortgages named in the petition, or to act as trustee thereunder, (5) that the judgment decree and order did not and does not provide that the Cincinnati Hotel Company might, within a time to be specified, pay the amount of the coupons and interest that had accrued, and thereby purge the default which had been incurred in the non-payment of the same, (6) that the petition does not allege that the said bonds and coupons were ever presented for payment at the place where they were payable, (7) that the petition upon which the judgment was predicated, was defective in that it did not aver that the bonds and coupons secured by the mortgages were executed and delivered, (8) that there was no averment in the petition that the certificate referred to therein had ever been signed by the said trustee, and that consequently the said bonds never became secured by said mortgage, (9) that the petition did not state a cause of action in that no contract was averred between the parties, nor any consideration of any contract, nor any demand nor any breach, (10) that the judgment is contrary to law in that it grants relief not prayed for in the petition, in that the judgment decree orders the sale of the property involved subject to certain incumbrances not specified in the petition, (11) that the judgment grants relief contrary to law and not prayed for in the petition, in that it fails to order the payment of a specified sum by the Cincinnati Hotel Company as a condition precedent to the foreclosure of the equity of redemption, (12) that the judgment is contrary to law in that it orders the payment of divers sums of money by the Cincinnati Hotel Company, the recovery of which was not sought nor prayed for in the petition, and which sums of money are not specified in the judgment nor in any way made definite or certain, (13) that the judgment is excessive and contrary to law, and, (14) that there are other and further errors apparent upon the face of the record.

The decree itself recites that "the cause came on to be heard on the pleadings and the evidence and was submitted to court. It is true that there is a finding that the Cincinnati Hotel Company is in default, and "that the allegations of the petition are confessed to be true," yet the court further finds "the allegations of the petition to be true as against all the defendants, and that the equities of the case are with the plaintiff, and that it is entitled to the relief prayed for." The pleadings show that the answers and cross-petitions of certain of the defendants, who occupied the relation of lien holders by way of mechanic's liens, contain a denial of each and every allegation of the petition, and, therefore, put in issue every fact contained in the petition; while it might be said that the Cincinnati Hotel Company admitted all the allegations of the petition by default in pleading, yet these defendants having liens adverse to the interests of the Central Trust and Safe Deposit Company, have contested the right of the defendant in error to recover at all. It could reasonably be inferred from the language of the decree that the court must have passed upon the issue raised by the pleadings, and that evidence must

have been submitted. We can only consider the errors as disclosed by the record.

It is contended by the Cincinnati Hotel Company that there was not proper service of summons on the Cincinnati Hotel Company, and that the court acquired no jurisdiction over the Hotel Company. Section 5044 of the Rev. Stat. of Ohio, provides the manner in which a summons against a corporation may be served. If the chief officer cannot be found in the county, then upon its cashier, treasurer, clerk or managing agent; or if none of the aforesaid officers can be found by a copy left at the office or the usual place of business of such corporation, with the person having charge thereof. The return in the summons recites that the Cincinnati Hotel Company, the defendant below, was served "by delivering a true copy of this writ with all the endorsements thereon personally to J. H. Berry, secretary of the company, no other chief officer being found." It is insisted, substantially, that the return, besides stating the facts that its chief officer was not found in the county, should also state that such officer could not be found.

It is held in the case of *Fee v. The Big Sandy Iron Company*, 13 Ohio St., 563, that it must in substance affirmatively appear from the return that the chief officer could not be found, but this was a case where the return of service only showed that a copy of the summons had been left at the office, or place of business with the person in charge. It contained no other recital, and, therefore, did not show in substance that neither the chief nor the subordinate officer could be found. There is a compliance with the requirement of the statute in the return that no other chief officer was found. The form of service in this case seems to have been approved in the case of *Mohr & Mohr Distilling Company v. Lamar Insurance Company*, 8 Dec. Re., 421. The *Wheeling, Parkersburg & Cincinnati Transportation Co. v. The Baltimore & Ohio Railroad Co.*, 1 Cin'ti Sup. Ct. Rep., 311.

There is a further contention by the plaintiff in error that the petition is defective in that it does not allege that the bonds, or any of them, were endorsed by the trustee as required by their terms, nor does it allege that the coupons were signed by the Cincinnati Hotel Company, nor does it allege that the trustee issued the bonds or coupons, or any of them, nor that they were transferred to or held by any persons lawfully acquiring the same according to their tenor and effect.

The petition states that these bonds now outstanding are secured by the mortgages. This averment is sufficient and any other interpretation in construing pleadings would be a violation of the liberal spirit of code. Section 5096: The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties. The bill sufficiently alleges the execution and delivery of the bonds by the averment that they were issued, and also that they were secured by the mortgages, and now outstanding. The word "issued" has been construed to be equivalent to "emit" or "put into circulation." The bonds and coupons having been issued, that is, put into circulation as bonds and coupons, there is no presumption of law that they were not signed, nor is there any such presumption of fact; nor can any such presumption reasonably be inferred from the language of the pleadings.

It may be said as to the sixth ground of error as alleged, that in the opinion of the court the allegation of presentation and offer to surrender is unnecessary, inasmuch as such presentation and offer to surrender were not in fact necessary under the conditions.

It has been held upon a demurrer to a bill to foreclose a mortgage where the trustee of the mortgage had declared the principal due for failure to pay the coupons that the bill was not bad on demurrer for want of an averment of the presentation of the coupons for payment. The court say, "Nor need the averment that the company had failed for more than six months to pay the interest, also show further, that presentation had been made of the coupons for payment at the office or agency of the company where they were made payable. In regard to past due promissory notes, payable at a particular place, the law is well settled that if the defendant has suffered any loss by a failure to present them there, he must establish it in defense. The Savannah and Memphis Railroad Company v. Lancaster et al., 62 Ala., 564.

In the case of Railroad v. Johnson, 54 Pa. St., 127, which was an action at law upon the bonds and coupons, the bonds having been declared due for failure to pay the coupons the court say: "The coupons were deliverable only upon payment, and no payment or even readiness and willingness to pay is alleged. Nor is it denied that they were presented after the day of payment. They were payable at the office of the company in Philadelphia, and it was necessary to a complete defense, to allege that the company was ready at that place to pay, but that the coupons had never been presented. Payment is a matter of defense as between debtor and creditor, which must be shown by positive acts."

These cases clearly indicate that the averment of a failure to pay, is both at law and equity, and therefore, under the code, a sufficient averment of a breach. It is not contended that this action is brought under sec. 5086 of the Rev. Stat., but the bill avers that the plaintiff in error made its negotiable promissory notes which it issued, and for securing which it made a mortgage, and that it failed to pay its negotiable notes at the time and place when they were payable by their terms, and that the plaintiff below is the trustee of the holders for the time being of these promissory notes, and as such trustee is now seeking a foreclosure of the mortgages by which they are secured. The Central Trust and Safe Deposit Company, therefore, sues in its capacity as trustee of an express trust upon a contract made partly with it and partly with its *cestuis que trustent*, the persons who, for the time being, should be the holders of these bonds. The petition is not, in general frame, unlike the bill in the case of Railroad Company v. Lancaster, 62 Ala., 564, which was held to be good as against a general demurrer. The averment of a breach, we take it, is sufficient, and the authorities sustain the position that the petition being good either upon demurrer or motion in arrest of judgment, it must stand as against a proceeding in error.

It is insisted as a further ground of error, that the Central Trust and Safe Deposit Company had no legal capacity to sue, or corporate power to take the mortgage named in the petition or to act as trustee thereunder. The Fidelity Safe Deposit and Trust Co. was organized under the act of the general assembly passed April 17, 1882, 79 O. L., 101. Sections 3821a and 3821b of the Rev. Stat. provided that such companies shall also have power to receive and hold money and property in trust, etc., from corporations or individuals upon such terms or conditions as may be obtained or agreed upon between the parties. It is also provided in sec. 3821b that any such company may be appointed trustee under a will or instrument creating a trust for the care and management of property, under the same circumstances, and in the same manner, and subject to the same control, by the court having jurisdiction of the same, as in the case of a

legally qualified person. Section 3235 of the Rev. Stat. provides that a corporation may be formed for any purpose for which individuals may also act themselves, except dealing in real estate or carrying on professional business. There does not seem to be any good reason why a corporation so organized could not act as trustee under a mortgage in a case germane to the purpose of its incorporation. Perry on Trusts, sec. 43 and 44.

It was provided in the mortgage, as will be seen on pages seven (7) and eight (8) of the petition, that in cases of the default in the payment of any of the quarterly installments, and interest should remain unpaid for sixty (60) days from the date the same became due, etc., then, and in every such case, the principal of each and every one of said bonds might be declared, by the trustee for the time being, or a majority in interest of the holders of all bonds outstanding, to be due, and the same should thereupon become due and payable, notwithstanding the time limited thereafter for the payment thereof had not elapsed, which declaration should be made by an instrument in writing under seal, and a copy served on the party of the first part, etc. The claim of the plaintiff in error is, that if a provision is made that in case interest be not paid when due, or within a certain time thereafter, that the principal declared to be due and payable is void as a matter of law, and that the mortgagor can always redeem by paying the interest only. The trustee, having declared the principal to be due for a default in the payment of the interest, the amount due at the time of the bringing of the suit was principal and interest; such declaration having been made, the trustee was required to bring an action for the entire amount due, and the decree necessarily had to follow the petition. Even if the Cincinnati Hotel Company could have applied to court to relieve it of the declaration made by the trustee that the principal was due by reason of default in payment of interest, and ask the court to allow it to redeem, yet, seeking no such relief, and being in default, the finding of the court that the principal became due and payable on the declaration made by the trustee, is a finding which the court had a right to make upon the facts alleged in the petition, and the proof to support it, and cannot be reversed in error.

The case of McClelland v. Bishop, 42 Ohio St., 113, cited by plaintiff in error, is directly in point that such a stipulation contained in the mortgage in question is for the benefit of the mortgagee and a valid stipulation, and one which relates to the remedy for foreclosure. It will be remembered that this is not an action for a money judgment on bonds by the bondholders, but simply a foreclosure of the mortgage by the trustee. The contention that the Cincinnati Hotel Company was entitled to a provision in the decree that there should be no sale if the plaintiff in error paid the coupons, without paying the bonds, is not sustained by the law. Nor does the case of McClelland v. Bishop, *supra*, support such a claim. That case holds that a provision contained in a mortgage that if default be made in payment of any one of a series of notes, each and all shall fall due and the mortgage shall become absolute as to all the notes remaining unpaid at the happening of such default, is valid; and that the mortgage may be foreclosed for the whole debt upon the happening of the event. It does not operate to extinguish the obligation expressed on the face of the notes themselves for other purposes, and, therefore, for the purpose of demand and notice to charge endorsers, the notes are to be deemed due

only as of the maturity named in the note without regard to the stipulation of the mortgage.

It is urged, again, that the petition did not state facts sufficient to constitute a cause of action, in that it did not allege that the said bonds and coupons were ever presented for payment at the place where they were payable. The allegation of the petition on page (10) is "that on the sixth day of March, 1889, the said defendant, the Cincinnati Hotel Company, of Cincinnati, failed to pay the interest coupons on the \$75,000 then outstanding in accordance with the terms and conditions of said bonds and mortgage, and that more than sixty (60) days have expired, and that said interest coupons still remain unpaid and unsatisfied." This can only be construed as an allegation that the company failed to pay the coupons on that day in accordance with the terms and provisions of the mortgage. Since the terms of the bond and mortgage were specifically alleged in the petition it would seem sufficient to follow with the further averment that they were not complied with and that there is a breach.

The decree is attacked, too, for the reason that it is contrary to law in that it grants relief not prayed for in the petition in ordering the sale of the property involved subject to certain incumbrances not specified in the petition. This proposition, perhaps, involves more difficulty than any other alleged as error. It is true that the petition averred that the co-respondents, Charles Reed and Marmet Company claimed an interest in the premises in controversy as lessees of a part thereof. There is the further averment that their rights are subject to those of the mortgagee, and the court is asked to determine the priority of the liens upon the property. And for such determination, even in a decree by default, it is necessary that the court should hear testimony, and if it appeared that these defendants were lessees of parts of the premises, then it was the duty of a court of equity to restrict the relief sought so far as might be necessary. In other words, in respect to Reed and the Marmet Company, defendants below, the decree does not grant relief not sought by the petition, but in fact grants relief than is sought by the petition, and, therefore, the decree is not open to criticism from that direction.

The cases cited in 12 Abbott's Practice, 331, (*Simonson v. Blake*), as well as the case in 7 Ben. Monroe, 104, (*Champion v. Foster*), arise under the statutes of New York and Kentucky respectively. The New York Code of Civil Procedure, sec. 275 (now sec. 1207) and which is not found in the Ohio Code of Civil Procedure, is as follows: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." It will be observed that these cases in New York and Kentucky do not apply because they simply held that the relief shall not exceed the relief prayed for in the petition. The relief prayed for in the petition was as against the Cincinnati Hotel Company, that its equity of redemption should be foreclosed, and as against the defendants Reed and the Marmet Company, that their leases should be declared invalid as against the mortgage.

The Central Trust and Safe Deposit Company had a right to abandon its contention as against the defendants Reed and the Marmet Company, in which case the property might be sold subject to whatever rights they had under the leases. If the Cincinnati Hotel Company, which was not a party to the relief sought against the defendant Reed

and the Marmet Company, had desired to have the property sold free of their claims as lessees it might by cross-petition have invoked the aid of the court for that purpose. It sought no such relief. It is not the law, as we regard it, at least in this state, that a decree by default is required to follow strictly the prayer of the petition, nor is it the rule anywhere that a decree by default is required to give all the relief asked by the petition as well as to give no relief not asked for by the petition.

The error, if any, consists in holding that the leases which are not denied to have been given by the Cincinnati Hotel Company, are valid as against the mortgagee. Such a holding is a holding in favor of the mortgagor, because it holds that the mortgagor could make a valid lease in derogation of the rights of the mortgagee, or else that the mortgagee gave its consent to the making of such lease. Such a lease unquestionably would be valid with the consent of the mortgagee. In *Kennett v. Plummer*, 28 Mo., 142, it was held that a stranger could not make the objection that a lease made by the mortgagor in possession was invalid as against the mortgagee.

In *Trent v. Hunt*, 9 Exchequer, 14, the same position was held, and in *Costigan v. Hastler*, 2 Schoales & Lefroys, 160, the court maintains that where the mortgagor has contracted to make a lease the court will make him either secure the consent of the mortgagee or pay off the debt, or consent to the rescission of the contract, showing that the consent of the mortgagee is all that is required in any such case to make a lease valid, and there can be no doubt that such consent may be given, not merely at the time of making the lease, but at any time up to decree of sale.

The Central Trust and Safe Deposit Company alleges that these parties claim an interest as lessees, and ask for a sale free and clear of their interest. The parties are in default and the court holds that the plaintiff is not entitled to the full amount of the relief asked, or to a sale clear and free of those interests; that a court upon a decree *pro confesso*, or what is the same thing, a default judgment, can go outside the allegations of the bill when they are indefinite and require evidence to be submitted and base its decree thereon. *Williams v. Corwin*, Hopkins Chancery, 471, cited in *Thompson v. Wooster*, 114 U. S., 111, and in which a carefully prepared history of the practice and effect of taking bills *pro confesso* is given, in support of this position.

The court, in fact, orders a sale subject to the two leases, mentioning specifically the book and page of each and the term of such leases, and that an estate had been granted to each of these two lessees for the time named, so that the mortgages to the central Trust and Safe Deposit Company were mortgages of a remainder in an estate. The decree orders a sale of the remainder which belonged to the mortgagor, free and clear of all claims of all parties to the suit. It is certain that the mortgages made to the Central Trust and Safe Deposit Company could only attach upon the interests of the mortgagor in the land at the time, and that the mortgagee could not take a decree for sale for any greater interest than remained in the mortgagor. If that position were correct no court could order the sale of a remainder in fee simple, subject to a life estate upon foreclosure of a mortgage given only upon that remainder. The same principle applies to estates for a term of years as to life estates. If it be urged in reply that the decree shows the leases began subsequent to the date of issue of the bonds the court having found that the property was subject to those leases, and found this upon evidence submitted at the trial, it

must necessarily be presumed that the court in special term made a correct finding. The presumption would arise, either that the contract was entered into for the leases prior to the execution of the bond and mortgage, or that the bondholders and trustees had consented that the leases should take precedence of their mortgage, or that some other equity existed by which the court was justified in its finding. It can not be presumed by a reviewing court, which has none of the evidence before it, that the trial judge made a finding without evidence to sustain it. Whether or not a sale subject to a lease reduces the value of the property sold depends very much upon whether the lease is a beneficial one; for anything that appears these leases may be of great value to the Cincinnati Hotel Company. The court would hardly be justified in the presumption that the court in special term, with all the evidence before it, directed a sale to take place under circumstances which would injure the legal rights of any party to the action.

It is claimed that the amount fixed in the decree in the foreclosure proceedings was excessive in that it computed interest upon the principal at the rate of seven per cent. per annum after the time the principal was declared due by the trustee, in May, 1889, for previous default in payment of interest. This claim was not set up in the pleadings in this case and can not well be urged, since there is nothing to sustain it.

It will be observed that the bond promises to pay interest not merely as per coupons, but generally at seven per cent. per annum; and, further, that it refers to the mortgage specifically for information as to the terms and conditions on which the bonds are issued. In this respect these bonds differ from the case of *McClelland v. Bishop*, 42 Ohio St., 113-123, cited by counsel for plaintiff in error. In that case the note made no reference to the mortgage. The recital in the mortgage making the bonds payable upon default in interest at the election of the trustee, or bondholders, does not cut down the interest upon the principal after such precipitated maturity to six per cent., but leaves the interest to run at the rate promised; and such rate should be computed in the decree by force of Rev. Stat., sec. 3179 and 3180, as interpreted in the *Hydraulic Co. v. Chatfield*, 38 Ohio St., 575-577; also *Monnett v. Sturges*, 25 Ohio St., 384; *Marietta Iron Works v. Lottimer*, 25 Ohio St., 621. Nor do the notes in *Samyn v. Phillips et al.*, 15 Ohio St., 218, contain any stipulation as to the rate of interest. The bond does in the case at bar, and the bond not only makes the mortgage a part of its terms by reference, but the mortgage also contains the bond in terms.

There is another objection urged to the decree in that it provides that the Cincinnati Hotel Company shall pay to the Central Trust and Safe Deposit Company its expenses herein, and such compensation as may be fixed by the court. As to the compensation of the trustee, the trustee has no right to receive it until fixed by the court, so that until the court has fixed the compensation of the trustee the Cincinnati Hotel Company is entitled to redeem by paying the bonds and coupons without compensation to the trustee. The Hotel Company evidently has not been prejudiced by this, for the record discloses that the sale has not been confirmed, and until the sale has been confirmed the Hotel Company would, notwithstanding the expiration of the thirty days, be permitted to come in and redeem. The court would still have power to fix the amount of any expenses or compensation, if any such expenses or compensation were legal. It cannot be denied that in this state a warrant of attorney to confess judgment attached to a promissory note in which



it is provided that the judgment conferred shall be for the principal and interest of the note, and a percentage thereon as a collection fee, is usurious and void. In *Bronson v. LaCrosse & Milwaukee Railroad Co.*, 2 Wall, 283, it was held that where a mortgage allows the payment of the expenses of the mortgagee, it is proper for the court to allow a trustee in addition to the taxed costs, reasonable counsel fee. See also *Munter & Faber v. Linn*, 61 Ala., 492; *Weatherby v. Smith*, 30 Iowa, 131; *Parham v. Pullian, Ex. etc.*, 5 Caldwell (Tenn.), 497; *Daily v. Maitland*, 88 Pa. St., 384; *Clawson v. Munson*, 55 Ill., 394; *Renshaw v. Richards*, 30 La. Annual 398. And in *Trustees v. Greenough*, 105 U. S., 527, it is held that a trust state must bear the necessary expenses of its administration. It will be found in the case of *Coe v. Columbus, Piqua & Indiana Railroad Company*, 10 Ohio St., page 372, and cited by counsel for plaintiff in error, that the mortgage upon which the decree for sale was based in that case provided that "the trustee should be entitled to receive proper compensation for every labor or service performed by him in the discharge of his trust in case he shall be compelled to take possession of such premises, or any part thereof, and manage the same." This may explain the language on page 409, where *Gholson, J.*, says: "We do not understand that the mortgagees in that case came before the court in the character of trustees of any property or fund which would authorize the court to charge upon that property or fund their expenses. They are not and never have been in the possession of the property." In the present case, the mortgage expressly allows the trustee compensation and expenses, regardless of possession. It must be said that the court in the case just cited did not feel at liberty to allow ordinary mortgagees compensation for their trouble, or for counsel fees, out of the proceeds of a sale of mortgaged property, and this we conceive to be the law of this state. In our view of the proceeding, however, it is not necessary to reverse the judgment of the court below for this reason, inasmuch as no amount was mentioned in the decree for expenses and compensation. A redemption from sale could have been effected simply by paying the amount due on the bonds as fixed in the decree, and disregarding all reference in the decree as to the expenses and compensation to the trustee. The amount of the trustee's expenses and compensation is indefinite and unfixed in the decree and practically could have no effect whatever without further order of the court. It certainly never stood in the way of redemption, nor is there any claim that there was ever any intention or desire on the part of anyone to redeem, or that anyone was prevented or that anyone had been prejudiced in his rights.

Section 5115, Rev. Stat., requires that the court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed, or affected, by reason of such error or defect.

The record must show that the error complained of was prejudicial. *Scovern v. State*, *supra*; *Dickey v. Beatty*, 14 Ohio St., 389; *Oviatt v. The State*, 19 Ohio St., 573; *Dallas v. Ferneau*, 25 Ohio St., 635-638.

Where, on error, it is apparent from the record that the judgment of the court below was right, technical errors intervening in the trial, will not avail to disturb the judgment. *Way v. Langley*, 15 Ohio St., 392.

In *Dayton Insurance Co. v. Kelly*, 24 Ohio St., 345 it was held that a failure to aver in the petition the performance of a condition precedent

in the contract sued on was not sufficient ground for reversing the judgment where it appeared from subsequent pleadings and record that the defendant had not been prejudiced thereby. In *Jack v. Hudnall*, 25 Ohio St., 255, the court has distinctly declared that where the finding of fact by the court admits of a construction which will support the judgment, that construction will be adopted rather than a different one which would render the judgment erroneous.

There is nothing in the record to show that the Cincinnati Hotel Company was injured in any manner whatsoever by the order, and a reviewing court would hardly interfere, unless something was shown in the face of the record to be prejudicial. The Supreme Court has said in the case of *McHugh v. The State*, 42 Ohio St., p. 154, "The duty of regarding any record brought before this court for review, as being wholly free from error until the contrary is clearly shown, is one which we endeavor to faithfully perform; and, except as to matters relating to jurisdiction, or the practice of the court, or where counsel have overlooked a statute or decision of this court controlling the case, the court confines itself, ordinarily, to the errors assigned as grounds of reversal. Nor does it necessarily follow that the judgment will be reversed because error has intervened. In *Scovern v. The State*, *supra*, the court again says: "In order to justify the reversal of a judgment on error, the record must affirmatively show, not only that error had intervened, but that it was to the prejudice of the party seeking to take advantage of it."

It is not necessary to consider further the alleged grounds of error. No error is apparent in the record and the decree and judgment should stand.

#### AS TO THE MOTION TO VACATE.

In regard to the motion filed January 12, 1891, to vacate the entry of judgment and order for sale, the principle is fundamental that every court has a right to judge of its own records and minutes; and if it appear satisfactorily to it that an order was actually made at a former term and omitted to be entered by the clerk, it may at any time direct such order to be entered upon the records, as of the term when it was made. *Benedict v. The State*, 44 Ohio St., 679; *Bothe v. Railway Co.*, 37 Ohio St., 147, 149; *Elliott v. Plattor*, 43 Ohio St., 198, 205; *Freeman on Judgments*, sec. 56 to 68.

It is suggested, however, that by reason of entering the decree upon the December minutes plaintiff in error was deprived of his right to file a motion for a new trial within three days as provided in sec. 5307 of the Rev. Stat. It would appear from the reasoning in the case of *Landon v. Reid*, 10 Ohio Rep., 202, that the decision having been rendered at the December term it was the duty of the person aggrieved to file their motion during that term, but if the absence of the decree from the minutes prevented in some way the filing of the motion and the party was unavoidably prevented from filing the motion within three days after the decision is rendered, then the limitation would not apply. Indeed the very relief is now invoked by the motion.

The subject is carefully discussed in *In re Cook*, 77 California, 220, by *McFarland, J.*, it can hardly be questioned that the decree might have been entered in the January minutes *nunc pro tunc* with the same effect. The December minutes were open and the court in the exercise of a proper discretion could order the decree to be entered upon them

directly instead of by reference. The ordering of the decree was a judicial act; the entering it was purely ministerial and could have been done at any time without affecting the validity of the judicial act. The decision of the court is the judgment the entry; the entry by the clerk is the evidence of it. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute. Cal. St. Tel. Co. v. Patterson, 1 Nev., 124.

The motion to vacate the entry of judgment and order for sale filed January 12, 1891, and submitted to the court, is based on irregularity in entering the same, and it is contended that it was not in fact entered at the December term, 1890. The testimony of the witnesses upon the matter of the entering of the decree will be found as follows: Mr. Wulsin, pp. 92, 95, 135, 141, 142; Judge Harmon, p. 465, 469; Judge Taft, in his deposition in response to interrogatories.

The testimony seems to establish the fact that the decree was complete and in the hands of the trial judge prior to the fourth day of January, 1890.

The court, having directed at the December term that this decree should be entered in the minutes of the last day of that term, it could afterwards, in the January term, have ordered it entered upon the minutes of the January term, *nunc pro tunc* as of the last day of the December term; and had the court done so the decree would have had precisely the same effect that it has appearing as it does now upon the minutes of the December term. Benedict v. The State, *supra*; Elliott v. Plattor, *supra*; Potter v. Meyers, 31 Ohio St., 103; Lambert v. Mustard, 18 Ohio St., 419; Landon v. Reid, 10 Ohio, 202.

No exceptions to the decree was taken, although under the authority of the Commercial Bank v. Buckingham, (12 Ohio St., 402) it may be claimed that it is not necessary in order that a final judgment may be reviewed, reversed, vacated or modified, that the party seeking its reversal should have excepted as such final judgment at the time.

It is the testimony of the trial judge (p. 8 of deposition) that at the time of the endorsement of the entry the court was sitting in the submitted room, and in the December term, that the court declared to counsel for the defendant in error that he was entitled to his decree, that the court endorsed the decree to be entered on the last day of the term, and at the same time handing the papers to counsel and speaking to the clerk about it. It is further the statement of the trial judge (p. 5) that the delay in the entry of the decree of judgment and order for sale was caused by an intervention in the interest of the plaintiff in error. The petition in error will be dismissed, and the judgment of the court in Special term affirmed; and motion to vacate entry overruled.

MOORE, J., concurred; SAYLER, J., did not sit.

Kramer & Kramer, Lowry Jackson and William L. Avery, for plaintiff in error.

Drausin Wulsin, Frank O. Suire, Edward Colston, William M. Ramsey and William Worthington, for defendant in error.

[The Supreme Court, on motion for leave to file petition in error, May 9, 1891, ordered that the judgment of the superior court of Cincinnati be modified by striking out of the decree as rendered by the court in Special term and affirmed in General term, the provision requiring the plaintiff in error to pay the expenses and commissions of the trustee, the Central Trust and Safe Deposit Company, the defendant in error, and in all other respects affirmed the decree.]

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## CONTRACTS—INJUNCTION.

[Hamilton Common Pleas, May 20, 1891.]

## COLUMBUS BASE BALL CLUB V. CHARLES T. REILEY.

A court of equity will not enforce a contract for personal services, by injunction, unless the services contracted for were peculiar, unique, and extraordinary in their nature, and the person sought to be enjoined is shown to be a person of exceptional skill and ability, so that his place could not reasonably be filled, and that irreparable pecuniary injury would result.

MAXWELL, J.

This case was submitted to the court upon an application by the plaintiff for an injunction against the defendant. The facts briefly stated are as follows: The plaintiff desiring to secure the services of the defendant—who is said in the petition to be a player of exceptional and peculiar skill and merit—for the season of 1891 and 1892, employed a Mr. Elliott, of Philadelphia, a member of the bar, and connected with the Athletic club, as an officer, to go to Princeton, N. J., where the defendant lived, and obtain defendant's signature to a contract. Mr. Elliott went to Princeton pursuant to the request of the plaintiff, on February 16th of this year, saw defendant, and after some conversation they agreed upon the terms of employment as to advance money and salary, and thereupon defendant signed a form of contract which had been used the year before between the American Association and its players. The terms agreed upon were four hundred dollars advance money, to be paid within ten days, and twenty-seven hundred dollars a season, salary. So much is without dispute. Now comes the disputed matter as between Mr. Elliott and the defendant, the only persons testifying as to what occurred at the time of the signing of the contract. The original contract, a printed form, contains the words: "Conditions and Provisions of the National Agreement," meaning the agreement between the League and the two Associations, American and Western, providing for a board of arbitration to settle all differences between the respective clubs and their players. The contract as now presented has the words "National Agreement" erased, by drawing a pen through them wherever they occur in the contract.

As to this matter there is a serious contradiction between Mr. Elliott and the defendant. Mr. Elliott testifies that the matter of the Association breaking away from the National Agreement was talked over by himself and the defendant before the contract was signed, and that the words "National Agreement" were erased with the consent and approval of the defendant. The defendant denies this *in toto*, and insists that he placed great reliance on this clause. The difference between the testimony of Mr. Elliott and the defendant cannot be reconciled or explained away. Either one or the other has testified to what is not true. Unfortunately there is nothing to throw much light on this difference in the testimony, one way or the other, and I must leave it there for the present, somewhat in the shape of a Scotch verdict.

The Association formally renounced the National Agreement at the meeting of its representatives in New York, on February 18th, two days after the signing of the contract in dispute. There is some testimony tending to show that this action was advertised as imminent on Sunday morning, February 15th, in the various metropolitan papers, by reason of

the action of the arbitration board in the Stovey and Bierbauer cases, but no formal action had been taken at the time of signing the contract, so that the question of this erasure is a material one. I may say in passing, without meaning to cast any reflection or suspicion upon any one, that but one copy of the contract was signed, and that was taken away by Mr. Elliott, and forwarded to Columbus.

Mr. Elliott, on his return to Philadelphia, sent defendant one hundred dollars of the advance money, and the other three hundred dollars reached defendant on the morning of February 26th, within the time agreed upon.

On the morning of February 26th, whether before or after the receipt of the money from Columbus, can not now be definitely ascertained, defendant signed another contract with the Pittsburg League club, at a considerable increase, both in advance money and salary, and on the same day he returned the advance money that he had received from Columbus, and notified them he would not stand to his contract with them.

On this state of facts, shall this court issue its order enjoining defendant from playing with any other club than the plaintiff? Were it not for the erasure in the contract, I should have a precedent in the decision of Judge Phelps, of Baltimore, in the Childs case, and might refuse an injunction upon the same ground that he did, or, on the other hand, the materiality of the clause as to the National Agreement, being conceded, were it not for the contradiction in the testimony as to the erasure, I might follow the ruling and reasoning of Judge Thayer and Judge Arnold, of Philadelphia, in the cases of Hallman and Pickett, respectively submitted to them.

The law, as applicable to cases of this character may be stated as follows: An injunction to restrain a breach of contract will only be granted where the right is free from doubt, and the injury resulting from the breach would be irreparable in damages. Applied more particularly to the case at bar, the principles laid down in the cases may be summarized into this statement: An injunction will not be granted to prevent the violation of an ordinary contract for work and labor, for clearly, in such a case, the injury would not be irreparable, as the place of the person violating the contract may be filled, and a court of equity will not permit its jurisdiction to be used solely, or principally, to inflict a penalty upon one party for the violation of a contract, where the other party has not or will not suffer irreparable pecuniary injury. Where, however, the contract provides for special, unique or extraordinary personal services, such as those to be performed by an eminent singer, actor and the like, one whose place can not be reasonably and readily filled, the court will enforce the negative covenant, although it may not be able to enforce the affirmative one. Many cases upon this subject may be found in the books, and there seems at first impression to be much contradiction among them. I think the seeming contradiction is largely due to losing sight of the principles stated above. For instance, in the opinion of Judge Thayer in the Hallman case, a number of cases are cited where courts, of equity have granted injunctions to prevent physicians from breaking contracts not to practice within certain limits, and the like. Such cases have no application whatever to the subject under consideration. They are cases where there is but one covenant, and a complete and adequate remedy can be had by enforcing that.

I venture to say that no serious conflict will be found among courts of last resort concerning this matter of personal services from the case

of Lumley v. Wagner down to the present time. I venture to say in every case where the contract is reasonably clear to the court, where the right to the relief sought is clear, and it is made to appear to the court that the services contracted for, were of such a special, unique, extraordinary personal character, whether intellectual or otherwise, as that the place of the defaulter could not be filled, and hence irreparable injury would result, a court of equity would grant an injunction, and not otherwise, in a contract for personal services.

In this connection it may be interesting to call attention to some very recent cases. In the 12th N. Y. Supplement, page 580, will be found the case of Carter v. Ferguson, decided by the Supreme Court, general term, first department, Judge Bartlett delivering the opinion. The syllabus is: "An injunction to restrain an actor from playing elsewhere than for plaintiff will be denied, unless it appears that irreparable injury will result to plaintiff therefrom. Injunctions to prevent actors from performing for other parties in violation of their contracts are limited to cases where the artistic abilities of the defendant are extraordinary and pre-eminent." The court cites in its opinion with approval 3d Pomeroy's Equity Jurisprudence, 1343, where the principle, as I have briefly stated it above, is set out at length. In the same volume at page 808, will be found the case of the Strobridge Lithographing Company v. Crane, where the court refused the remedy of injunction as to a skilled workman, known as a lithographic designer or sketch artist, in violation of a contract of employment by plaintiff. It appeared that much of the work that he was employed by the plaintiff to do was merely mechanical, and there was no proof that his place could not be adequately filled so as to cause no damages or injury. These cases were decided in December, 1890, and I have referred to them only for the reason that they are the latest I have been able to find on this subject, and especially as the argument of counsel for plaintiff at bar, tended to show, what in fact is true, that the courts have become more liberal in granting injunctions than formerly with reference to the negative clause of a contract.

Another interesting case will be found in 58 Conn., 356, decided January, 1890, Rogers Manufacturing Co. v. Rogers, where it is said: "Courts of equity will not undertake to enforce a specific performance of a contract for ordinary personal services. But where the services are special or extraordinary, or purely intellectual, or peculiar and individual in their character, the court will grant an injunction in aid of a specific performance." The case of Cort v. Lassard, 18 Oregon, 221, decided December, 1889, is also a case in point, and the same principles are there held. It is not necessary for me to review all the cases from the time when this jurisdiction began to be exercised up to the present time, for the purpose of illustrating what I have already indicated as the true principle to govern the court in cases of this character. The right must be clear, and the services contracted for must be peculiar, unique and extraordinary, before a court of equity will undertake to exercise its jurisdiction in such a case as this. In the cases cited to the court, as having been decided, similar to this, it is singular that while in each case the court upheld its jurisdiction, nearly every one of them went off on some other point. There have been in the eastern states a great number of cases decided, many others than those cited upon the hearing of this case. All of them—with perhaps one or two exceptions—have gone off on some other question, and it was a question too, which would have necessarily decided the case, had the court said nothing about its jurisdiction:

so they furnish me with no special light, even though I should be inclined, as of course I would, to treat those courts with respect and deference.

Professional base ball has become a business, and should be treated as any other business, with no greater consideration and no less; and if the court undertook to exercise its jurisdiction in this particular case, unless this player were conceded to be an extraordinary and unique player, there would be ground for exercising its jurisdiction in almost every case of a contract for personal services, which, I think, would be something not only extraordinary in the history of jurisdiction, but something which no one would claim that the court ought to undertake.

Upon the three grounds, the doubt about the right of the plaintiff in this case, growing out of the change in the contract, the question as to whether or not this player was of such extraordinary and peculiar merit, and because in my opinion, they have an adequate remedy in damages, I must decline to grant the injunction.

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### DAMAGES.

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[Cuyahoga Common Pleas, 1891.]

H. G. SMITH ET AL. V. JOHN F. SIPE ET AL.

In an action for goods sold and delivered by wholesaler to retailer, and cross action by retailer for damages for non-fulfillment of guaranty contained in contract of sale of same, loss of profit on sales, by retailer, may be included in estimating damages, when they are not speculative, contingent or remote, and are such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract.

ON MOTION to strike out testimony.

This was an action on an account for certain plated chain goods sold and delivered. The answer and cross-petition sets up a special contract under which they were to be made. The contract included a guaranty that the chains would wear five years, and a claim was made for a large sum by way of damages for violation of this contract. A large part of the damage claimed arose from the sale of these chains to defendants' customers throughout the country, a customer buying say five hundred chains, and half of them not wearing more than a few months, the whole were returned; this is said to have happened in a large number of cases. The profits arising on the entire sale were claimed as damages. Plaintiffs claimed that in any event damages could be recovered for only those chains which were not in compliance with the guaranty, and could not include those chains which were not so shown. A witness, Murray, having testified that certain chains manufactured by Smith & Greene for Sipe & Sigler, had been returned to Sipe & Sigler by the persons to whom Sipe & Sigler had sold them, testified further that some of the chains thus returned were worn and some were not worn. Whereupon the plaintiffs moved the court to strike out from the record and take from the jury all the testimony with reference to the return of chains which were not worn, and the motion was argued by counsel.

NOBLE, J.

The first question is whether defendant shall be allowed to inquire as to chains returned by customers unworn, and so returned because certain other chains bought at the same time proved unsatisfactory. And,

second, whether the profit made on such unworn chains is a proper subject of damages in this action. A large number of authorities have been cited on both sides, but the court must be governed by the rule laid down by our own Supreme Court in *Bank v. Telegraph Co.*, 30 Ohio St., 555, where the court cites approvingly the rule of damages laid down by Justice Earl in *Leonard v. Telegraph Co.*, 44 N.Y., 544.

"The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this rule, speculative, contingent, remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties, when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties must have contemplated the actual damages which are to be allowed. But the damages must be such that the parties may be fairly supposed to have contemplated when they made the contract. A more precise statement of the rule is, that the party is liable for all the direct damages which both parties would have contemplated as flowing from its breach, if, at the time they entered it, they had bestowed proper attention upon the subject, and had been fully informed of the fact." Other authorities are approvingly cited in the opinion of the court, but the above expresses the rule most clearly and carefully.

Now, applying this rule, what can fairly be said to have entered into the contemplation of these parties when this contract was made, as to profits? It certainly must be conceded that the question of profit or advantage in this contract, on the part of Sipe & Sigler, in re-selling, must have been taken into account. The contract provides that the chains shall wear five years. Plaintiffs knew that defendants were wholesale and retail dealers, and that the chains were bought to sell again. The profits are part and parcel of the contract itself, constituting a portion of its very elements, the right to the enjoyment of which, is just as clear as the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon, when the contract was made, and formed perhaps the only inducement to the arrangement. Now, profits on what should be allowed? The current of opinion seems to be, that no profit should be allowed which would depend upon the chances of trade, but only those which are certain, or may be rendered reasonably certain, by evidence. They must not be left to conjecture. Now, under which head do the profits in controversy come? It must be that only those are included, which are rendered certain by the fact that the goods have been worn, and fallen short of the guaranty given, and on that account returned. In the opinion of the court, it cannot be said that there should also be included, those which have not been so tested. These could not have entered reasonably into the consideration of the parties, unless it could reasonably have been contemplated, that the entire lot of chains were to be made in noncompliance with the contract. This can hardly be believed. The terms of the guaranty fairly cover only those worn, provided, of course, that the chains were in all other respects, in accordance with the contract. The profits on those not worn, would depend more or less on the chances of trade, perhaps the whim of the purchaser; and under the decision referred to, could not be allowed, in the opinion of the court.



The court therefore holds that it is immaterial to the issues in the case, that certain chains which have not been tested or worn, were returned to the defendants. The objection to this testimony is therefore sustained, and the motion to strike out is granted.

Everett, Dellenbaugh & Weed, for plaintiffs.

Ong & Hamilton, for defendants.

## ACTION FOR WRONGFUL DEATH.

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[Mahoning Common Pleas, 1891.]

KATE ESSENWINE V. PENNSYLVANIA CO.

1. A widow, residing in Pennsylvania, can bring and maintain an action, as such widow, for the wrongful death of her husband, in the court of common pleas of this state, notwithstanding the injury was received and death resulted in the state of Pennsylvania.
2. Such an action is transitory, and can be brought and maintained, by the person in whose favor the cause of action has accrued, in any court having jurisdiction of the subject-matter where jurisdiction of the wrongdoer can be acquired.
3. Such action, if brought within the time limited by the statute under which the same is brought, is based upon the same grounds and governed by the same principles as an action for personal injury not resulting in the death of the party injured.

ON DEMURRER to petition.

JOHNSTON, J.

In this case the plaintiff alleges that she is the widow of one Augustus Essenwine, and resided in the state of Pennsylvania; that said Augustus Essenwine was a brakeman in the employ of the defendant on the ninth day of February, 1891, and that on that day, the defendant so negligently and carelessly constructed and maintained near to a certain side-track of the railroad of the defendant, a building with its roof projecting, that in the discharge of his duty as such brakeman he was caught and knocked from the car by this building, and was run over by the moving cars, killing him instantly. She alleges that he had no knowledge of the fact that the building had been so constructed, or was so maintained by the defendant at the time, and that in all matters the deceased was in the exercise of proper care upon his part. She alleges further that the right of action has accrued to her by the laws and constitution of the state of Pennsylvania. That by an act of the General Assembly of that state a recovery can be had where death ensues by reason of the wrongful or negligent act of another, and that the persons entitled to recover damages would be the husband, widow, children or parents of the deceased. She also alleges that by the constitution of the state of Pennsylvania, it is provided that "no act of the General Assembly shall limit the amount to be recovered from injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall provide for whose benefit such action shall be prosecuted." She says that in pursuance of this constitutional provision, the General Assembly has provided that an action may be brought by the husband, widow, or the children.

There are other allegations in the petition, but these are the material ones, and the ones upon which the plaintiff especially relies for a recovery.

To this petition the defendant has filed a general demurrer, which has been argued and submitted. The question raised by this demurrer, and the only question urged by counsel for the defendant, is this: Is the plaintiff, in view of the facts stated, entitled to bring and maintain her action in this court? If not, then the demurrer should be sustained, otherwise it should be overruled. The exact question here presented has never been determined by the Supreme Court of this state. Counsel for defendant cited the case of *Woodward v. M. S. & N. I. R. R.*, found in the 10th Ohio St., 121, and also the case of *Hover v. Pennsylvania Co.*, 25 Ohio St., 667. Whilst it is true that the questions involved in those cases are kindred to the question here, yet they are so different in many respects that they constitute no guide, and furnish no rule for the solution of the problem before us. In the former case, the action was brought by the administratrix of Woodward, appointed in this state, to recover damages for the death of her intestate, occurring, as alleged, by the negligent act of the defendant in the state of Illinois, which action was brought under a statute of Illinois, authorizing a recovery for a wrongful death by the personal representative of the person killed, and the only question presented was, whether the administratrix, having been appointed in this state, could maintain such action. The court held that she could not. Proceeding, however, with the usual caution, and avoiding all questions not necessarily involved. Judge Gholson, in delivering the opinion of the court says: "We do not undertake to decide whether the administrator, appointed under the laws of Illinois, might or might not maintain such an action, for the purpose of recovering the fund to be distributed under the laws of Illinois. That case will present very different considerations from the present." When we look at the reasons suggested by the court in support of the conclusion, this quotation from the opinion becomes very significant, in fact so much so that there can be but little doubt that if the administratrix had been appointed in Illinois, she would have been permitted to maintain her action in the courts of this state.

In the latter case *Hover v. Pennsylvania Co.*, all that the court undertook to decide or did decide was, that an administratrix, appointed in this state, could not maintain an action in this state, where the wrongful act which caused the death, was committed outside the state; in other words, that this act allowing a recovery for a wrongful death had no extra territorial effect.

Other cases are cited in support of the demurrer, but the one particularly relied upon is the case of *Ash v. The B. & O. R. R.*, decided by the Maryland court of Appeals, and found in Vol. 44 Am. & Eng. R. R. Cases, on page 676. In that case the death occurred in West Virginia, and by the law of that state the action must be brought in the name of, and by the personal representative of the deceased. The action was brought in Maryland by an administratrix appointed in that state. By the law of Maryland, where the action was brought, it was provided that the action must be brought by the wife, husband, parent or child of the deceased, and must be prosecuted in the name of the state for the use of the person entitled. Under the circumstances stated, and in view of the dissimilarity of the statutes of the two states relating to a recovery for a wrongful death, that court held that the action could not be maintained in the courts of that state by an administratrix appointed therein.

In that case it was also held that: "The right of action given by statute for the death of an individual is not transitory like the common law right of action for personal injuries, but the operation and force of such statute must be confined to the state enacting it, except where it can be extended by comity." This feature of the decision of the court in that case is based upon the idea that the action was not transitory, and whilst this is undoubtedly sustained by some very respectable authorities, yet the weight of authority appears to be adverse. This adverse view is sustained by the Supreme Court of Minnesota in the case of *Herrick v. Minneapolis & St. Louis R. R. Co.*, in Volume 31 on page 11 of the reports of that state. In that case the court says that, "The general rule is, that action for personal torts are transitory in their nature, and may be brought wherever the wrongdoer may be found, and jurisdiction of this person can be obtained." And it says further that: "As to torts which give a right of action at common law, this rule has never been questioned, and we do not see why the transitory character of the action, or the jurisdiction of the courts of another state to entertain it, can in any manner be affected by the question whether the right of action is statutory or common law.

This principle is distinctly recognized, and this idea as to the action being transitory is fully sustained in *Leonard v. Steam Nav. Co.*, 34 N. Y., 48; *Chicago etc. v. Doyle, & Am. & Eng. Ry. Cases*, 171; *McDonald v. Maltory et al.*, 77 N. Y., 546, and *Herrick v. Railroad Co.*, 103 U. S., 11, as well as in numerous other reported cases.

In this connection it might be regarded as proper to consider what constitutes a transitory action. Bouvier defines a transitory action to be "an action in which the venue may be properly laid in any county, though the cause of action arose out of the jurisdiction of the court."

And upon the same subject he says, quoting from *Chitty's Pleading*, that: "Personal actions which seek nothing more than the recovery of money or personal chattels of any kind, are in most cases transitory, whether they sound in tort or in contract, because such actions of this class are in most instances founded on the violation of rights, which in contemplation of law have no locality, and it will be found true, as a general proposition, that actions *ex delicto*, in which mere personality is recoverable, are by common law transitory."

In the case of *Herrick v. R. R. Co.* just referred to, Justice Miller in delivering the opinion of the court, says: "Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."

This broad, liberal and apparently sound view of the law and of the rights of the parties under it, would, if adopted and recognized, dissipate all the doubts that have arisen in regard to the rights of parties under these statutes permitting a recovery for a wrongful death, wherever enacted, and whenever the enforcement of these rights has been attempted beyond the territorial limits of the state enacting it.

It is urged in argument by counsel that if the right of this plaintiff can be enforced in this state, it can only be done by comity, and that comity can only be called to her aid and will only be extended where the statutes are similar and the enforcement of her rights claimed under the law of Pennsylvania is not against the public policy of this state; that these statutes are dissimilar, and the enforcement of her claim is against

the public policy of our state; and that for these reasons she should not be permitted to have and maintain her action. It is a sufficient answer to the last proposition to point to the statute of this state upon the subject.

The fact that we have a statute authorizing a recovery for wrongful death is conclusive evidence as to the policy of this state upon that subject. If this question of public policy is to be recognized, it might limit the amount of recovery, but it certainly does not and would not prevent a recovery for any amount within the limit fixed by our statute.

As to the other question, there are but three particulars in which the statutes of Ohio and Pennsylvania are dissimilar. In this case, under the statute of the latter state, the action must be brought by the widow; it must be brought within one year from death of the decedent, and there is no limit to the amount of recovery. Under the law of this state, such an action would have to be brought by the personal representative of the deceased, within two years from the death, and the recovery would be limited to ten thousand dollars. In all other respects the object, purpose and general scope of the two statutes are identical, and being so in all the main features and purposes of each, it would seem, that even if this argument was to prevail in a case where a substantial dissimilarity existed, yet it would have but little potency in this case where the reasons upon which it is based do not exist.

But it does not occur to me that the existence of a similar statute, or in fact the existence of any statute upon the subject, is essential. If this right of recovery exists, I do not believe that in the enforcement of that right, the exercise of comity is withheld or extended upon any such narrow and restricted ground. In fact, no such restriction would be suggested, and no such restriction would be insisted upon by any court, unless such courts should regard state rights as being paramount to human rights. And if the citizens of each state are to be entitled to all the privileges and immunities of citizens in the several states, as guaranteed by our organic law, it would seem that the refusal of the right to enforce a valid claim in the courts of this state, to a citizen of another state in whose favor the cause of action has accrued, and the right to enforce it exists in the courts of the state of which he may be a citizen, would conflict with this constitutional right.

If it is a privilege there, it should be a privilege here.

Aside from the decisions referred to and the reasons therein assigned, there is another view of the matter which, it occurs to me, is tenable and supported by reason, at least, if not by authority. It is well settled that such an action as this, can not be maintained, in the absence of a statute providing for a recovery in such a case, for the reason that at common law an action for personal injury abated at the death of the person injured. If death did not ensue, and an action was brought to recover for personal injury, no question would be made, if the action was brought in a court having jurisdiction of the subject-matter where jurisdiction of the parties could be had. All would concede that the action was transitory. What is the difference in principle between such an action and the one at bar? Both the statutes of Pennsylvania upon which the plaintiff bases her right to recover, and the statute of our own state indicate clearly, that the cause of action and the right of action are the same in principle and effect as actions for personal injury, and the principal purpose of each being to abrogate the common law rule that such an action abates by the death of the party injured, and giving to the persons named

the same right that the injured party would have had, had death not ensued. And we are not entirely without authority for this view of our own statute. In the case of *Meara's Adm'r v. Holbrook et al.*, 20 Ohio St., 137, 146, Judge Day, in delivering the opinion of the court, says: "It is the plain intent of the act to give the administrator of a deceased person, whose death had been caused by wrongful act, neglect or default, a right of action on the same ground that an action could have been maintained by the party injured if death had not ensued. The case, therefore, rests upon the same principle as though Meara, if death had not ensued, had brought an action against the same parties and based on the same grounds."

If then, this action brought by the widow of Essenwine is based upon the same grounds and rests on the same principles that the action would if death had not ensued and Essenwine had brought the action himself, it would seem to eliminate all the doubts and overcome all the objections urged against this petition, and satisfactorily dispose of all the questions raised by the demurrer, and the same is therefore overruled.

Carey & Boyle, for the demurrer.

Anderson & Terrill, *contra*.

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## CORPORATIONS.

425

[Superior Court of Cincinnati, General Term, April 9, 1891.]

\* CHARLES H. HILL ET AL. V. CINCINNATI HOTEL CO. ET AL.

1. The rule allowing parties to appeal to chancery against a judgment in any court, is of great strictness and inflexibility, and the court will not lend its aid, unless the party claiming its assistance can impeach the judgment by facts, or on grounds of which he could not have availed himself at law, or was prevented from doing it by fraud or accident, or the act of the opposite party unmixed with negligence or fault on his part.
2. In cases where a stockholder in a private corporation has a right to insist on the enforcement of the trust which is imposed by statutory provision upon corporate authorities, and when it is a question of the right of the stockholder to restrain the corporate body within its express or incidental powers, the stockholder may, in a proper case, be denied on the ground of his express, or his intelligent, though tacit consent to the corporate action.
3. In defining the difference between a case of total want of power or *ultra vires*, and mere illegality of corporate action, the true inquiry is: Whether it belongs to the class of public as distinguished from private wrongs; so that the guilty party may set it up in avoidance of just obligations, and whether courts must accept the defense without regard to the situation and rights of the other party.
4. Where a private corporation engages in any form of business, foreign to the objects of its incorporation, it may properly be said, that such an act is in violation of a peremptory statute and within that phase of *ultra vires*, where the public is concerned, and therefore void, on the ground of the total want of power; but where an act, although contrary to a directory statute—a difference between the corporation as an entity, and the stockholders in the management of its corporate affairs; or the act involves a contract with a corporation, and the corporation received the benefit, and where, if ignored, the transaction would operate as an injustice; *ultra vires*, will not be permitted to prevail, although it might be different if the contract was unexecuted, and the parties could be restored to their original position.

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\*This judgment was affirmed by the Supreme Court, by refusal of leave to file a petition in error, June 9, 1891.

MOORE, J.

This is an action in which certain holders of the common stock of The Cincinnati Hotel Company seeks relief on behalf of themselves and their corporation, against the enforcement of proceedings in foreclosure in suit No. 44113 of this court.

The substantial allegations of the petition are, that in the year 1872, The Cincinnati Hotel Company was organized under the laws of the state of Ohio, and has continued its corporate existence and organization ever since. That its authorized capital was \$610,000, of which \$400,000 is common stock and \$210,000 preferred stock, the latter only entitled to the preference of 6 per cent. dividend per annum. In pursuance of the request of three fourths ( $\frac{3}{4}$ ) of the stockholders of said company in number and amount, on December 24, 1881, \$230,000 of preferred stock was issued and disposed of at its par value, and afterwards reduced, so that in January, 1885, there was in the hands of stockholders the amount of \$210,000. In January, 1884, The Hotel Company leased its building to H. C. and Louisa Gilmour, at a rental of \$35,000 per annum for ten years. At the time of the making of said lease, and at sundry times thereafter, the said Gilmours purchased large quantities of the common stock of said company, and became largely indebted therefor to B. S. Cunningham, Larz Anderson, M. E. Ingalls, B. F. Evans, W. J. Lippencott and E. F. Osborne, and being unable to pay, it was agreed between them and the Gilmours, that said Gilmours should cause a mortgage to be made by said Hotel Company upon its hotel property, the proceeds to be used in the payment of said indebtedness. Said Gilmours held the controlling interest in the stock of the company.

In pursuance of said scheme the said Gilmours caused a board of directors to be made of persons who held no more than a nominal interest, and who were really the agents and representatives of said H. C. Gilmour. In February, 1888, in pursuance of said scheme the Gilmours procured the board to make and deliver a mortgage on the real estate of said Hotel Company to the defendant, The Central Trust and Safe Deposit Company, to secure 300 bonds of \$500 each, bearing interest at 7 per cent. per annum. The bonds were delivered to The Citizens' National Bank, and Messrs. Cunningham, Anderson, Ingalls, Lippencott, Evans and Osborne, to be applied to the liquidation of the indebtedness of the said Gilmours to said parties.

The plaintiffs further alleged that in order to give color and appearance of fairness to the transaction before stated, said parties caused a resolution to be adopted by said board to the effect that said Hotel Company should purchase from the Gilmours, their, the said Gilmours', furniture, in said hotel at a valuation of \$130,000. That said transaction was wholly fraudulent, the furniture not being worth \$130,000, and by the terms of the lease the furniture was to remain in the building until the expiration of the ten years' term. That the payment of the furniture in the bonds of the company was a gross fraud upon the stockholders of the corporation, and is in effect a payment of the individual indebtedness of the Gilmours, out of the property of the corporation. It is alleged that the remaining \$20,000 of the proceeds of said bonds were used in the retirement of preferred stock belonging to the Gilmours.

The record shows that in March, 1888, one J. C. Thoms brought a suit in the superior court of Cincinnati against the Hotel Company and the parties named, substantially alleging the foregoing averments, and that he was the owner of a considerable amount of common stock, and

praying relief, but the action was compromised in April following, and proceedings of the board organized by the Gilmours, provided for the conveyance to the Gilmours of \$40,000 of said furniture, reducing the consideration to \$90,000, and further for the surrender and cancellation of \$75,000 of the mortgage bonds of the \$150,000 issue. And that the holders of the \$75,000 bonds accordingly surrendered them, and they were cancelled, leaving outstanding only \$75,000, which went to pay for the furniture, leaving \$15,000 claimed to be unpaid. It was further provided that another mortgage for \$225,000 to said Fidelity Safe Deposit and Trust Company, (now the Central Trust and Safe Deposit Company) should be executed and delivered to secure bonds to that amount, bearing six per cent. interest per annum, and that \$75,000 of said bonds should be used in the redemption and the retirement of preferred stock to that amount.

The plaintiffs contend that to give the bonds and mortgages of said company to take up said preferred stock, was *ultra vires* of said corporation. And that the said bonds are now held by beneficiaries under the mortgage, under the provision that the \$150,000, the residue of said last named bonds, should be used in redeeming and retiring \$135,000, the balance of said preferred stock, the \$15,000, the balance of said bonds, should be paid over to the Gilmours in payments of the amount still claimed to be owing on the furniture. And that it was stipulated in the mortgages securing the bonds mentioned, that in default of payment of the interest thereon, for a stipulated time, all the bonds should become due, and the mortgage absolute and liable to foreclosure, and on application of one-third of the bondholders the mortgages should be foreclosed; that the attorneys who acted for the Hotel Company also represented the bondholders, in whose interest said mortgages were made. That bondholders to the amount of \$75,000 were the parties specifically intended to be benefited by said clause in said mortgage. And further that the trustee named in said mortgage did, in case No. 44113, bring suit to foreclose said mortgage, and said clause and condition in the same was alleged and claimed, and a decree was taken in accordance therewith, and terms of sale made accordingly, in cash. That the interest due at time of suit was only about \$8,000, and that said company made no effort to pay the amount, and that this was done by the request of said bondholders. And that in May, 1889, The Central Trust and Safe Deposit Company commenced an action, No. 44113 of this court, to foreclose said two mortgages, and made said Hotel Company and other parties defendants, and alleged and claimed that all of said bonds were outstanding and held by the bondholders under said mortgage; that the attorneys representing the bondholders under said mortgage, at the time the suit for foreclosure was brought, were also the attorneys for the Hotel Company, and have continued such ever since, and during all such scheme of fraud. That said bondholders and the officers and directors of said company had full knowledge of all of said fraudulent acts, and the disposition made of the stocks, bonds and mortgages. That the Hotel Company fraudulently and negligently and for the purpose of falsely and fraudulently protecting said bondholders, allowed said petition to go by default, did not set up said fraud as a defense to the bonds and mortgages, and knowingly permitted a finding and judgment of said court to be entered as of January 4, 1890, but not, in fact, until January 10th following, establishing the validity of said bonds and mortgages, and a decree for the sale of said property, and pursuant to said judgment and order of sale, said

property has been appraised and advertised for sale, for cash, thus preventing competition and fairness.

The plaintiffs further allege (a) that they have duly demanded of the Hotel Company to bring an action in substance as this action to set aside said judgment and to make the defense to said bonds and mortgages, but it refused so to do. That the value of the stock is totally destroyed, if said sale is not enjoined and said judgment not set aside.

(b.) That the outstanding common stock of the company is \$399,525; that the plaintiffs own of the same as follows: C. M. Hill, \$218,650, J. T. Purcell, \$27,400, Wm. Goodheart, \$69,400, Freiberg & Workum, \$1,300.

(c.) That the plaintiffs had no knowledge of said acts of fraud, and other things therein stated, until said judgment was entered and the term of said court at which it was entered had adjourned *sine die*.

The plaintiffs demand that the finding, judgment and order of the court in case No. 44113, be set aside, and that no injunction be allowed restraining the said sale, and that said bonds and mortgages be held void and be set aside and cancelled.

The answer of the Central Trust and Safe Deposit Company admits the statements of the plaintiffs' petition regarding the amount of bonds owned by it, and the pendency of proceedings in foreclosure, known as case No. 44113, of this court, but denies each and every other allegation not specifically admitted. It is averred that in said foreclosure proceedings a judgment was entered on January 4, 1890, establishing the validity of said bonds and mortgages, and ordering the sale of said mortgaged property for cash; that pursuant to said judgment an order of sale was issued under which said property was appraised and advertisement made; that it would be sold on March 17, 1890, at 10 o'clock, A. M.; that said property was sold on said last named day under said order; and that the term of court at which said judgment was entered had been adjourned *sine die*, prior to the filing of the petition herein.

For a second defense, it is averred that if said plaintiffs and one J. T. Purcell own any of the stock of said company, it was obtained by assignment from former stockholders of said company who had full knowledge of all actions of the board of directors of the Hotel Company, with reference to the execution and delivery of said mortgages and bonds and the disposition to be made and that was made of the proceeds thereof when the same were respectively had and done, and with such knowledge either assented and agreed thereto, or else ratified the same.

For a third defense, it is averred that many of the present holders of said bonds are either themselves purchasers thereof for a valuable consideration before maturity, without knowledge as to any of the circumstances under which the bonds held by them were issued and the consideration received therefor, or derived title through such holders.

For a fourth defense, it is averred that no one of the complaining parties requested the board of directors of the Hotel Company to resist said action of foreclosure, nor have any of them laid their alleged grievances before a meeting of the stockholders of the company, although a stockholders meeting had been had, as the defendant was advised, since the said judgment was entered, nor have the stockholders attempted to have a meeting for the purpose of taking action upon their alleged grievances.

The answer of the Cincinnati Hotel Company admits the facts alleged in the petition, and avers that it is ready, willing and able, and



so offers to reinstate the former holders of the preferred stock, and consents that said mortgage bonds may be cancelled.

It is contended by the defendants that the plaintiffs, as stockholders, have attempted to make a defense for their corporation which the corporation does not see fit to make for itself, and it is urged by the defendants that there is no proof to sustain the allegation of the petition that the corporation had been requested to act in its corporate name, on behalf of its stockholders in the defense of the alleged illegal acts complained of, and refused to do so.

For the present, we will concede the right of the complainants under the allegations of the petition to prosecute a cause of action, and make a defense for their corporation by a bill of equity, and entirely outside the foreclosure suit, and in an independent action wherein they ask that the proceedings in foreclosure be enjoined, and that the bonds and mortgages be cancelled. It is an action to impeach a judgment for fraud, and is not brought under section 5354 of the Revised Statutes providing for relief against a judgment by petition, at a subsequent term. The complainants have seen fit to appeal to the equitable consideration of the court, as against the position of the defendants, who claim that the inattention of parties in a court of law can scarcely be made the subject of interference in a court of equity. It is to be remembered that the rule allowing parties to appeal to chancery against a judgment in any court, is of great strictness and inflexibility, and the court will not lend its aid unless the party claiming its assistance can impeach the judgment by facts, or on grounds of which he could not have availed himself at law, or was prevented from doing it by fraud, or accident, or the act of the opposite party, unmixed with negligence or fault on his part.

The author, in Freeman on Judgments, sec. 486, says: "When a party has once an opportunity of being heard, and neglects to do so, he must abide the consequences of his neglect," and in the same section adds, "to set aside a decree obtained by fraud in an original bill filed for that purpose, has long been unquestioned."

One of the grounds relied upon by the complainants for setting aside the decree of foreclosure is that the interest of the corporation, and consequently the interests of the stockholders, failed of protection during the pendency of the proceedings and at the time of the decree, by the failure of the attorneys for the Hotel Company to protect its interests, rather serving the bondholders as their attorneys and entirely in their interest, or rather for the purpose of fraudulently protecting the bondholders, and while acting as attorneys for the Hotel Company the attorneys allowed the petition to go by default, and did not set up the fraud, in the issue of said bonds and mortgages, but permitted a finding and judgment of the court to be entered as of January 4, 1890, but not in fact until January 10th, following.

The circumstances surrounding the parties and the testimony revealing the position of all the parties in interest at the time of the entry of the decree and for a long time prior thereto, brands this charge as one made without reason or truth, and the same might apply to the statements or claim of one of the complainants, C. M. Hill, that an attorney employed by him to secure favorable terms with the bondholders at a time shortly after his purchase of a majority of the common stock, was at the time advising the Hotel Company and the bondholders as to their interests. The service of Mr. Hill's attorney, was a personal matter and favorable to himself at a time when he bought out the Hotel Company, and as a

circumstance in no way effects the question here. Mr. Hill's reflections upon his attorney have the appearance of afterthought.

The attorneys for the bondholders, and who are referred to as also being attorneys for the Hotel Company, at no time acted for the company in the foreclosure suit, yet they had at a time prior thereto advised the board of directors in certain matters relating to the Hotel Company business connected with the issue of stock and bonds, and they had as well, advised Mr. Gilmour in differences between himself and the company.

The testimony shows, however, that the company was represented by counsel at the time complained of, at and about the time the decree in question was submitted to the court. Mr. Burnet who seems to have been connected with McConville, agent, of the owners of a majority of the common stock, the very same stock bought a few days after and now owned by C. M. Hill, one of the complainants herein; appeared as the attorney of the Hotel Company, and took part in the opposition to the appointment of a receiver of the hotel property, and afterwards in an arrangement by which the appointment of a receiver was waived. A reference to the minutes of the board of directors will display a resolution passed March 25, 1889, to make no defense. It further appears that before the decree was entered, Mr. Burnet examined it and told the court that it was correct.

It is contended by the complainants that the suit to foreclose was prematurely brought, because the mortgages provided that the trustees should not foreclose either one until requested so to do by holders of one-third of the first mortgage bonds outstanding, and again: that the decree in the foreclosure suit was excessive in amount in that it computed interest upon the principle at the rate of seven per centum per annum after the time the principle was declared due by the trustees.

We are compelled to dismiss these two propositions from our consideration for the reason that they are not set out in the petition as matters of defense.

It is contended that the decree in question was incomplete at the time of its indorsement for entry by the court. The testimony shows that the entry was complete in the hands of the court prior to January 4, 1890, the last day of the December term. The entry on December term minutes of 1889, although not actually made until January 10th, as the record shows, was wholly within the control of the court, and no action was had which in any way prevented the Hotel Company through its attorney from exercising its legal rights. Our conclusion is that in this action no reason exists for setting aside the judgment of the court as prayed for, and we are bound to find that the effect of the judgment upon the questions involved is to establish the validity of the bonds and mortgages now in the hands of the defendants. The Central Trust and Safe Deposit Company. We have not only satisfied ourselves that the complainants had not a satisfactory or meritorious defense, but we are satisfied that no opportunity, with a full knowledge of all the facts, was lost to the complainants to make a defense. This statement may suggest the impropriety of further discussion of the case, but we prefer, briefly in a general way to state that, in considering whether the Hotel Company had a good defense to the foreclosure proceedings or not, we are led to the conclusion that the defense attempted is one that would induce hesitation on the part of the court to act in a case wherein the complainants are in

a situation which does not commend them as innocent of the wrongs complained of.

The complainants allege that the issue of \$225,000 of second mortgage bonds was *ultra vires* and void, for the reason that they were issued to redeem preferred stock, which preferred stock was made redeemable in money, and because there was no authority for incorporating that feature into the issue of stock, and again, that the redemption as carried out was invalid.

The bondholders now claim that even if there was a want of power to issue redeemable preferred stock, it is clear that a court of equity would not permit the issue of such stock to be adjudged invalid or *ultra vires* without restoring to the purchasers of the stock the amounts paid therefor, of which amounts the corporation has had the benefit; and the transaction of redeeming stock by the purchaser of the same by an issue of bonds, having been executed, it is now too late to question it, even if it could have been questioned while executory.

It is in evidence that in March, 1874, the Hotel Company issued preferred stock to the amount of \$150,000 at eight per cent. interest per annum, and after sale, used the proceeds in completing the hotel building. Between the years 1874 and 1881, the high rates of interest paid prompted the board of directors to secure a loan of 6 per cent. interest upon the company's note, secured by mortgage on its property, and to meet this loan and for the purpose of taking advantage of the privilege of purchase of one of the lots upon which the hotel building stood for \$60,000, and which privilege was about to expire, it became necessary to secure \$215,000. It was therefore determined by the board of directors to issue preferred stock with attractive features, to the amount of \$230,000,—the holders to have preferred dividend and be permitted to convert the same into common stock, the company to have the privilege of redeeming and cancelling the preferred stock at its option at any time after one year, and for the benefit of the same, the hotel building was to be kept insured in an amount equal to the preferred stock. This issue was agreed to in writing by more than three-fourths in number and amount of stockholders, to wit: 3779 shares out of 4000, the whole number.

The effect of the transaction in the present case, is the issue of preferred stock in the first instance, as evidence of a loan of money to be used in completing the hotel building. To reduce the capital stock the board with the assent of 75 per cent. of the common stock, held by the Gilmours, issued the bonds of the company secured by mortgages, as set forth in the petition.

The defense attempted, and upon the assumption that the plaintiffs have succeeded in touching in the corporation as a party plaintiff, is of *ultra vires*; not the mere abuse of power, but the total want of it, in issuing preferred stock and its subsequent redemption by the issue of mortgage bonds. The real question is, whether the complaining stockholders here, are in the position of those who go into the market and buy the right of a stockholder, or in other words, the right to have a trust which is imposed by statutory provision upon corporate authorities, in favor of stockholders, duly carried out.

The complaining stockholders on behalf of the corporation contend that the trust in the present case is one of a public nature, and that no laches or acquiescence stockholders will avail; that it is only "when it is a question of the right of the stockholders to restrain the corporate body within its express or incidental powers, the stockholder may in many

cases be denied on the ground of his express assent or his intelligent though tacit consent to the corporate action."

In *Bissell v. Mich. & South. R. R. Co.*, 22 N. Y., 253, cited with approval in *Kent v. Quicksilver Mining Co.*, 78 N. Y., 159, in defining the difference between a case of total want of power, or *ultra vires*, and mere illegality of corporate action, the court says "The true inquiry is whether it belongs to the class of public, as distinguished from private wrongs, so that the guilty party may set it up in avoidance of just obligations, and whether the courts must accept that defense without regard to the situation and rights of the other party." The court adds, "We can not believe such to be the rule of reason or of law." Cited with approval in *Allen v. First Nat'l Bank of Xenia*, 23 Ohio St., 97, 104.

It seems to be the established doctrine that where a contract with a corporation has been executed, and the corporation has received the benefit, and where to ignore the transaction would operate as an injustice, *ultra vires* will not be permitted to prevail, although it might be different if the contract was unexecuted and the parties could be restored to their original position. *Sherman Central Town v. Morris*, 23 Pac. R., 569; *Geety v. Milling Co.*, 40 Kansas, 231, 237; *Township of Pem Grove v. Talcott*, 19 Wall., 666, 678; *Morgan v. Lewis*, 46 Ohio St., 1-9; *Bissell v. Mich. South. R. R. Co.*, 22 N. Y., 258; *Whitney Arms Co. v. Barlow*, 65 N. Y., 63; *Bradley v. Ballard*, 55 Ills., 413; *Browning v. Mullens*, 13 S. W. R., 427 (Ct. App. Ky., 1890); *Harrigaw v. Baird*, 15 S. C. R., 565 (1890); *Foster v. Seymour*, 23 Feb. K., 65 (T. D. N. Y.).

In the case of *Bradley v. Ballard*, 55 Ills., 413, it was said: "While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of its charter, they are equally inclined on the other hand to enforce against private corporations contracts, though *ultra vires*, of which they have received the benefit." Courts simply say to corporations in cases where they raise the question of their own want of power to make a contract: "It is sufficient that you have made it, and by so doing have placed in your corporate treasury the fruits of others' labor, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter." *Sedgwick (Statutory and Const. Constr.*, 79), says: "where it is a simple question of authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement can not be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains."

It is true that frequent discussion of authorities to which we are so extensively referred, reveal instances where the principles we suggest have been applied to the acts of the corporate authority in accepting money and materials for the corporation in some irregular or unauthorized way, but we see no difference between the cases of that character and the issue of preferred stock, under the facts of the present case, admitting its irregularity, to secure money to pay debts legitimately contracted and in the furtherance of the organization of the corporation, and in the present case to pay for hotel grounds, buildings and the furnishing the building as a hotel.

The complainants' reliance in the present case is that the acts of the Hotel Company directory and stockholders in creating incumbrances

upon its property and to the exclusion of the rights of the holders of common stock, are *ultra vires*, and in the application of that doctrine it should be borne in mind that it has two phases; one, where the public is concerned, or where the act is in violation of a peremptory statute, and when that is the case, to restrain a corporation within the limits of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body, will be of no avail. The other phase referred to is, where only the corporate body and its stockholders, or it and its stockholders, and third persons dealing with it, and through it with them, are concerned—as when the act is contrary to a directory statute.

In the case of *Williams v. The Western Union Telegraph Co.*, 13 Jones & Spencer, 349, in illustrating the difference in acts *ultra vires*, the court cites the leading case of *Kent v. Quicksilver Mining Co.*, *supra*, as approving the propositions just stated. In *Williams v. The Western Union Telegraph Co.* it was held "that if the act complained of falls within the second phase, a judicial discretion exists to grant or refuse the rigid enforcement of a directory statute according as good faith and the circumstances of the case require. The plaintiff must have a standing in equity to be heard, and his position must commend him to the conscience of the court."

The facts in the case at bar show that there is not enough in the plaintiff's case to call for the interposition of the court, on grounds affecting public interests. If the Hotel Company had attempted to engage in any form of business foreign to the objects of its corporation, it might be properly said, there was a violation of a peremptory statute, and within the first phase of *ultra vires*, as defined by text-writers and the authorities. In the present case it may be an instance of an unauthorized act—an issue of preferred stock, contrary to a directory statute—a difference between the corporation as an entity in the management of its corporate affairs and its common stockholders, and coming within the second phase of acts *ultra vires*, as just defined. Therefore it seems to us, that not only upon the principles upheld by decisions to the effect that where a contract, although contrary to directory statute, has been executed in good faith, and the corporation has had the full benefit of performance, but upon the ground that the stockholders themselves failed to promptly and actively condemn the unauthorized acts, and seek relief after knowledge of the committal of them, the plaintiff has no standing in a court of equity. *Havre v. Oakland*, 104 U. S., 450.

Morowitz on Corporations, sec. 262, in discussing the authorities bearing upon this question, states it thus: "There is evident propriety in refusing to allow a shareholder to sue on account of a wrong, while he has voluntarily acquiesced in and condoned, even although the corporation might sue for his benefit by reason of his interest in the corporation as an entity."

It appears that these complaining stockholders, 2187 shares of which (the controlling interest) is now owned by one of them (Mr. Hill), and all of whom seeking to repudiate the action of the corporation, represent stock that was voted in favor of the acts of which they complain. Mr. Hill bought his stock at 20 cents on the dollar, at a time when the Hotel Company was in an embarrassed condition, and with full opportunity of knowing the financial condition of the company and its past transactions, and at a time when he knew that a decree of foreclosure securing

a large amount of bonds was about to be entered in this court, the effect of which involved not only a sale of the hotel property, but the determination and recognition of the validity of the corporate obligations. Goodheart and Purcell admit their purchase of stock for nominal rates, as a speculation. Right here, we are reminded that courts will not lend their aid to unconscionable bargains and it is their settled doctrine to discourage speculative suits. See *Miss. & Mo. R. R. Co. v. Cromwell*, 91 U. S., 643; *Hawes v. Oakland*, 104 U. S., 250; *Cunfell v. O. & M. R. R. Co.*, 110 U. S., 259; *Jenks v. Quednock Co.*, 10 S. G. R., 655.

These complainants in behalf of their corporation in no way intimate a desire to return to those who have taken the preferred stock of the corporation, the money which went into the buildings and grounds, but they desire to repudiate everything in the form of an incumbrance. Such of the complainants as are transferees of the stock after the acts complained of, obtain no better title than the prior holders. *Parson v. Hayes*, 14 Abb. New Cases, 419; *Venner v. Alk. & S. T. R. R. Co.*, 28 Fed. Rep., 581; *Matter of Application of the Syracuse R. R. Co.*, 91 N. Y., 1; *Cook on Stock and Stockholders*, sec. 40-733, cases cited.

We have not seen fit to recall and review in detail all the facts and evidence relating to the proceedings of the hotel directory and the stockholders' meetings, from the year 1874 to the beginning of the year 1890, and the statutes in relation to the incorporation and regulation of hotel companies and the many assumptions made in favor of the bondholders' rights under said proceedings, as well as the standing of the plaintiffs, yet we think this general statement of our views is sufficient to convey to the parties in interest our understanding of the case derived from a long and laborious examination of the great volume of facts.

In our judgment, the petition of plaintiffs should be dismissed.

HUNT, J., concurs.

SAYLER, J., did not sit.

Kramer & Kramer, Lowry Jackson and William L. Avery, for plaintiffs in error.

Edward Colston, William M. Ramsey, William Worthington, Drausin Wulsin and Frank O. Suire, for defendants in error.

[The Supreme Court on motion for leave to file petition in error, May 9, 1891, affirmed the judgment of the Superior Court in General Term.]

### 3

### COUNTY DITCHES.

[Clark Probate Court. Decided April 20, 1890.]

\* *JESPER N. MARSH ET AL. V. CLARK CO. (COM'RS) ET AL.*

1. In locating the route for a county ditch, the commissioners are not confined to that prayed for in the petition, but may change either termini.
2. The notice to be given interested parties under sec. 4457, should contain a description of the route as located by the commissioners.
3. A mistake by the scrivener, in writing northeasterly, instead of southeasterly, the correct direction of the route, in the notice given to persons affected, where it is such a palpable error that no interested party could be misled thereby, will not avoid the notice.

\*For decision in this case, on motion to set aside the verdict, see post 442.

4. County commissioners may locate and establish a county ditch over the route of a previously established township, if the same is conducive to the public health, convenience or welfare.
5. On a ditch appeal, it seems, the probate court is not a court of error to review the proceedings of the county commissioners, or to pass upon any supposed errors or irregularities therein, but can only determine the regularity of the appeal, and submit the statutory questions to a jury.

#### DITCH APPEAL.

ROCKEL, J.

This cause is an appeal from the decision of the County Commissioners of Clark county in the locating and establishing of a county ditch under sec. 4447, *et seq.* of the Rev. Stat. The appellants now move to dismiss the proceedings, for three several reasons:

First—Because the notice given to them and to each of them in the cause while pending before the County Commissioners is insufficient, the same not being in compliance with the statute requiring notice to interested parties. Section 4457 provides:

“Upon the filing of the report of the surveyor or engineer, the auditor shall, without delay, fix a day for the hearing of the same; he shall prepare and deliver to the petitioners, or any one of them, a notice in writing directed to the resident lot or landowners, and to the authorities of municipal or private corporations, affected by the improvement, also a copy directed to each of such lot or landowners, agent or officer, setting forth the pendency, substance and prayer of the petition, together with a statement of the apportionment made to such person or corporation by the surveyor or engineer in his report, one of which copies shall be served upon each lot or landowner, and upon each member of any such public board or authority, and upon any officer or agent of such private corporation, or left at his usual place of residence, at least eight days before the day set for the hearing, and the person who serves the same shall made return on the notice, under oath, of the time and manner of service, and file the same with the auditor on or before that day; and the auditor shall, at the same time, give the like notice to each non-resident lot or landowner, or by publication in a newspaper printed and of general circulation in the county, for at least two consecutive weeks before the day set for the hearing, which notice shall be verified by the affidavit of the printer or other persons knowing the fact, and filed with the auditor on or before that.”

It is contended that the notice given in this case did not comply with the statute in that it did not correctly state the prayer of the petition, and that it did not give the route as described in the petition.

The route described in the petition is as follows: “Commencing at a point in the lands of Newton Marsh, in Pleasant township, about one hundred rods west of the Davisson road, running thence in a southeasterly direction through the lands of Wm. E. Yeazell, Andrew Phelan and Jonathan Markly, about one hundred rods southeast of Phelan’s west line.”

The Commissioners in their report of the route upon which the ditch should be located, described it as follows: “Said ditch commences at a point in the line of Wm. E. Yeazell and Andrew Phelan, thence in a southeasterly direction through the lands of Andrew Phelan and Jonathan Markly to the old Columbus road.” The route described in the notice given the appellants was like that in the Commissioners’ report, except that the

scrivener by mistake gave the direction as northwesterly instead of southeasterly.

We think that the error misled no one. The notice correctly gave the starting point, the names of the owners of the lands through which it would extend, and its terminus at a public road. It was such an error that it would show itself to be such at once. There is but one Columbus road in that vicinity, and a ditch beginning at the point where indicated in the notice, leading through the lands described and terminating at that road, would at once indicate to anyone familiar, as an interested party would be, with the surrounding country, the route of the proposed ditch. The fact is, no one was misled by it so far as herein appears.

It is contended that this notice is defective because the route therein described is not the same as that in the petition, and, therefore, does not give the "prayer of the petition," as required by the statute above quoted.

The Commissioners, in determining the location of the route, did not agree with the petitioner in the termini of the proposed ditch. Instead of commencing at a point in Newton Marsh's land, about one hundred rods west of the Davisson road, they concluded to commence a few hundred rods down the proposed line, at a point on the line of the lands of Wm. E. Yeazell and Andrew Phelan, and instead of terminating a ditch at one hundred rods southeast of Andrew Phelan's and Jonathau Markly's lands, they concluded to run it about 600 feet further, to the old Columbus road.

Under the broad language of section 4448, and the liberal interpretation that is always applied to our ditch laws, there is no doubt in my mind but that the Commissioners had ample authority to change "either terminus" of the improvement "if they were of the opinion that the object of the improvement will be better accomplished thereby."

The object of notice is to apprise the parties who will be affected by the ditch as it is finally located, so that they can be heard and have their day in court. It would be folly to describe in the notice the route described in the petition, and its termini, when the Commissioners had, in accordance with the law, decided upon different termini. To confine the notice to the route described in the prayer of the petition, would not, in this case, have apprised the parties of the proposed route, and if so given, would have been defective. We, therefore, find that the notice given was proper and legal.

The second cause for dismissal is in substance the same as the one disposed of here, and the same reasons will apply for holding that the notice given by the publication was legal and valid.

The third cause for dismissal is as follows: "That the proposed location and construction of a ditch on the line described in the published notice, is upon the line of a ditch already established by proceedings duly and regularly had before the Township Trustees of Pleasant township, Clark county, Ohio, which trustees had, at the time said petition was filed, and said notice was given, and at this time have complete jurisdiction over and control of the same to the exclusion of the jurisdiction of the Board of Commissioners of Clark county, Ohio.

The fact is, that all but about 600 feet of the lower end of the 3,300 feet of the line of the proposed ditch is over the exact line of a ditch established by the Trustees of Pleasant township in the year 1887. Do such facts preclude the Commissioners from acting under the petition in the case? Have the Commissioners power to locate a ditch over the line



of a ditch already located and established by a board of Township Trustees under a proper proceeding before them? are questions here presented for decision.

A proper answer involves a consideration of our ditch laws without any very material aid of judicial interpretation.

Section 4447, conferring power upon the County Commissioners, is as follows:

"The Commissioners of any county, at any regular or called session, may in the manner provided in this chapter, when the same is necessary to drain lots, lands, public or corporate road or railroad, and will be conducive to public health, convenience or welfare, cause to be located and constructed, straightened, widened, altered, deepened, boxed, or tiled, any ditch, drain, or water course, or box or tile any portion thereof, or cause the channel of all or any part of any river, creek, or run, within such county to be improved by straightening, widening, deepening, or changing the same, or by removing from adjacent lands any timber, brush, trees, or other substance liable to form obstruction therein.

Section 4511, giving authority to township trustees to construct ditches, etc., as follows:

"The trustees of any township may, whenever, in their opinion, the same will be conducive to the public health, convenience or welfare, cause to be established, located and constructed, as hereinafter provided, any ditch within such township, and for that purpose may cross a railroad, turnpike road, or do any other thing necessary or proper to promote said purpose."

Statutes equally broad and comprehensive confer jurisdiction upon county commissioners and township trustees to establish a ditch over the line in question, if neither had presumed to locate a ditch, as in this case. They may be, then, said to be courts, or bodies having concurrent jurisdiction over the subject-matter in issue. It is a well known rule that where courts have concurrent jurisdiction of the same subject-matter, the court first acquiring jurisdiction excludes the other court from acting therein.

This rule applies to inferior courts, such as boards of county commissioners and township trustees.

The question then presents itself, did the township trustees at the time the commissioners acted in this case, have jurisdiction over the ditch in question; and if they had, was the exercise of it such as would preclude the commissioners from acting in the premises?

The original jurisdiction of township trustees as well as county commissioners, to locate and establish any ditch, is only acquired by the filing of a proper petition, signed by one or more persons to be benefited by the improvement, and the presentation of a proper bond. Without such an invocation they are powerless to act. Of their own volition they can do nothing.

If a proper petition is presented, and the requirements of the statutes are all complied with, the trustees have jurisdiction and power to make all orders necessary to construct and establish the ditch. Have they any further power over that ditch? Can they, under and by virtue of the authority invoked by the original petition, do anything else? Does the law anywhere give them a continuing control of the ditch they have just located and established? Can they, of their own volition, cause a single act to be done in reference to the improvement, any more than any private individual, or this court?

If it is desired to alter, deepen, widen, enlarge, repair, box or tile the ditch, the authority of the trustees to act is acquired by the filing of a petition for that purpose (sec. 4552) as in the original establishment of the same. Without such petition, they are as powerless to act as they would have been in the original location and establishment of the same.

If it is desired to clean out any such ditch, may the trustees proceed to act of their own volition? No; again they can only act, only acquire jurisdiction, when they are requested to do so by a proper application by an interested landowner. (Section 4553). Suppose some adjoining landowner places some obstruction in the ditch; can the trustees, of their own motion, cause its removal? They cannot. (Section 4555). Before they have jurisdiction to act in this instance, some one must previously invoke such jurisdiction by filing a written statement of the fact of such obstruction with them.

There is quite a distinction between ditches and roads established by township trustees or county commissioners. In examining the road laws you will find that in many, if not in nearly all, instances the trustees or commissioners can act after the original construction of the same to secure its necessary or proper repair without any petition or application being previously required for that purpose.

But as to ditches located and constructed by either township trustees or county commissioners, the law nowhere gives them power to act of their own volition. In all cases a petition, or application of some kind, must be filed as a condition precedent to the acquiring of jurisdiction to act in the matter.

It rather occurs to us, then, that at the time of the action of the Commissioners in this case, the trustees did not have such jurisdiction over the line in question as would preclude the Commissioners from acting.

Even if the trustees had a kind of latent or slumbering jurisdiction in the matter, would the action of the Commissioners interfere or destroy the jurisdiction of the trustees?

In the case of *Miller v. Commissioners of Logan county*, 2 Circ. Dec. 358, upon this question, the court says: "This court has upon more than one occasion held that such action of the commissioners in locating a county ditch for a portion of the way along its line upon that of a township ditch, makes no ground for the intervention of a court of equity.

"First—Because the two easements may exist together. They subserve a common object and purpose, and the jurisdiction of either would not interfere with the exercise of it by the other. Each has but one easement in the land, and neither easement may destroy the other."

Suppose the county Commissioners locate and construct the ditch as proposed, what is there to prevent the trustees from acting over the ditch, when called upon so to do, just as they could have done, had the commissioners never acted?

The mere fact that the commissioners locate and establish a ditch, does not give them a continuing or exclusive jurisdiction over it all time in the future. They can no more act after they have finally located and constructed the ditch, in response to the prayer of the original petition, without a new invocation of their jurisdiction, than could the trustees.

It seems to us that after the county commissioners or township trustees, have established and constructed a ditch, completing it, or at least ceasing to act, under the prayer of the original petition, that their jurisdiction over such ditch ceases until again invoked by petition or otherwise, as required by law.

There is another question presented to the court which would make us hesitate to dismiss these proceedings for want of jurisdiction in the commissioner to act in the matter, and that is whether the matter is properly before the court on appeal. I am aware that, as a general rule, an appellate court may always inquire into the jurisdiction of the inferior court over the subject-matter in issue. But the appeal provided for in these cases is not general, but limited by statutory environments.

The sections providing for the appeal are as follows:

Section 4463.—Any person or corporation aggrieved thereby, may appeal from any final order or judgment of the commissioners made in the proceeding and entered upon their journal, determining either of the following matter, viz:

1. Whether said ditch will be conducive to the public health, convenience, or welfare.

2. Whether the route thereof is practicable.

3. The compensation for land appropriated.

4. The damage claimed to property affected by the improvement, and the appellant shall file with the commissioners, at the final hearing before them, a notice in writing, of an intention so to do, and specifying therein the matter appealed from; the commissioners shall fix the amount of the bond to be given by the appellant, and cause an entry thereof, and of the notice, to be made upon their journal; the party appealing shall, within ten days thereafter, file with the auditor a bond, in the amount so fixed, with at least two sufficient sureties, to be approved by the auditor, conditioned to pay all the costs made on the appeal in the case the appellant fail to sustain the same, or the appeal be dismissed for any cause; and the auditor shall make a complete transcript of the proceedings had before the commissioners, and certify the same, together with all original papers filed in his office, and transmit them to the probate judge of the county within twenty days from the day of the final hearing.

Section 4464.—The probate judge shall file the transcript and the original papers, and docket the case, and the appellant shall be plaintiff therein, and the county commissioners and the petitioner, defendants, and the case shall be so styled; and thereupon he shall fix a day, not exceeding five days thereafter, for the hearing of all preliminary motions, and the examination of the papers so filed; on the day so fixed all preliminary motions shall be heard and determined, as well as all questions arising upon the record, and if he find that the proceedings are irregular in substance, or that the appeal has not been perfected according to law, he shall dismiss the appeal at the cost of the appellant, and certify such dismissal with his findings thereon back to the commissioners; but the judge may, in his discretion, order and allow the correction of any technical defect, error or omission in such proceedings.

Section 4465.—If the probate judge find that the appeal is perfected, he shall thereupon fix a day, not more than ten days from that date, for the trial of the case as appealed by jury, and he shall immediately notify the clerk of the court of common pleas and the sheriff of the county, to meet at the clerk's office, and the clerk and sheriff shall proceed at once to draw from the jury box the names of sixteen jurors; and the clerk shall make a list of the names so drawn, in the order in which they were drawn, and certify the same to the probate judge, who shall issue a venire, commanding them to appear on the day set for trial, at the hour of eight o'clock, A. M., and deliver the same to the sheriff, who shall serve the

same within five days thereafter, and return the same on or before the day set for trial.

It will be seen from these statutes that four things may be brought up in this appeal:

First. Whether such ditch will be conducive to the public health, convenience or welfare.

Second. Whether the route thereof is practicable.

Third. The compensation for land appropriated.

Fourth. Damage claimed to property affected by the improvement, etc.

In section 4464, it is said a day shall be fixed for the hearing of all preliminary motions and examination of the papers so filed; on the day so fixed all preliminary motions shall be heard and determined as well as all questions arising upon the record, and if it is found that the proceedings are irregular in substance, or that the appeal has not been perfected according to law, the court shall do what? Dismiss the original proceedings? No; he shall dismiss the appeal at the cost of the appellant.

In the next section it is provided that if the judge find that the appeal is perfected, he must call a jury, etc.

The statute providing the appeal from the county commissioners in ditch cases is almost identical with that providing appeal from township trustees in similar cases. In two different cases has this question been under consideration in appeals from the decision of township trustees.

The first case, that of *Miller v. Weber*, 1 Circ. Dec., 77, was affirmed by the Supreme Court, without report.

In this case it was said "various errors are assigned." \* \* \* The first one in order "that no sufficient bond was filed by the petitioners with the township clerk, and the trustees failed to find that such bond was filed; and this being necessary to the jurisdiction of the trustees, the probate court had none." It is sufficient answer to this alleged error to say that although the filing of such bond is jurisdictional, the question is not here properly presented. This is not a direct proceeding to reverse the order of the trustees. Their record is not under review, only that of the probate court. The jurisdiction of the last court in the proceeding, like that of the trustees, is special and limited, and can be exercised only according to the terms of the statute, and in the mode therein prescribed. The statute provides that on the filing of the appeal that court shall fix a time for hearing the preliminary questions, and at that time, if the court find the proceedings relating to the appeal are regular, shall issue a venire for a jury. If the proceedings have not been in conformity to the statute, the appeal shall be dismissed. Upon such appeal, the probate court is not made a court of error to review and pass upon the regularity of the proceedings before the trustees, but can only perform the statutory duty of determining whether the proceedings relating to the appeal are regular or not, and if regular, then to proceed to the performance of that other statutory duty, the issuing a venire for a jury, and proceeding in the manner pointed out by statute for the jury trial therein provided for."

It will be observed that the questions sought to be made in the case just quoted from, like the one under consideration, was one of jurisdiction. For if no bond was given, as required by law, no jurisdiction could be acquired; and yet the court held that the probate court could not consider the question on appeal.

The question was again considered in *Board of Trustees v. Jackson*, 2 C. C. R., 482, where the court again says, "The appeal did not constitute the probate court a court of error to review the proceedings of the trustees or authorize it to pass upon any supposed errors therein, or irregularities therein. Nor did the appeal vest that court with chancery powers, to amend or restrict the action of the trustees as being in excess of the authority conferred by the statute or invoked by the petitioner. \* \* \* Section 4437 provides, that if the probate judge finds the preliminary proceedings for appeal in substantial conformity with provisions of the chapter, he shall select a jury and notify them of their election. These provisions restrict the inquiries of the probate judge to the preliminary proceedings pertaining to the appeal. He is to ascertain whether they are in substantial conformity with the provisions of the chapter. If they are not, the statute provides that his order shall dismiss the appeal. If they are, it requires him to call a jury."

And again, in *Miller v. Commissioners of Logan county*, 2 Circ. Dec., 358, where the identical question as to locating a county ditch was made as in this case, in a suit to enjoin, the court would not interfere because:

"Second.—If any question is to be made growing out of such action of the commissioners, it should be made to the board at the time fixed for the hearing of the report, and upon such hearing any person aggrieved can take error under sec. 850, Rev. Stat., and have a full and adequate remedy at law."

In *Haff v. Fuller* 45 Ohio St., 495, it is said: "In this state the proceedings and final orders of township trustees and county commissioners establishing ditches and roads, and of other boards exercising similar functions, may be reviewed by petition in error, and reversed for errors appearing on its records. (Citing cases.)

The remedy thus afforded being adequate for the correction of errors in such proceedings which are disclosed by the record, the rule already stated has been applied in such cases though the errors so appearing rendered the proceedings void for the want of jurisdiction." Citing *Frevert v. Finrock*, 31 Ohio St., 621; *Id.*, *Holliger v. Bates*, 43 Ohio St., 437, 445.

I would therefore suggest to counsel, that it rather occurs to us that the proper way to raise these questions is by a petition in error to the court of common pleas, as provided in sec. 850 of the Rev. Stat.

For all of these reasons the motion to dismiss the appeal or the original proceeding herein, of the county commissioners, is overruled, and said appeal is found to be perfected as the law requires.

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## DISSOLUTION OF CORPORATION.

39

[Hamilton Common Pleas. May 21, 1891.]

### D. ARMSTRONG, RECEIVER, ET AL. V. HERANCOURT BREWING CO.

1. Where stock of an Ohio corporation was lawfully owned by a national bank, but not registered in its name in the books of the corporation, a receiver of the bank, who by virtue of his office, acquired control of the stock, is not by reason of merely such control a stockholder within sec. 5673 Rev. Stat., and is not authorized to petition under said section, for a dissolution of the corporation.

2. Where under R. S., sec. 5673, a petition for the dissolution of a corporation is filed by persons claiming to be stockholders under said section, whose names are not registered in the books of the corporation as such, the holder of stock who, as between himself and the corporation, is not a legal owner (as distinguished from equitable owner) is not authorized by said section to petition for a dissolution of the corporation. Query: Is such receiver without express directions from the comptroller of currency, authorized to cause himself to be registered as a stockholder in the books of the corporation?

SHRODER, J.

On February 17, 1891, a petition was filed against the Herancourt Brewing Company, a corporation under the laws of Ohio, praying that proceedings under Rev. Stat. sec. 5673, be had for the dissolution of the corporation. Among other allegations, the petition stated that the petitioners were stockholders, owning more than one-fifth in amount of the paid up stock of the corporation. One of the petitioners was D. Armstrong, as receiver of The Fidelity National Bank of Cincinnati, whose franchise had been judicially forfeited. An order was entered and served upon the officers of the defendant corporation requiring them to file in court by a stated day, the inventories, account and statement for such cases prescribed by law. Thereupon, the corporation filed a motion to set aside this order, for the reason that the petition did not constitute stockholders owning one-fifth in amount of paid up stock.

The motion presented an issue which involved the consideration and determination of the jurisdiction of the court, since it could only be invoked by and exercised upon the petition of stockholders owning one-fifth or more in amount of paid up stock. To obtain the desired order, the procedure was by motion. It can form no objection to the entertaining of such motion, that its determination required a decision upon the jurisdiction of the court, as based upon the evidence adduced at the hearing. 2 Circ. Dec., 721.

It appeared that Armstrong, as receiver, found among the assets of the bank a certificate of twenty shares of the defendant corporation. It was issued to E. L. Harper July 20, 1886, number sixty-six. The evidence showed that prior to July 20, 1886, E. S. Herancourt, had delivered to the bank in pledge for a loan a similar certificate for twenty shares, issued to him on September 1, 1881, and numbered five. By virtue of a power given to it by Herancourt, the bank sold the pledge and applied the proceeds of the sale to his credit upon the loan. Harper purchased the stock in his own name, but in the interest of the bank. He delivered to the corporation the certificate number five, received for it certificate number sixty-six in its stead, and had his name enrolled on its books as a transferee from E. S. Herancourt, and as one of its stockholders. The certificate in the possession of the bank, as when taken charge of by the receiver, by its terms made the stock transferable only on the books of the company upon presentation of the certificate, and bore the indorsement of E. L. Harper under a form of assignment and power of transfer on the corporation books; the spaces intended for the assignee's and attorney's names were unfilled, and are still in that condition. The stock also remains registered in Harper's name.

The bank's possession and title were the legal consequence of Harper's delivering to it the certificate with his indorsement. It vested in the bank the rightful possession coupled with the power to have the transfer registered to it; (129 Mass., 283), and with the additional power of transmitting, by mere delivery of the certificate to any other person,

all its right, title and powers. As between the corporation and itself in order to invest itself with Harper's legal title, it required the exercise of the power of transfer, and, until that was done, it was only the equitable owner of the stock.

"Delivery of the stock certificate without a transfer on the bank's books would have made no more than an equitable title as against the bank (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y., 80, and cases cited), though it would give legal title as against the assignor." *Grymes v. Howe*, 49 N. Y., 22. See also *Conant v. Bank*, 1 Ohio St., 298, 306; *Continental Bank v. Eliot Bank*, 7 Fed., 373, 374; *Johnson v. Liffin*, 5 Dillon, 65, (6 C. L. J., 128, 130); *Johnson v. Liffin*, 103 U. S., 800.

The assignee of the stock comes only in privity with the corporation by having his stock transferred to him on the company's books, whereby their mutual legal rights and obligations are created. *Webster v. Upton*, 91 U. S., 69, 70, 72.

The bank had a right to hold the stock in pledge as security for the loan, *National Bank v. Case*, 99 U. S., 628, and under its contract with Herancourt, to purchase it at the sale, if necessary to save itself from loss, *Coppin v. Greenlees*, 38 Ohio St., 275, 279; *Lamprecht v. Kehrwicher*, 40 Ohio St., 646; *Morgan v. Lewis*, 46 Ohio St., 1; *National Bank v. Exchange Bank*, 92 U. S., 128; 70 Mo., 335.

Under the circumstances, it was not disqualified from being either the equitable or legal owner of the stock.

But as the facts stand, neither was the bank nor the receiver at any time the transferee of the stock. And in this connection it is not necessary to consider whether the receiver is now empowered to make himself the transferee; or, if so empowered, by what procedure or authorization the power is to be exercised. It is sufficient for the inquiry, to hold upon the evidence that as between the receiver and the defendant corporation, he is only the equitable owner of the stock.

The contention of the parties turns upon the question, whether an equitable owner of stock comes within the provision of Rev. Stat., sec. 5673—whether he is a stockholder within the scope of its provisions?

So far as it is useful to quote from the section it reads: "When the stockholders owning one-fifth or more in value in the paid up stock of a corporation organized for manufacturing or mining, file in the office of the clerk of one of the courts mentioned in sec., 5651, their petition containing the statement that for two out of three last preceding years the net earnings of the corporation had not been sufficient to pay in good faith, an annual dividend of six per centum upon the paid up capital stock, over and above the salaries and expenses authorized by the by-laws and regulations of the corporation, and that they therefore desire a dissolution of the corporation, the court shall make an order," etc.

By its terms the remedy mentioned in the section is intended as a relief to the minority of stockholders in interest who are dissatisfied with the returns from their investment. Its purpose is not to furnish a means of collecting a claim or enforcing a liability. This supposition is precluded by the diverse results to which these proceedings might lead. To the stockholders the outcome might be that, if the corporation is insolvent, they may realize on their stock, and if insolvent, they may be called to answer upon their statutory liability. The section expressly confining itself to manufacturing or mining corporations, suggests that this legislation proceeded from the growth and development of trading corporations

in general. The circumstance warrants the interference if we recognize the analogy between the inducements and the objects of such corporations and those belonging to trading partnerships, that the purpose and intent of the section was to enable minority stockholders to compel a termination and a settlement,—a winding up—of their common enterprise, the pecuniary effect of the dissolution upon the stockholders being uncertain and merely incidental to the result. But it must not escape attention, that a necessary and intended result of the dissolution is the annihilation of statutory corporate rights and privileges of stockholders consisting of the participation in meetings, and in the elective franchise, and that these belong exclusively to legal owners of stock.

The mutual rights and obligations of the stockholders and corporation arise from the contract of subscription. They are created by the statutes, whose provisions form part of the contract. The corporation, its organization, and management as well as the rights and duties of stockholders as such, are those enacted by the statute, and exclude all others unless they be fairly incidental.

Their character is wholly legal or statutory. They are not of equitable origin. Equity takes jurisdiction in cases where it is sought to secure or enforce the legal rights or to control the corporation, its officers or directors in matters involving their trust capacity. We must therefore resort to the statutes to determine what they intend by the use of the term "stockholders." In secs. 3253 and 3254, wherein provisions are made for the payment of stock installments, the issuance of certificates and the registration of stockholders and transferers, he is identified in his legal capacity of assignee, transferee or original subscriber. Equitable ownership is not there recognized. By section 3259, relative to statutory liability to creditors, a stockholder is described as one who appears on the books of the corporation to be such (18 N. Y., 220; 6 Hill., 24; 36 Ohio St., 355), but is extended to one who is an equitable owner for the exceptional and limited purpose of liability to creditors. The provisions of sections 3253, 3268, 5652, and 5673 presuppose the stockholder to be one whose name is known to the corporation officers. Section 3253 makes it necessary, before selling a delinquent stockholder's stock for an unpaid installment, to give notice by newspaper publication in the county of his actual residence or where he made the subscription or became assignee or transferee.

Section 3268 requires that each stockholder be furnished an annual statement with list of stockholders and their residences. Sections 5652 and 5673 direct, in cases for dissolution, the filing of a full list of stockholders, specifying their names and residences. A reasonable and practical enforcement and operation of these provisions, would make them apply only to persons whose names are registered as stockholders on the company's books. It is impossible for the corporation to be held credited with a knowledge of the names or residences of persons, who may be vested or divested of their holding or title as frequently as the certificates are changed by deliveries from hand to hand in the numerous transactions of trade. The phraseology of section 3259 already spoken of points out the statutory stockholders as distinguishing him from the equitable owner. The exception here expressly enacted proves the statutory rule upon the subject. *Henkle v. Salem Mfg. Co.*, 39 Ohio St., 553, 18 N. Y., 224; 11 N. Y., 148.

It has been argued that section 5673, speaks of "stockholders owing one-fifth or more" of paid up stock, and that it made the actual owner-



ship the essential qualification for the right to the petition. This conclusion would follow, if the ownership referred to, would necessarily exclude the registered legal title. But it may be said that so far from having that result, it may be taken to limit the right of petitioning to such stockholders as are not only the legal, but are also the actual owners; that is, requiring the petitioner to have both legal and equitable title. But the expression as used is not peculiar to this section. In section 3238a, articles of corporation may be amended by vote of "owners of three-fifths of the stock." Notice must also be given to the "holders" of the stock. Section 3245, provides that at elections "each share shall entitle the owner to as many votes as there are directors to be elected."

Similar employment of the word "own" is found in section 3245a. In these sections the ownership of stock, by its connection, is made to refer to the legal ownership, shown by the books of the corporation. In view of the general scope of the stockholder's rights, it must be conceded that the right to petition for a dissolution is of the greatest importance. It would appear extraordinary to confer this right, of peculiarly corporate nature, in a matter of supreme consequence, to persons who are debarred from the exercise of the ordinary corporate right of voting or participating in the business of the stockholders' meeting. Might it not be said, that had the legislature so intended by section 5673, it would have pursued the course taken in section 3259, and by appropriate language expressed its purpose to the same effect.

It is thus seen that in endeavoring to ascertain the legislative intent of section 5673, if we give its words their usual significance in law, or if we apply to them such a meaning as may be warranted by analogies afforded by their sections, or if we keep in view the nature and degree of the corporate right established by the section, or the object and purpose aimed to be accomplished by it, the conclusion must be that holders of stock not enrolled as such on the company's books, are not within the purview of the section in question.

Armstrong is not a registered stockholder. The other petitioning stockholders do not own the requisite amount of stock, and this deficiency renders the making of the former order without authority of law. The motion to set it aside ought, therefore, to be granted, and it is so ordered.

Goebel & Bettinger and John W. Herron, attorneys for plaintiff.

Gorman & Thompson, attorneys for defendant.

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## EVIDENCE.

65

[Hamilton Common Pleas, June, 1891.]

F. W. KEENEY v. M. OTTMAN.

Courts have power in the interest of justice to admit further evidence after a cause has been finally submitted and the jury are deliberating on their verdict.

Plaintiff sold to defendant a pile of cherry lumber estimated to contain 8,000 feet, at \$23 per thousand; to be remeasured in presence of both and to be delivered at a place to be designated. A misunderstanding or altercation arose before measurement or delivery, and defendant refused to participate, and plaintiff sues for the price.

No measurement for the purposes of the case was ever made, and the court intimated that it was the plaintiff's duty to furnish one, and in the charge told the jury that if they found the evidence as to quantity not satisfactorily definite, and needed a measurement, they should have it. The jury having retired to deliberate on their verdict after trial, argument and charge, returned after a while and asked for a measurement, and the court ordered the plaintiff to employ a licensed measurer with opportunity to defendant to concur in the selection, and be present, and adjourned until next morning. The defendant refused to concur and excepted, and the next day the measurer was allowed to testify to the amount, which was a few feet over the 8,000, and also that the pile bore no appearance of change. Other evidence was also heard that it had never been disturbed.

The jury found for the plaintiff. The defendant asks for a new trial, because, among other things, evidence was admitted after the cause was submitted to the jury.

BATES, J.

It is true the order of proceedings in trials is laid down in the Code, Rev. Stat. sec. 5190. But all rules regulating the order in which evidence shall be produced are universally regarded as very elastic, and the discretion of the court to vary customary routine in the interests of the justice, is limited solely by the test of injurious consequence. See *Bean v. Green*, 33 Ohio St., 444.

Thus, where a motion for a non-suit after plaintiff has closed his case is granted, it is quite a matter of course to open up at once and let plaintiff supply his missing links. Nearly every state in the union can furnish authorities to this effect; our own courts having the following: *Pennesy v. Gilliland*, *Wright*, 38; *Morris v. Bills*, *id.* 343; *Newbraugh v. Curry*, *id.* 511; *White v. Francis*, 4 Am. Law Record, 501. Indeed, it has even been held abuse of discretion to refuse. *Meacham v. Moore*, 59 Miss., 561; *Wadsworth v. Thompson*, 18 Ga., 709, *contra* 22 S. Ca., 557. Cases are equally numerous of evidence in chief for plaintiff let in during or after rebuttal, or for defendant after rebuttal, if justice requires.

But courts can and do go much farther, and an overwhelming weight of authority substantiates their right in a proper case to admit more evidence even after argument, sometimes because not accessible before, and sometimes to meet disparaging or unjust inferences in argument not theretofore foreseen, or for other reasons. Such was the holdings in the following: *Mathis v. Colbert*, 24 Ga., 384; *Jones v. Smith*, 64 Ga., 711; *Watt v. Alvord*, 25 Ind., 533; *Stipp v. Claman*, 123 Ind., 532; *Crawford v. Furlong*, 21 Kan., 698; *Haley v. Hickman*, Litt. Ky. Sel. Cas., 266; *Fleet v. Hollenkemp*, 13 B. Mon., 219; *State v. Powell*, 40 La. Ann., 241, 34 So. 447, note; *Ruggles v. Coffin*, 70 Me., 468; *Smith v. Merrill*, 9 Gray, 144; *Thompson v. Ellsworth*, 39 Mich., 719; *Hood v. Mathis*, 21 Mo., 308; *Fremont*, etc. R. R. v. *Crum*, 46 N. W. Rep. (Nebr.), 217; *Wells v. Burbank*, 17 N. H., 383; *Darland v. Rosencrans*, 56 Ia., 649. Or after the charge has been begun or finished, as in *Taylor v. Shemwell*, 4 B. Mon., 575; *Thompson v. Ellsworth*, 39 Mich., 719.

The present case goes farther than any of the above, because the jury had already retired to consider it. But no substantial distinction arises from that fact where the parties are still all present, and such are the authorities. Thus in *Com. v. Ricketson*, 5 Met. (Mass.), 412, the jury while deliberating on their verdict came out and asked for proof as

to a certain fact, and the court permitted a witness to be sent for, and the Supreme Court said this was wholly discretionary. So in *Com. v. Zimmerman*, 1 Cranch, C. C. 47, and *U. S. v. Greenwood*, *Id.* 186, the jury asked to have a witness reexamined, and the court so ordered; and in *Hawthorne v Bowman*, 3 Sneed (Tenn.), 524, on the same request by the jury, the witness was also examined as to new matter. In *Cook v. Ottama University*, 14 Kan., 548, the court refused to re-open after submission, and the Supreme Court held such matters to be wholly discretionary, reviewable only for abuse or injustice.

The above authorities show plainly enough that the practice in the case at bar was neither an unusual nor unauthorized relaxation of settled rules.

Ernst Rehm, for plaintiff.

Merrill & Kuehnert, for defendant.

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### PLATS.

73

[Franklin Common Pleas, 1891.]

HULING V. HUFFMAN.

Section 2614, Rev. Stat., requires proceedings in court to change a plat, only when the alteration affects streets or alleys, and an owner may change, otherwise his allotment at will.

EVANS, J.

Cyrus Huling brought a suit to prevent Huffman and others, who some years ago subdivided Ohio Place addition, from selling off three of the lots in the subdivision. Mr. Huling's residence, which was in Ohio Place addition, fronts on Oak street. By the subdivision two lots were turned so that they fronted on Huffman avenue, and of course backed against Mr. Huling's property. He sought to compel the continuance of the addition plat, which would make the two lots referred to front on Oak street, and not back against him. His suit was based on section 2614 *et seq.*, which provides that where a change in an addition is to be made, a regular suit must be brought in the courts and all the property owners be made parties. Defendants demurred to the petition, and Judge Evans held that the law in question referred only to changes in or subdivisions of additions so far as they related to the alteration of streets and alleys. The case will go to the Supreme Court on the claim that it affects the change of front of lots also. (Editorial.)

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### WILLS.

83

[Hamilton County Common Pleas, April 23, 1891.]

\* AUGUST T. HELFFERICH V. FRANCIS HELFFERICH, JR.

1. Where A. by his last will and testament devised and bequeathed all his property to B. for and during her natural life, with power to sell and dispose of the same as she shall deem advisable; and at her death he devised and bequeathed all his property to C. and D. to be equally divided between them, and where he further directed that in case of the death of either of them before his or B.'s death, said C. or D.'s portion, "that is, one-half of my estate," shall be divided equally between his children, subject however to B.'s life estate. Held:

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\*Another report of this opinion will be found *ante* 234.

- (a.) That the power given to the life tenant B., to sell and dispose, did not enlarge her estate into a fee simple estate.
- (b.) That subject to the lawful exercise of the power conferred on B., a fee simple title in remainder in the property vested in C. and D. immediately upon the death of A.
2. Where after D.'s death, leaving no children, B. conveyed a fee simple estate to C. by a deed reciting that the conveyance was executed by virtue of the power given in A.'s will, and where the consideration recited was "one dollar and love and affection, and other good and valuable considerations," and said other considerations consisted of a lease of the same property back from C. to B., for life, by the provisions of which lease, the rights, duties and obligations of both B. and C. as to said property and to each other, were the same as they had been prior to these conveyances, and where the substantial effect of the transaction was, to leave in B. the enjoyment of the property for life and in C./the vested fee in remainder of his original undivided half together with the original undivided half devised to D. and his heirs. Held:
- (a.) The power conferred on B. was only a power to sell for money; it conferred no right on B. to convey the property on mere equitable or moral considerations. The exercise of the power upon such considerations is void although upon the face of the deed of conveyance it is accompanied with a pecuniary condition.
- (b.) The will did not intend the power as one beneficial to B. alone, but intended it as executorial in its nature, to enable her to change the form of the investment for its better enjoyment or for the benefit of the estate.
- (c.) That B.'s exercise of the power was illusory;—was not only voidable, but wholly void.

**SHRODER, J. (oral.)**

In this case the plaintiff seeks a decree for partition, setting forth in her petition that she is the owner in fee simple of an undivided one-half of certain real estate, which she claims under a will of her husband, Jacob Helfferich, who, she alleges, acquired it by devise from his father, Francis Helfferich. The petition, in its form, looks to a statutory partition.

It is claimed at the outset by the defendant that the petition ought to be dismissed because the case discloses that the plaintiff is not the owner of the legal title or estate in common with the defendant. The cause was, however, submitted upon the pleadings and the evidence. In the pleadings is the reply, which was suffered by the parties to remain on file with its prayer, which prayer, although irregular as belonging to a reply, enlarged the original prayer to that for equitable relief.

The evidence and the agreed facts required the court to construe the will of Francis Helfferich, and involved the determination of the rights of the parties upon a certain contract for the dissolution of the partnership of Francis Helfferich and Sons.

In the case of *Linton v. Laycock*, 33 Ohio St., 128, 133, the Supreme Court held that: "The special statutory mode of obtaining partition never was exclusive of that in equity by civil action under the code. Partition was always a subject of equity jurisdiction, especially where the case involved the settlement of questions peculiarly cognizable by courts of equity. The case involved the construction of a will, upon which the right to a partition sought depends, and for an account of rents if the plaintiff was entitled to partition. It was not a case for partition merely, and therefore could not have been brought properly under the partition act. It was then a proper case in which to invoke the equitable aid of the court in procuring the petition now sought." In the case of *Byers v. Wackman*, 16 Ohio St., 441, 443, the Supreme Court said: "In a statutory proceeding for partition, a legal title in the defendant is necessary.

If his title is equitable merely, the proceeding should be under the code for and equitable partition, and the defendant should be brought into court by process. Where, however, the defendant actually appears, and contests the defendant's right, and agrees upon the facts of the case, it can hardly be claimed that it is error to the defendants prejudice to order the partition upon a mere equitable title in the defendant."

The opinions in both of these cases necessarily lead to the conclusion, that as this case was submitted upon an agreement of facts and pleadings, which involved the construction of the will of Francis Helferich, and of the contract spoken of, and a ruling upon the account that necessarily arose under the contract, a case for partition was presented.

I have already stated the claim of the plaintiff. The defendant claims, that by the will of Francis Helferich, his widow, Sabilla Helferich, was vested with an estate in fee simple, so that no estate came to Jacob Helferich; also, that if this view be wrong a power of sale was conferred upon her, which was exercised in the form of a conveyance to Francis Helferich, the defendant, whereby Jacob's estate, if any, was divested; and further, that the will, properly construed, conveyed no estate to Jacob in view of the fact that he had a child born to him, in consequence whereof he was divested of whatever estate he had; and again, that the will gave him but a life estate.

Now, in construing wills, the court in the discharge of its duty must look for the intention of the testator. Other cases can throw very little light upon the case in hand unless the circumstances are analagous. Reference to other cases may be instructive in enabling the court to apply to the case at hand principles adopted by courts for the construction of wills. See opinions found in *Sheehan v. Davis*, 17 Ohio St., 571, 580; *Brasher v. Marsh*, 15 Ohio St., 103, 109; 6 Peters, 168.

The intention of Francis Helferich is evidenced in the second item of his will, which reads as follows: "I give and devise and bequeath, all my property, real, personal and mixed, of which I may be entitled to at the time of my decease, to my beloved wife, Sabilla Helferich, for, and during her natural life, with power to sell and dispose of the real and personal property as she shall deem advisable, and I desire that she take my place in every respect, and for all purposes as the senior and leading member of the firm of F. Helferich and Sons, if she should desire to do so; and at the death of my said wife, I give, devise and bequeath, all my property, real, personal and mixed, to my sons, Jacob Helferich and Francis Helferich, to be equally divided between them, without any deduction to either of them on account of advancement or on any other ground whatever, and I hereby will and direct that in case of the death of either of my sons before my or before my wife's death, his portion, that is, one-half of my estate, shall be equally divided between his children, subject however, to the life estate of my said wife as above devised."

Looking to the clauses of this item, and for the present paying no attention to the provision by which certain power is conferred upon Sabilla Helferich, the language clearly states, that he bequeaths and devises to Sabilla Helferich his property for and during her natural life. In providing for his sons he says: "I give, devise and bequeath all my property at the time of the death of my said wife to my sons, Jacob Helferich and Frank Helferich, to be equally divided between them." He then makes further provision: "That in case either of my sons die before my or before my wife's death, his portion, that is, one-half of my

estate, shall be equally divided between his children, subject however, to the life estate of my said wife as above devised." Here the will clearly recites that his wife's is a life estate. In the depositive portion of this item, he gives, bequeaths and devises all his property to her during her natural life. When he comes to the disposition of the property after her death, he says: "I give, devise and bequeath all my property to my two sons," naming them, to be equally divided between them. He does not limit this devise to what shall be remaining after the death of his wife, but he there disposes of all his property. If there were any doubt as to what was in the testator's mind at this point of item two he relieves us of it in the final portion, wherein he provides, that in the case of the death of either of his sons, such son's portion, which he defines as follows. "That is, one-half of my estate shall be equally divided between his children," and further adds: "Subject, however, to the life estate of my said wife as above devised." He thus clearly evinces his intention in his will that his wife shall have a life estate, unless there shall be something else in it requiring a different construction.

It is claimed, however, that where a devise is for life with power of sale, an estate in fee simple is given. Now, we have some very instructive cases upon that point. One of them is the case of *Clark, Executrix v. Trustees of Hardwick Seminary and others*, 3rd Circuit Court Reports, wherein the court examined the question and discussed a number of decisions. On page 167, Judge Woodbury, says: "Numerous cases have been cited to us bearing somewhat upon the construction which should obtain under like provision in wills. Referring to a claim similar to that here made by the defendant he adds: "I may say without taking up the time to examine them, that nearly all those cases are cases where there was an express life estate or interest given to the devisee"—in which case the estate is not enlarged by reason of the power of disposition given into that of a fee simple; and on page 169: "I say here that the rule seems to be well settled that where an express life estate is given that the devise over, although there may be provisions in the will authorizing disposition, the devise over is good. But almost every one of the cases, it will be observed, uses the language where there has been an express devise or bequest for life."

Reference might also be made to the opinion of the Supreme Court in *Huston v. Craighead*, 23 Ohio St., 198, 207, and to a very instructive and well considered opinion. *VanHorne v. Campbell*, 100 N. Y., 287.

It is the established rule that wherever a life estate is expressly given by a will, the fact that the will empowers the devisee for life with the right to sell and dispose of the property does not enlarge the life estate into a fee simple. The conclusion therefore is from the face of the will, and in view of the principles of law laid down by the decisions, *Sabilla Helfferich* acquired only an estate for life.

Now, what estate did Jacob and Frank Helfferich receive by this item? In *Linton v. Laycock*, 33 Ohio St., 128 the Supreme Court held, that unless there is a clear and express intention stated to the contrary where the provision is that at the death of the life tenant the property is devised to others in fee, the estate in remainder will vest immediately at the death of the testator. In *Jeffers v. Lampson*, 10 Ohio St., 102, where the testator provided: "I bequeath all the rest \* \* \* to my beloved wife during her natural life," further: "After the decease of my wife, I give and bequeath all my property, real personal and mixed, of every kind to my sons, William and Henry Jeffers, to them and their

assigns forever," the court said on page 104, "We are of the opinion that by this language a remainder in fee, after the determination of the life estate of the mother was vested immediately in William and Henry in equal moieties of the premises in common." In *Collins v. Collins*, 40 Ohio St., 353, where the devise was: "At the death of my said wife, the real estate aforesaid, and such part of my household goods as then may remain unconsumed or unexpended, I give and devise to my two sons, Siras and William Collins and their heirs," on page 364 the court held: "In our view by clear unequivocal terms in the second clause of the first item of the will, William took a vested remainder in fee simple in one undivided half of the homestead farm, and as the contingency upon which his estate might be divested became impossible it can not be cut down to a life estate given in subsequent clauses." In that case the court decided that an estate in remainder vested immediately upon the death of the testator; and the Supreme Court of the United States in *McArthur v. Scott*, 113 U. S. S. C. Reports, 380 held: "Words, directing land to be conveyed to or divided among remainder-men after the termination of a particular estate, are always presumed, unless clearly controlled by other provisions of the will to relate to the beginning of the enjoyment of the remainder-man, and not to the vesting of the title in him. For instance; in a devise of an estate legal or equitable to testator's children for life, and to be divided upon or after their death among his grandchildren in fee, the grandchildren living at the death of the testator take a vested remainder at once subject to open and let in after-born grandchildren."

Thus, upon the authorities, the language of this will would require the court to find that Jacob Helfferich received at the death of his father a remainder in fee simple, subject to the rights and interests of his mother.

Counsel for defendant, in a very able brief, have referred to a number of authorities, to the strongest of which I shall now address myself, and in saying this I do not intend to criticise the decisions, but only to distinguish them as being inapplicable to the case at bar.

In *Holt v. Lamb*, 17 Ohio St., 374, the syllabus reads: "Where land is devised to a tenant for life with direction that at his death it be sold and the proceeds divided among his children, the children may elect at his death to take the land itself, or have it sold for their benefit." The provision required that the land shall be sold at the death of the life tenant. It was claimed, unsuccessfully, that this vested a remainder in fee at the time of the death of the testator. The Supreme Court, however, held that this was not a proper construction. Judge Welsh saying on page 387: "This is an equitable right to have the land sold, or at their election to have the land itself upon the death of George Stevenson." There the intention of the testator was manifest, that at the death of the life tenant, the children had the option either to take the property or to take the proceeds of the sale. It did not give them the property itself as Judge Welsh said, it was an equitable right to have the land sold that the testator intended, and that intention was inconsistent with any vesting in the children of a fee simple estate in remainder, at the testator's death. In the case of *Buell v. Southwick*, 70 N. Y., 581, the will devised certain premises to "each of his three children, C., J. and W., respectively, and his, her or their direct lineal descendant should he, she or they have any, in fee simple absolutely," "subject to the conditions and contingencies following, that is; in the event that either shall die \* \* \* leaving

no children or descendants or any children, then in such case," the devise to the one so dying to go "to the children of the survivors or survivor \* \* \* equally, share and share alike, the direct lineal descendants, if any, of my said three children \* \* \* as may then be deceased, to be entitled to the same share, which the child or children so deceased would be entitled to if living." There it was held the estate over was valid as a contingent limitation upon the fee under the Rev. Stat., of New York; and the court, on page 586, says: "Considering the language of the first clause in the will which has been cited, which, expressly qualifies the estate devised, and makes it subject to the terms afterwards specified, and without laying down any general rule as to other cases, it is sufficient to say that the devise over was valid as a contingent limitation upon the termination of the first estate." It will be observed that the very devise given to the children, was by the language of the testator himself made expressly subject to something else. It was not left to the force of any construction or inference, but he, himself affixed to the devise a qualification by subjecting it to something which he himself specified in express terms in his will. The intention in this case was to give this qualified interest, an interest qualified and subject to something else, as the testator expressly made it by the provisions of his will. The Court of Appeals recognized this, and qualified its own language by saying, it did not want the construction of this particular will applied as a rule for other cases. It said, that considering the language of the first clause of the will (which expressly qualifies the estate devised, and makes it subject to the terms afterwards specified), it was compelled in order to carry out the intention of the testator, to give the will the construction which it gave. But that will is entirely different from a will such as we are now considering—wherein the testator makes no express qualification of the estate in remainder, and uses language as broad as can be used by saying, "I bequeath all my property to my two sons," and afterwards defining his portion as, "his, one half of my estate, subject to the life estate of my said wife above devised." Therefore, I repeat that the two cases, which are the strongest cited by counsel for the defense, are not applicable to a case of this kind.

It remains to consider the effect of other provisions of this will upon these dispositions. The testator says: "I hereby will and direct that in case of the death of either of my sons, that his portion, that is, one half of my estate, shall be divided between his children, subject to the life estate of my said wife, as above devised."

Jacob Helfferich had a child born to him which predeceased him and Sabilla Helfferich. Had this child survived Jacob this portion of the will would have been operative. It was an executory devise. The will, however made no provision for the case of the death of any of the sons leaving no children. That was an omission. And in this connection, the following language of Judge Brinckerhoff, in *Jeffers v. Lampson*, 10 Ohio St., 102, 105, is appropriate: "This view of the question is objected to on the ground that the will makes no provision in case of both William and Henry should die during the life of their mother. The objection \* \* \* we think entitled to but little weight, it is a *casus omissus*, a contingency, though a very possible one, not foreseen by the testator; a thing than which hardly anything is more common."

The executory devise never went into effect. It never became operative, and therefore it left in Jacob Helfferich a vested fee simple estate in remainder. The executory devise not being operative, had no



other effect, and did not cut down the remainder in fee to a life estate. *Collins v. Collins*, 40 Ohio St., 353, 354.

Now, what effect upon these estates was the provisions conferring upon Sabilla Helfferich a power of sale? The will devised all his property to her for, and during her natural life, with power to sell and dispose of real and personal property as she shall deem advisable. In *Cleveland v. State Bank*, 16 Ohio St., pages 236 and 238, a power of sale is defined to mean a power to sell for money. In *Bloomer v. Waldron*, 3 Hill (N. Y.), 367, the Supreme Court, by Judge Cowen, held, when a man directs a sale of his land, whether his object be to raise money or not, he means to put it in the market for what it will fetch at the time, and avoid the fluctuation in prices. It must be noticed that the power given to Sabilla Helfferich, is the power to sell and dispose.

Francis Helfferich died in February, 1880. He was the leading member of the firm of F. Helfferich & Sons, of which he and his two sons were partners. By the will he expressed a desire that his widow may take his place in every respect as the leading and senior member of the firm, if she should desire to do so. Although the will gave her but a life estate in the personal property, the effect of this provision was not to enlarge the life estate to absolute ownership, but to protect her against the charge of waste in case she chose to continue a partnership interest in the business. She chose to continue as the senior member of that firm, according to the desires of her husband. On March 13th, and May 22, 1886, articles of dissolution of this firm were entered into and signed by all the parties. By them Francis took the business; he agreed to pay his mother a certain sum of money for her living, to pay all taxes and assessments and repairs of real estate during his mother's life. It was agreed that whatever this would amount to, over and above his indebtedness to her for interest, should be borne equally by both him and Jacob, and chargeable to the proceeds of the sale of the property after her death. The effect of this was that the balance in his favor would be a charge, to the extent of Jacob's share upon Jacob's interest in that real property. On September 15, 1887, Jacob Helfferich died, leaving this plaintiff, his widow, as the sole devisee of his will. There were no children surviving him. On July 11, 1888, Sabilla Helfferich conveyed this property to Francis Helfferich by a deed in fee simple, reciting in the deed that she did it "with the power and authority given to her by the last will and testament of Francis Helfferich, deceased," and also reciting in the deed as a consideration, "one dollar, and in consideration of maternal love and affection, and for other good and valuable consideration." On the same day by an instrument, wherein it is said that Francis Helfferich, "leases and demises unto Sabilla Helfferich," he conveyed this property for her entire life, "the absolute use of said above described premises, together with the privilege of leasing or renting out the same or any part thereof, and using the rents therefrom resulting for her own benefit." Francis Helfferich in this instrument assumed the payment of all taxes and assessments on all premises, and all necessary repairs. Both instruments were executed and deposited for record on the eleventh day of July, 1888. They constitute, one and the same transaction. What constituted the other consideration spoken of in the deed of conveyance, is not expressed therein but the deduction the court must make from the evidence is, that the other consideration was this instrument called a lease for life, with its terms and provisions; and on the other hand, the consideration referred to in this so called lease for life is the fee simple conveyance made by the

mother. In other words, the consideration of the whole transaction were these mutual transfers, together with the nominal consideration of one dollar, and the consideration of maternal love and affection. Sabilla Helfferich died on March 24, 1890.

I have already stated my view of the extent of this power. It was to sell and dispose, and that means to sell and dispose for money; and according to the opinion of Judge Cowen, for what the property will fetch when put into the market to avoid the fluctuation of prices. Francis Helfferich was in business at the time of his death, as the leading member of the firm. The business seems to have had life in it, for there was no dissolution of it until six years after his death. It may be inferred from the evidence that this business was his means of livelihood. From the situation of things he reasonably could have supposed that what would support him and his wife, would certainly support his widow alone. Construing the will from the surroundings, the little light that the court was permitted to receive as to the condition of things at the time this will was made, it would indicate that all that Francis Helfferich intended by that power of sale, was not to enlarge his widow's estate, but to convert the form of the investment. He does not say that he gives her the power to sell and dispose of the real and personal property for her own benefit or for herself. It is a general power given to her without stating specifically for whose benefit it was to be, and in such a case it might be said, as the Supreme Court held in *Baxter v. Bowyer*, 19 Ohio St., 490, 499, that such is the nature of the power intended, "that it is the nature of an executorial power, or a power to change the property into money for the benefit of the estate for its better enjoyment." The intention and object of the testator by conveying this power was to enable her to convert the property into money, not to enlarge her right into that of an absolute estate; simply to convey to her a life estate in that money, and affix to the money or the proceeds of the property the same rights that Jacob and Francis had to the real estate in specie. When Sabilla Helfferich conveyed this property to Francis Helfferich for the nominal consideration of one dollar and the maternal love and affection, there was no other or new consideration, because, under his contract of dissolution he was already bound to do every thing which he assumed to do in his lease, to-wit: pay the taxes and assessments, and keep the property in repair. In *Bloomer v. Waldron*, 3 Hill 371, Judge Cowen said: "In short, we have again and again held that the power in question conferred no right on the donees to convey the land of Edin's estate on mere equitable or moral considerations, however strong or imposing they might be; and that where such appeared on the face of the deed, though accompanied with a pecuniary condition, the conveyance was void." The conveyance by Sabilla to Francis pretended to be in execution of that power, was not, in fact, an execution and exercise thereof, and therefore was wholly without authority and void. Again, the transaction itself was illusory. It will be observed independent of the power of sale, the will vested in Sabilla Helfferich a life estate, in Frank Helfferich an estate in fee simple in one-half in remainder, and an estate in fee simple in one-half in remainder to Jacob Helfferich. The proposed effect of these mutual transfers of July 11, 1888, was to give the mother a life estate, the very thing she always had by the will, and to leave in Francis his undivided half of the remainder in fee, the very thing that he got by the will; and it transferred to him what was coming to Jacob. So it was only a mode of defeating the intention of the testator, and in enabling

Francis to get Jacob's share. It was as the Supreme Court held in *Shank v. DeWitt*, 44 Ohio St., 237, an abuse of the power. It was an illusory exercise of the power. The Supreme Court held in that case (page 243) the exercise was not only voidable, but void. The result here is, that these instruments of July 11, 1888, are of no force and effect. They left the estate as if Sabilla Helfferich had never attempted to exercise that power. It left the fee simple estate in remainder vested in Jacob Helfferich, which became an absolute estate had at the death of Sabilla Helfferich on March 24, 1890.

What effect upon Sabilla Helfferich's right to use this power had the contract of dissolution made in 1886? Without deciding the point it may be said that by its provisions it is expressly described as a family affair. By them in consideration of what her sons were to do under the contract, the mother agreed not to exercise the power except upon their separate written consents. Usually a power, being that which the testator has given, can not be disposed of in this way. Yet Sugden on Powers, star pages 90, and 125, holds, that where there is a power known as a beneficial power (that is, a power in which the donee receives the benefit, and which is not in trust for anybody else) the donee can release the power, and equity will enforce the release. I think at this day a court of equity will extend this principle to cases of contract, and not limit it to cases of mere common law release. Although Sabilla Helfferich didn't have the beneficial power, that is, to use the power for herself alone, but for the benefit of the estate, which was also in her two sons, Jacob and Frank, yet inasmuch as they were parties to that contract, and thus had given their consent to the contract to release, and as the release was to themselves, and for their benefit, a court of equity would enforce that contract made on her part.

The conclusion is that the plaintiff is entitled to partition in this case; that an account ought to be taken of the transactions between Francis Helfferich and Sabilla Helfferich, growing out of the contract of dissolution, relative to the payments of money to her by him, and in reference to this property, and also what he may be indebted to her as a set off against that; and one-half of the balance in his favor shall be a charge upon the interest of the plaintiff herein.

The plaintiff will be required to amend her petition so as to make it conform to the facts, making it a case for equitable partition, and taking of said account.

Wm. H. Pugh, for plaintiff.

Irwin & Murray, for defendant.

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## DEPOSITARY LAWS.

102

[Ross Common Pleas, July 13, 1891.]

STATE OF OHIO EX REL. ENTREKIN V. JOHN A. SOMERS, AUDITOR.

Where the general laws make it a felony to deposit the public moneys in a bank, an act which does not repeal the general act, but provides that, in some of the same counties of the commissioners refuse to deposit the public money in a bank, they are liable to severe punishment, is unconstitutional.

EVANS, J.

The petition recites that the relator, on July 8, 1891, presented to the county commissioners, for allowance, a claim he held against Ross county for stone furnished by him to repair a bridge over Paint creek, under a contract with the commissioners; that the claim was allowed and ordered paid, and the defendant, as auditor, was ordered to draw a warrant for the payment of the same upon the county treasurer; that thereupon the relator demanded of the defendant that he draw a warrant for the payment of the claim, but he refused and still refuses to do so. The relator prays that a writ of mandamus be issued, commanding the auditor to issue such warrant. The defendant has filed an answer in which he admits the truth of all the averments of the petition; but, he says, he has no right to draw a warrant upon the treasurer for the payment of the claim because of the following facts: that the claim is by law payable, and was ordered paid, out of the general fund of the county; that at the time the demand was made upon him to draw the warrant there was no money to the credit of the general fund in the county treasury, that fund being then, and still is, exhausted; that the general assembly of the state, on March 17, 1891, (Ohio L., 1891, p. 124) passed an act entitled "An act to require the county commissioners in any county containing a city of the second class, third grade, to provide a depository for the county funds, etc.;" that this act is in force and is applicable to Ross county, it containing a city of the class and grade mentioned; and section nine (9) of said act provides, among other things, that "the auditor shall issue no warrant payable from any fund unless there is money belonging thereto for the payment thereof in full, notwithstanding the provisions of section 1108 of the Revised Statutes." For these reasons, he says, he refused to draw the warrant.

The state denurs to the answer, claiming that the act referred to by the auditor, which forbids him to issue warrants when there is no money in the fund out of which they are to be paid, is unconstitutional. The state claims that the act is in conflict with sec. 26, of article 2, of the constitution, which requires that "All laws of a general nature shall have a uniform operation throughout the state."

The Supreme Court, in the case of *The State ex rel. v. Ellet et al.*, 47 Ohio St., 90, decided that "The act entitled an act to require the county commissioners, in any county having a population at the census of 1880, of 43,788, and containing a city of the second class, third grade, to provide a depository for the county funds, and for other purposes, (86 Ohio Laws, 70,) is a law of a general nature, applicable only to Summit county, there being no other county having the specified population and containing a city of the designated class and grade, and is in conflict with sec. 26, of article 2, of the constitution of this state, which requires that "all laws of a general nature, shall have a uniform operation throughout the state." The act was declared to be unconstitutional, and the act now under consideration, differs in this respect: The former act provided (section 1) "That in each county having a population of 43,788, at the census of 1880, containing a city of the second class, third grade, it shall be the duty of the county commissioners, etc." Section 5, provides that the undertaking mentioned shall not be accepted until it has been submitted to the prosecuting attorney, etc. Section 17, provides that for neglect of the duties imposed by the act, on conviction thereof, the penalty shall be a fine not exceeding \$10,000, or imprisonment in the penitentiary not more than ten years, or both. Section

18, is, "Any provision of the statutes of this state in force when this act takes effect, which conflicts with any provision of this act, shall be held to be superseded by the latter, as to the matter of inconsistency, and not otherwise in the counties to which this act relates." In the latter act the first section reads "That in each county containing a city of the second class, third grade, it shall be the duty of the county commissioners \* \* \*. But the provision of this act shall not apply to any county, which, at the federal census of 1880, had a city containing a population of 18,113." Section 5, requires that the undertaking shall be submitted to the prosecuting attorney and the judge of the court of common pleas, etc. The penalty provided by sec. 17, to be imposed, on conviction, etc., is a fine not exceeding \$1,000, or imprisonment in the jail not less than three months, nor more than one year, or both. Section 18, of the former act, superseded conflicting statutes, etc., is omitted. In all particulars except those mentioned, the latter act is a re-enactment of the law declared to be unconstitutional. In re-enacting the law, the legislature, evidently, aimed, by the changes pointed out, to remove the constitutional objection found by the Supreme Court to the former act. But the latter act is fully as objectionable in every respect as was the former, and for the same reasons.

The latter act is a law of a general nature, "the subject of the statute, is the custody, safe keeping and disbursement of the public revenues, and the duties of public officers concerning them;" the subject, etc., in the two acts is exactly the same,—and all that is said upon the matter of the general nature of the law, by the Supreme Court in the case of *The State ex rel. v. Ellet*, applies aptly here. The act of March 11, 1889, was applicable only to Summit county, "there being no other county having the specified population and containing a city of the designated class and grade, and is in conflict with sec. 26 of article 2 of the constitution of the state, which requires that all laws of a general nature shall have a uniform operation throughout the state." The act of March 17, 1891, is made applicable to a particular class of counties only, and one county of the class named is excepted from the provisions of the act. Muskingum county is the only county in the state "which at the federal census of 1880, had a city containing a population of 18,113; "and it is impossible for any other county, by the increase or decrease of the population of a city within its limits, to come within the exception.

Muskingum county, and it alone, is excepted from the operation of the general act as specifically as if it was named. The act in question is a law of a general nature, but it is not of uniform operation throughout the state.

This further objection was found by the Supreme Court to the former act: "Then, the effect of this statute, if valid, is to give partial operation to criminal laws of the state." The criminal code, Rev. Stat., sec. 6841, makes it a felony for any person charged with collection, safe keeping \* \* \* of the public money \* \* \* to loan to any company, corporation, \* \* \* any portion of the public money \* \* \*. And the offender may be imprisoned in the penitentiary for a term of years, and heavily fined. Any county treasurer who should deposit the public money in any bank, \* \* \* and whether so directed by the county commissioners or not, would be guilty of a violation of this section \* \* \*. And if the county commissioners should advise and direct such deposit to be made, they would be equally guilty. It is sought to take Summit

county, and its officers, out of the operation of this section, and to relieve the latter from the consequences of its violation, by sec. 18 of the statute in question, which enacts that "any provision of the statutes of this state in force when this act takes effect, which conflicts with any provision of this act shall be held to be superseded by the latter, as to the matter of inconsistency, and not otherwise, in counties to which this act relates." \* \* \* "Thus it appears, if effect be given to this statute, that while it is a felony for the treasurer of any county, except Summit, to deposit the public moneys in a bank, or for the commissioners to advise or direct such deposit to be made, it is perfectly lawful for the treasurer of Summit county to deposit the public moneys of that county in banks, and for the commissioners to advise and direct the same to be done. Not only so, but in that county the refusal of the treasurer to make the deposit, or of the commissioners to select the bank and direct the deposit, is made a felony. In other words, under the operation of this statute, acts, which in one county are innocent, and the faithful performance of official duty, are made grave crimes if done in any other county; and, on the other hand, that which is innocent and the faithful performance of official duty in the latter is a crime of equal gravity in the former. \* \* \* Whether, therefore, the same act be lawful, or criminal, is made to depend upon the boundary of a county line. This would be a somewhat singular state of the law; at least, it is that state of legislation, which, as already seen, according to the former decisions of this court, the particular provision of the constitution we have been considering, was designed to interdict." The latter act is as objectionable in this respect as was the former one. Omitting original sec. 18 has not mended matters in any way. If the provisions of the statutes of this state which conflict with any provision of this act, shall be held to be superseded by implication, as to the matter of inconsistency, in the counties to which the act relates, then the situation is the same--the last act is as bad as the first. If sec. 6841, Rev. Stat. is not superseded by implication, in the counties to which the act applies, then we have this strange situation: In certain of the counties of the state, to deposit the public money in any bank is a felony, and the treasurer, and the commissioners if they direct it to be done, on conviction thereof, may be imprisoned in the penitentiary for a term of ten years, and heavily fined. And in the same counties, if the treasurer and commissioners refuse to deposit the public money in a bank, on conviction thereof, they may be imprisoned in jail for one year, and heavily fined. The same officers are to be severely punished if they do, or if they do not do, the same acts.

The demurrer to the answer is sustained; and it is ordered that the writ prayed for be issued.

J. C. Entrekin, for plaintiff.

M. G. Evans, for defendant.

## MUNICIPAL CORPORATIONS.

104

[Superior Court of Cincinnati, Special Term, 1890.]

CINCINNATI (CITY) V. CINCINNATI EDISON ELECTRIC CO.

CINCINNATI GAS-LIGHT & COKE CO. V. CINCINNATI EDISON  
ELECTRIC CO.

1. Where application is made to the superior court of Cincinnati for a temporary restraining order, and it appears that many of the questions raised on such application have been presented to the common pleas court of Hamilton county, and have been argued and submitted to that court, and are likely to be decided at an early date, the superior court may in the exercise of a proper discretion refuse to hear the application upon such grounds until the decision of the common pleas court.
2. A permit granted to the Cincinnati Edison Electric Company by the Board of Improvements of said city to open more than two consecutive squares of said city at a time, for the purpose of laying its conduits therein, could not be revoked by a resolution of the board of legislation of said city, passed May 2, 1891.
3. Although what was popularly known as "The New Charter Bill" for the city of Cincinnati was passed and took effect generally on March 26, 1891, yet the Board of Legislation, as provided therein, did not succeed the council of said city until April 15, 1891; and the board of administration did not succeed the board of public improvements until May 4, 1891.
4. The city council retained all of its several powers and duties until the board of legislation was elected and qualified; and the board of public improvements retained all of its several powers and duties until the board of administration was appointed and qualified.

Motions for temporary restraining orders.

SMITH, J.

On or about March, 1890, the Edison General Electric Co., of New York, made application, under sec. 3461 of the Revised Statutes of Ohio, to the probate court of Hamilton county, for permission to place, maintain and use wires under ground in the streets, avenues, alleys, lands, lanes, squares, and public places, including sidewalks, of the city of Cincinnati, whereby to conduct electricity for furnishing light, heat and power, including the establishment of all necessary plants, fixtures, appliances and other apparatus. The Edison Company alleged that it had been refused such permission by the board of public affairs of said city, and in its application made the city of Cincinnati a party defendant. After a protracted hearing the probate court entered a decree granting said company the right to occupy the streets, avenues, alleys, lands, lanes, squares and public places, including sidewalks, of said city of Cincinnati, for the purpose aforesaid, subject, however, to numerous terms and conditions. Section 3461 is as follows:

"Section 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as

not to incommode the public in the use of the same; but nothing in this action shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness."

No proceedings in error were taken to reverse the action of the probate court in making the decree before referred to, and such decree is now valid and binding unless it can be set aside in a proceeding collaterally attacking it. Before the commencement of the cases at bar such a proceeding had been begun in the common pleas court of this county on behalf of one or two taxpayers, and the question raised by that proceeding have been elaborately argued there by counsel, including counsel for the Cincinnati Gas Light & Coke Company, one of the plaintiffs here. The case is under advisement in that court, and a decision upon it is expected within a short time. Meanwhile that court has not issued a temporary restraining order against the Edison Company, but has permitted them to proceed with their work under the decree of the probate court. Since the hearing and submission of that case the City of Cincinnati, in one case, and the Cincinnati Gas Light & Coke Company, in another, have commenced actions in this court for the same purpose and upon the same grounds as the case in the common pleas court, with one exception, viz.: that on the fifteenth of May, 1891, and since the hearing of the case in the common pleas court, the board of legislation of the city of Cincinnati has passed a resolution revoking the permit heretofore granted to the Edison Company by the board of public improvements of said city, under which permit they are now proceeding to lay their conduits in the streets of said city.

In both cases motions have been made for temporary restraining orders to enjoin the Edison Company from proceeding with further work until the final hearing of the cases, and the same have been argued and submitted to me.

Inasmuch as all the questions, except one, presented in these cases have, as I have before stated, been argued and are about to be decided in the common pleas court; and, inasmuch as, immediately upon the announcement of that decision, that case will be appealed to the circuit court of the county, I have refused to hear a discussion of the questions argued in the common pleas court, and have confined the hearing here to the sole question not before the common pleas court, viz.: Does the action of May 15, 1891, of the board of legislation withdraw from the Edison Company the permit given it by the board of public improvements, or prevent them from continuing their work?

To determine what effect this action of the board of legislation has upon the rights of the Edison Company, it is necessary to examine the decree of the probate court and the powers of the board of public improvements, the board of administration, and the board of legislation, with reference to this company.

The decree of the probate court is long and elaborate and goes with great minuteness into all the details as to the manner in which the conduits shall be laid. It would not be pertinent to this inquiry to refer to them. The vital part of the decree is found in the language:

"Wherefore it is ordered by the court that the said Edison General Electric Company, its successors and assigns, be and the same are hereby granted the right to occupy the streets, avenues, alleys, lanes, lands, squares and public places, including sidewalks, of said city of Cincin-



nati, for the purpose aforesaid in the following prescribed mode and upon the terms and conditions following:"—and the vital condition is the following—

"Before opening any street, alley or public places aforesaid, a neatly drawn plan showing the intended location of the opening shall be submitted to the board of public improvements, and such plans shall be subject to such modification as the board of public improvements may direct consistently with the rights and privileges hereby conferred; and provided further, that without special permission therefor from the board of public improvements, said company shall not open any trenches in said streets, etc., for any purpose, for a greater length than two consecutive blocks or squares, at any one time, and all applications for opening streets, etc., for laying conduits or making repairs, shall be in writing."

In fulfillment of this condition, the Edison Company duly presented to the board of public improvements "a neatly drawn plan showing the intended location of the openings" in the streets of Cincinnati, and such plans were, after examination and consideration by said board, adopted by them without modification.

It will be observed that by this condition, as soon as the plans submitted by the Edison Company had been adopted by the board of public improvements, the right to lay their conduits in the streets ripened and vested in them, without further order from any one, provided they did not open any trenches in said streets for a greater length than two consecutive blocks at any one time. But if they desired to accelerate the progress of the work by opening more than two consecutive blocks, the decree provided that they must first secure the permission of the board of public improvements.

Whether this right to open two blocks at a time, which the Edison Company secured by the approval of its plans, as aforesaid, could be taken away from it, or modified by the future action of any court or municipal board, or boards, it is not necessary for me to generally decide, at this time. The sole question now is, whether the board of legislation, by a resolution to revoke a permit granted by the board of public improvements to open three consecutive blocks affected such right. For, on the second of May, 1891, upon the application of the Edison Company to the board of public improvements for permission to open three consecutive blocks of a large number of streets, such permission was granted, and the resolution of the board of legislation simply aimed to revoke this permit of May 2, 1891. But the mere statement that the permit of May 2, 1891 was to open three consecutive blocks at a time, instead of two, and that the resolution of the board of legislation of May 15th was to revoke the permit of May 2d, is sufficient in itself to show that even if that resolution accomplished its purpose, the company could only be enjoined from continuing to open three consecutive blocks at a time, and that no injunction could issue against it to stop it from laying its conduits in the streets at the rate of two blocks at a time. The sole inquiry, then, is: Was it operative to prevent this defendant company from opening the streets at the rate of three consecutive blocks at a time?

The plaintiffs contend that it was so operative, and base their contention upon two grounds:

First—That the board of public improvements had no power to grant this permit upon the second day of May, 1891, but that such power, by reason of the passage of what is popularly known as the

"The New Charter Bill," had devolved upon the board of legislation ; and that, therefore, the action of the Edison Company under this permit was a mere trespass upon the streets which could be arrested by the board of legislation, by virtue of the power vested in it by sec. 2640 of the Rev. Stat., which provides that "the council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

Second—That even if the power to grant the permit remained in the board of public improvements on the second of May, and did not pass out of it until the qualification of the board of administration, upon a subsequent day ; that nevertheless, on that subsequent day, this power did pass out of it and passed into the board of legislation, which, in respect to granting the permit, was the successor of the board of public improvements ; and that as soon as it became possessed of the power to grant the permit, it necessarily became possessed of the power to revoke any permit previously granted, for the reason that the power to revoke is a necessary incident to the exercise of the power to grant.

Recurring now to the first ground, viz. : that the power of the board of public improvements to grant such permits was no longer in it upon the second of May, 1891, but was in the board of legislation, by reason of the "New Charter Bill," it will be necessary to examine the provisions of this bill in connection with the date of its passage, the date upon which it went into operation, and the dates of the qualifications of the members of the boards of administration and legislation.

The "New Charter Bill" was passed March 26, 1891, and in its last section is said to be in force from and after its passage. By this bill the board of public improvements was abolished, and a board of administration created in its place, and the city council was abolished, and a board of legislation created in its place. The board of administration was to be selected by the mayor, who, with the board of legislation, was to be elected on the first Monday of April, which was the sixth. The board of legislation was required to organize within ten days after its election, which it did, upon the fifteenth of April. But the mayor who was elected at the same time as the board of legislation, was not authorized to appoint the board of administration until the first Monday of May, which, in the year 1891, fell upon the fourth. It thus appears that the board of legislation succeeded the city council upon the fifteenth of April, but the board of administration did not succeed the board of public improvements until the fourth of May.

The argument of the learned counsel for plaintiffs is as follows : By section 1655<sup>a</sup> of the "New Charter Bill," "in cities of the first grade, of the first class, the legislative power and authority shall be vested in a board of legislation." The grant of a permit to the Edison Company to open the streets by three consecutive blocks at a time, is a legislative act, and vested in the board of public improvements by virtue of sec. 2227, of the Rev. Stat., which provides that "no grant of the use of a street or highway in any such city for the purpose of a street or other railroad, or an extension thereof, or for any other purpose whatever, shall be made or renewed, unless first recommended by the board (improvements) ; nor shall any such street or highway be used for supplying gas or water, or be broken up or obstructed for any purpose, or on any pretense whatever, unless permission be first given by the board and attested by its clerk in writing ; that the "New Charter

Bill," by sec. 2231 provided that "the board of administration shall have all the powers and perform all the duties, except those relating to public parks and public fountains, heretofore conferred upon or required of the board of public improvements, except those imposed or conferred by sec. 2227. That immediately, therefore, upon the qualification of the board of legislation on the fifteenth of April, the board of public improvements was shorn of this legislative power under sec. 2227, and the same vested in the board of legislation, in whom alone, upon the fourth of May, the right to grant the permit existed; and that the grant by the board of administration was a nullity.

It is not necessary, in order to show the fallacy of this argument, that the assumptions which it makes, that the grant of this permit is a legislative act, and that the grant is made under sec. 2227, should be disputed. It may be admitted for the sake of argument, that these assumptions are correct, and yet the argument is unsound. For it proceeds upon the theory that the board of improvements did not lose its powers instantly as a whole, but that it gradually lost them from time to time. That its death was not by decapitation, but by intermittent, partial paralytic strokes. That this was not the case appears clearly from sec. 3 of the "New Charter Bill," which reads as follows:

"That all appointments provided for in secs. 1708a, 2205 (the board of administration appointment) and 2436, shall, except in cases of vacancies, be made on the first Monday in May, or as soon thereafter as practicable, of each year in which appointments are required. The predecessors of the boards and officers whose appointments are so provided for, and also the council and mayor shall serve with their several powers and duties as now prescribed by law until such boards and officers shall be appointed and qualified, and the board of legislation and mayor shall be elected and qualified."

Now, there is only one construction to be put upon this language. It does not, in reason, admit of any other, and that construction is that each old board has all its "several powers and duties" until its successor is appointed, and as it is provided in section 2231, of the "New Charter Bill," that upon the appointment and qualification of the board of administration it shall be considered the "successor" of the board of improvements, it necessarily and conclusively follows that the board of improvements possessed all its "several powers and duties" until the appointment and qualification of the board of administration, which was on the fourth of May. And as the permit was given by the board of improvements on the second of May, it was given at the time when it had full power to act.

We come next to a consideration of the second ground upon which plaintiffs claim that the revoking resolution was operative, viz.: that even if the power to grant the permit remained in the board of improvements until May 4, 1891; nevertheless, that power was a legislative act under sec. 2227, of the Rev. Stat. that after the fourth of May it necessarily was in the board of legislation, which, for the purpose of granting permits, was the successor of the board of public improvements, and that having succeeded to the right to grant the permit, it necessarily succeeded to a right to revoke it as a necessary incident. The argument rests, therefore, upon three propositions, all of which plaintiffs must establish to maintain it. If anyone is unsound the argument fails. These three propositions are:

First—That the permit is granted to the Edison Company under sec. 2227 of the Rev. Stat.

Second—That the granting of the permit under sec. 2227 is a legislative act and passed by the Charter Bill to the board of legislation.

Third—That the right to grant the permit carries with it the right to revoke it, and especially under the particular circumstances of this case.

The first two propositions proceed upon the assumption that the permit is granted to the Edison Company by virtue of sec. 2227. But I cannot concede the correctness of that assumption. The necessity for the permit is not created by sec. 2227, but by the decree of the probate court, under sec. 3461. For if section 2227 is a limitation upon the power of the probate court as granted in sec. 3461, it renders the section nugatory; because the action of the probate court could never become operative until it had been sanctioned by the board of administration, or the board of legislation, whichever board, if either, has succeeded to the power under that section to grant permits. Now the basis—the condition precedent which is necessary to give the probate court jurisdiction under sec. 3461, is the fact that the electric company has been unable to agree with the municipal authorities upon the terms upon which it shall occupy the streets, and because of that failure the law takes the matter out of the hands of the municipal authorities and turns it over to the probate court. But, if after the probate court has acted and granted the right, or fixed the terms, whichever it may be, upon which the streets shall be occupied, if the decree, in order to become operative, must go back to one of the municipal boards for a permit, it is impossible to see what purpose the law ever intended to accomplish by allowing the applying company to leave the municipal authorities and go into the probate court. For it would give the municipal board a power concurrent with that of the probate court, and enable it to defeat its orders and decrees. This construction would make sec. 3461 a practical nullity. "But it is the plain duty of the courts, in the interpretation of a statute, unless restrained by the rigid and inflexible letter of it, to lean most strongly to that view which will avoid absurd consequences, injustice and even great inconvenience; for none of these can be presumed to have been within the legislative intent." *Moore v. Given*, 39 Ohio St., 661, 663.

But I question very much whether sec. 2227, or any of its provisions, is any longer in force. That section related exclusively to the board of improvements and its numerous predecessors, and as by sec. 2231 of the new charter, the board of administration, which it declares to be the successor of the board of public improvements, is entirely deprived of any powers formerly conferred by sec. 2227 on its predecessors; and as the new charter repeals sec. 2227, so far as it is inconsistent with the purposes of the act, I incline strongly to think that sec. 2227 has been repealed by the charter. And if so, what authority is there for the claim that its powers passed over into the board of legislation?

But it is not necessary that I should at this time express a positive opinion upon this point, as in my opinion sec. 2227 is in no way a limitation of section 3461, and as the necessity for the permit to the Edison Company arises from the terms of the decree of the probate court, and not from the provisions of sec. 2227.

As the right to grant the permits to the Edison Company did not pass to the board of legislation because of the provisions of the new

charter, giving the board of legislation the legislative authority and power of the city, nor by reason of any change which sec. 2227 may have undergone by the new charter act, it necessarily follows that the claim that the power to revoke the permit which it is claimed is now vested in the board of legislation because of its power to grant the permit, falls to the ground, and the action of the board of legislation of May 15th in passing a resolution revoking the permit granted by the board of public improvements is of no legal force whatever.

But as the decree of the probate court (which I have assumed upon these motions to be valid) has required the Edison Company to secure a permit from the board of improvements before it can proceed to open more than two consecutive blocks at a time; and as the board of improvements has been abolished, where is the power now lodged to grant these permits, and if a power to revoke exists anywhere, where is it to be found?

The decree provides for this precise contingency; for it distinctly states "that wherever the term 'board of public improvements' is used, its official successors are intended to be included." And as the Charter Bill provides that the "board of administration shall be considered the successor of the board of public improvements," it follows as a demonstration in mathematics that the power to grant permits under the decree of the probate court, is now lodged with the board of administration, and as that board has not taken any action looking to the revoking of the permit granted on May 2d, by its predecessor, the board of improvements, the Edison Company has the right to act under that permit.

When the board of administration shall pass a resolution revoking this or any other permit granted to the Edison Company, it will be proper to go into an inquiry as to their power to revoke, and especially with reference to the circumstances of the particular case in which the question may arise.

The motions for temporary restraining orders on the ground that the resolution of the board of legislation has revoked the permit under which the defendant company is opening three consecutive squares at a time in the laying of its conduits will therefore be overruled.

Horstman, Galvin, Whittaker & Van Horne, corporation counsel, for the city of Cincinnati.

E. A. Ferguson, for the Cincinnati Gas Light & Coke Company.

Paxton & Warrington, for various property owners.

Foraker, Black & Bosworth; Harmon, Colston, Goldsmith & Hoadly, for defendants.

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### PLEDGE—CORPORATION.

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[Superior Court of Cincinnati. Special Term, 1891.]

LYMAN L. BARNES V. EXRS. OF BRIGGS SWIFT ET AL.

A pledgee of shares of stock in a corporation has merely by virtue of the pledge, no right of action against the directors of a corporation to recover damages for the negligence and mismanagement of the directors, whereby the assets of the corporation are lost and the shares in the same rendered valueless.

SMITH, J.

This and similar actions are brought by pledgees of shares of stock of The Fidelity National Bank against its directors to recover damages for negligence and mismanagement of the directors whereby the assets of the bank are alleged to have been lost, the shares in the same rendered valueless, and the plaintiffs thereby damaged.

The petition sets out with great particularity the different acts of negligence and mismanagement, and, demurrers having been filed by several of the directors, or their legal representatives, the cases have been presented to me upon these demurrers.

In addition to the allegations of negligence, the petition in this particular case (which, in many respects, is representative of all the cases) contains the following :

"On or about the eleventh day of December, 1886, this plaintiff loaned to J. H. Matthews, one of the defendants herein, the sum of \$12,000, and took from said Matthews a note for said sum due upon call, or commonly known as "call loan," and to secure the payment of said loan and sum of \$12,000 the said J. H. Matthews assigned and delivered to this plaintiff certificate No. 525 for 100 shares of stock of Fidelity National Bank, of the par value of \$100 per share, but that in truth and in fact said 100 shares of stock was valuable and worth more than par, to-wit: \$175 per share, and that whole said 100 shares of stock was worth the sum of \$17,500."

"The said James H. Matthews is wholly insolvent, and this plaintiff has not brought any suit or proceeding against said Matthews to recover the amount of said note, or reduce the said note to judgment, for the reason that said J. H. Matthews is insolvent, and nothing can be made off of the said J. H. Matthews by execution or otherwise, and a personal judgment against him would be valueless and of no avail."

The petition then closes with these further allegations and prayer for relief:

"Plaintiff further avers and says that in making the said loans to the said Matthews he relied wholly upon the security which was given to him as the collateral for the said loan made by him, to-wit: the 100 shares of the said Fidelity National Bank stock. That he relied upon the care, fidelity, prudence of the said defendants, the directors of the said bank.

"The plaintiff further says that by reason of the wrongful, tortious and negligent acts of the defendants, the said directors, as aforesaid, and by reason of the neglect, want of care and prudence of the said defendants, directors as aforesaid set forth in this petition, his said security was wholly and absolutely destroyed and rendered valueless and of no value as a security to him for said loan so made to him as aforesaid.

"Wherefore the plaintiff says that he has been damaged in the sum of \$17,500 by the said defendants for which sum he prays judgment, with interest from December 11, 1886, and all proper aid and relief, and his costs herein expended."

Before proceeding to an inquiry as to the right of a pledgee of shares of stock to maintain an action of this nature against the directors of a corporation, it is important to observe what right the owner of the shares—the pledgor here—has to maintain such an action.

The leading case in the United States, upon this subject, is that of *Smith v. Hurd et al.*, 12 Met., 371, in which Chief Justice Shaw, of Massachusetts, held that—

"A stockholder in a bank cannot maintain an action against its directors for their negligence in so conducting its affairs that its whole capital is wasted and lost, and the shares therein rendered worthless; nor for malfeasance of its directors in delegating the whole control of its affairs to the president and cashier, who waste and lose the whole capital."

The reasons upon which this principle is based, as they appear in the decision in that case, are as follows :

1. There is no legal privity between the shareholders in their individual capacity and the directors. The duty of care and diligence which the directors owe, in the management of the bank, is a duty to the corporation in its corporate capacity, and not a duty to the stockholders in their individual capacity.

2. The individual members of the corporation, whether they should all join, or each act severally have no right or power to intermeddle with the property or concerns of the bank, or to call any officer, agent or servant to account, or discharge them from any liability. They are not the legal owners of the property, and damage done to such property is not injury to them.

3. The injury done to the capital stock by wasting, impairing and diminishing its value, is not, in the first instance, not necessarily, a damage to the stockholders. All sums which could in any form be recovered on that ground would be assets of the corporation, and when collected and received by directors, receivers, or any other persons entitled to receive the same, they would be held in trust, first to redeem the bills and pay the debts of the bank; and it would be only after these debts were paid, and in case any surplus would remain, that the stockholders would be entitled to receive anything.

4. An injury done to the stock and capital by negligence or misfeasance is not an injury to the separate interest of any stockholders, but to the whole body of stockholders in common. It is like the case of a common nuisance: where one suffers a special damage, peculiar to himself and distinguishable in kind from that which he shares in the common injury, he may maintain a special action.

This principal has lately been approved and followed by Judge Sage, in the United States circuit court for the southern district of Ohio, in the case of *Howe v. Barney*, 45 Fed. Rep., 668, in which he held that :

"A stockholder in an insolvent national bank for which a receiver has been appointed, cannot sue its directors to make them personally liable for the mismanagement of the bank, as the right of action is in the receiver, and not in the individual stockholders."

It is true that in that case a receiver had been appointed by the United States authorities for the bank of which the defendants were the directors; and that in the case at bar it does not appear from the petition that such a receiver has been appointed of the Fidelity Bank. But the decision in *Howe v. Barney*, *supra*, does not give the fact of the appointment of a receiver a controlling force in the determination of the case, but adopting the decision in *Smith v. Hurd*, *supra*, as a correct statement of law, follows and applies it to the facts in that case, and cites in approval the cases of *Craig v. Gregg*, 83 Pa. St., 19; *Allen v. Curtis*, 26 Conn., 455; and *Evans v. Brandon*, 53 Texas, 56. And after an examination of all the authorities on the question, Judge Sage says: "No

case has been cited, nor do I know of any, in which there has been a ruling to the contrary."

It must be conceded, therefore, that if these actions were brought by the owners themselves, of the shares of stock which were pledged, the demurrers should be sustained.

Do the pledgees of these shares stand in any different position, and have they any different rights as against the directors than the owners of the shares? "The general law of bailment defined a pawn to be that sort of bailment where goods or chattels are delivered to another to be a security to him for money borrowed of him by the bailor." Jones on Pledges, sec. 1. And a pledge is said to be made "where, by contract, a deposit of goods is made a security for a debt, and the right to the property rests in the pledgee, so far as is necessary to secure the debt." Jones on Pledges, sec. 3. And in later years the "term 'collateral security' has come into general use to designate a pledge of negotiable paper, corporate stocks, or other incorporeal personalty, as distinguished from a pledge of corporeal chattels." Jones on Pledges, section 1.

It is quite evident from the definition of a pledge, and from the very nature of the contract itself, that the pledgee acquires a qualified ownership in the property; that he is given, by the owner, the right of possession, either actual or constructive with the right, upon failure of the owner to pay the debt, of selling the property for the purpose of paying it.

Can it be successfully contended that, if the owner of shares of stock who is in the exercise of all the rights of ownership has no right of action against the directors of the corporation, a pledgee who is invested by the owner with part of his right of ownership, thereby becomes greater than the owner himself, and empowered to bring an action, by virtue of such partial ownership, which is denied to one who has the unqualified and exclusive ownership? Such a contention assumes that the part may be greater than the whole; or, that the fountain can rise higher than its source.

The unsoundness of such a principal in reference to shares of stock held by a pledgee at once becomes manifest by attempting to make a practical application of it.

As is forcibly said by one of the counsel in the case:

"If a stockholder could be found who owned 100 shares and had pledged 50 shares, the claim is that the pledgee could maintain an action for loss with respect to the fifty shares, but with respect to the fifty shares unpledged no one could maintain an action. Would the damages recovered by the pledgee be credited on the pledgor's debt? If so, the pledgor would really get the benefit of the recovery. Or, would the damages go to the pledgee as a bonus, and the pledgor remain liable for the whole debt?"

It is urged, however, by counsel for plaintiff, that the authorities are all to the effect that as the pledgee has the right to the possession of the pledge, he may bring an action for damages against any one who wrongfully injures the same or converts it to his use, and that pledgees of shares of stock are not excepted from this rule.

In regard to chattel and personal property, generally speaking, this is undoubtedly the law. The case of *Woodruff v. Halsey*, 8 Pickering, 333, is one of many cases illustrating this principle. It was held there that, "In regard to personal property, or chattels, the law is that trespass may be maintained by one who has the actual or constructive pos-



session." It is also the law that when the pledgee sues for trespass against the owner, he (the pledgee) is entitled to recover only his special interest in the chattel, but against a stranger he is entitled to the full value of the pledge. 4 Lawson's Rights, Remedies and Practice, sec. 1760, and cases cited.

The reason for this rule which entitles the pledgee to recover for a trespass by a stranger the full value of the property, is, that the pledgee having been invested by the owner of the property with its possession, is answerable over to the general owner in case it is lost or is converted by another to his use, and therefore the pledgee is entitled to recover for such conversion such damages as are required to satisfy the owner.

In the following authorities the rule and the reason are clearly stated :

In *Pomeroy v. Smith*, 17 Pickering, 85-86, the court held, "Where goods pledged were attached and taken from the possession of the pledgee, at the suit of a creditor of the pledgor without a payment or tender of the amount for which they were pledged, as provided by St. 1829, C., 124 the pledgee is entitled to recover of the officer the full value of the goods, and not merely the amount due from the pledgor."

The judge instructed the jury that if they should find a verdict for the plaintiff, he was entitled to recover damages to the full value of the goods so taken by the defendant. The Supreme Court upheld this instruction to the jury, declaring that "The general rule is founded on the consideration that, for all beyond the debt for which the goods are pledged, the pledgee is responsible to the pledgor."

And in *Ullman v. Barnard*, 7 Gray, 558, it was held, "The measure of damages is the whole value of the flour, with interest from the time of the conversion. The right of property and possession were both in the plaintiff; and although he had only a special property in the flour as security for the payment of the drafts, he is entitled to recover its full value. He is answerable over to the general owner. It is no reason for a reduction of damages in this case that a third person had an interest in the property. *Lyle v. Barker*, 5 Brun., 459; *Wheeler v. Webb*, 15 Conn., 502. The rule might be otherwise if it appeared that the defendant was entitled to the property after the claim of the present plaintiff upon it had been satisfied. *Spoor v. Holland*, 8 Wend., 445."

And in 55 Am. Dec., p. 678, the law is thus summed up: "The rule of the measure of damages depends upon the general principle that the plaintiff in trover is to be compensated, as nearly as can be done by judicial tribunals, for his actual loss. Therefore, where the property is converted by a mere stranger or wrongdoer, and the special owner or one entitled to possession is, or may become, liable to the general owner for the value of the property, or for the surplus value above the value of his own special interest, he recovers, in trover for such conversion, full value. But where he is not answerable over to the general owner, as when the property is converted by the general owner or those claiming under him, the plaintiff recovers merely the value of his own interest. See cases *Frost v. Willard*, 9 Barbour, 440; *Sheldon v. Southern Exp. Co.*, 48 Georgia, 625; *Sutherland on Damages*, secs. 524-526. The rule was recognized and justified on the same grounds as early as *Heydon and Smith's case* 13 Co., 69, in which the better opinion was declared to be 'that he who hath a special property of the goods at a certain time shall have a general action of trespass against him who hath the general property, and, upon the evidence dam-

ages shall be mitigated; and clearly a bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over.'"

It thus appears, by undisputed authority, that the measure of damages on the part of the pledgee against a stranger who destroys or converts the pledge, is the full value of it, and not the value of his special interest in it; and this for the reason that he is chargeable over to the owner for this full value. In other words, he stands in the place of the owner, and his right of action against third persons, trespassers, rests on the fact that, as regards them, he is the owner and entitled to all the rights of an owner. As he has all the rights of an owner, he is subject, also, to the limitations and disqualifications which accompany ownership, and as the owner has no right of action against the directors for negligently conducting the affairs of a corporation, it necessarily follows that the pledgee has no such right of action.

What right of action the pledgee has for the destruction or injury to the mere certificate aside from the shares it represents, is not necessary at this time to consider. *Smith v. Hurd, supra*, 386.

It is undoubtedly true that if a corporation refuses to bring the necessary action against its directors, a right of action arises in equity upon the part of the individual stockholder to bring an action in his own name. As is said in *Howe v. Barney*, 670, *supra*, "There are cases in which it has been held that if the corporation is under control of the parties sought to be charged, or if it refused, upon the request of the stockholders, to bring suit, the stockholder himself may bring a suit in equity in his own behalf and in behalf of all other stockholders who may wish to come in, but the corporation must be made a defendant, as well as the party sought to be charged, and the decree, if it be against the defendants, must be to compel them to make good to the corporation the corporate money or property lost by their negligence." See also *Brewer v. Boston Theatre*, 104 Mass., 378.

But there are no allegations in the petition in this case which bring it within the class of cases in which that principle applies.

It is alleged in this petition that the directors of the bank caused to be published a statement of its resources and liabilities, as provided by the United States Banking Laws, which statement was false, but there is no allegation in the petition that these pledges were made or continued in reliance upon this statement, or that, indeed, the pledgees ever saw this statement, and I have, therefore, not found it necessary to determine whether, if allegations to that effect were contained in the petition, it would give to the pledgees a right of action.

No demurrer has been called to my attention as having been filed on the part of Matthews, one of the directors of the bank, and himself the pledgor of the stock held by the plaintiff as collateral security, and I have, therefore, not considered the question whether plaintiff has a right of action against him for the destruction of the value of these shares by reason of his (the pledgor's) negligence. A demurrer upon his part might raise an entirely different question from the one I have here decided.

The demurrers argued before me are those of the estates of Briggs Swift and A. H. Chatfield and those of Eugene Zimmerman and E. L. Harper, in the case of Barnes against them, and, so far as those parties are concerned, their demurrers, in that case, raising the single question whether a pledgee of shares of stock in a corporation has, merely by

virtue of his pledge, a right of action against the directors of a corporation for misconduct in the management of its affairs, the same will be sustained.

Foraker, Black & Bosworth; C. W. Baker and David Davis, for plaintiff.

Ramsey, Maxwell & Ramsey, for estates of Briggs, Swift and A. B. Chatfield.

Herbert Jenney, for Eugene Zimmerman.

H. P. Lloyd, for E. L. Harper.

### RULE IN SHELLEY'S CASE, IN OHIO.

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[Superior Court of Cincinnati, General Term, 1890.]

#### HENRY MACK ET AL. V. AARON B. CHAMPION, TRUSTEE.

1. The rule applies to a conveyance to be held for the use of a person, and in case of his death before the same expires, for the benefit of his heirs, the trustee to pay the income to him if it so choose. This is so because if the rule does not apply to executory trusts created by deed, it means imperfectly defined trusts.
2. In such a case the beneficiary takes the fee simple, and having assigned for the benefit of creditors, the assignee takes the proceeds of the property.

HUNT, J.

This case involves the construction of a declaration of trust made April 18, 1887, by Henry Mack for the use of James Mack and, in case of his death before the same expired, for the benefit of the heirs of said James Mack.

It appears from the petition that on March 3, 1882, Jas. Mack conveyed to Henry Mack, by deed of warranty, the following described real estate in the city of Cincinnati, county of Hamilton, and state of Ohio, to-wit: Beginning at the south-east corner of Eastern avenue and Hazen street; thence outwardly along Eastern avenue three hundred and eighty-eight (388) feet; thence parallel with Hazen street to the Ohio river at low water mark; thence with the Ohio river at low water mark to Hazen street, and thence northwardly along the east line of Hazen street to the place of beginning, subject, however, to a certain lease, recorded in Lease Book No. 15 p. 383 Hamilton County Records;

That upon the third day of March, 1882, the said Henry Mack conveyed the above described premises, by way of mortgage, to said James Mack, to secure seven notes—all dated the third day of March, 1882—six of said notes being interest notes, each being for the sum of \$300, payable respectively, six, twelve, eighteen, twenty-four, thirty and thirty-six months after date, bearing interest at the rate of 8 per cent. per annum after maturity, payable three years after date, and that there is due thereon the sum of \$9,093, with interest thereon from May 5, 1890, and that there is a lien on the premises for a granite assessment in behalf of the city of Cincinnati amounting to the sum of \$2,870.14, which is the first and best lien on the premises.

That on the twenty-eighth day of April, 1887, Henry Mack, in consideration of one dollar and other good and valuable considerations, conveyed to A. B. Champion, trustee, defendant in error herein, all the above described real estate by a deed, with the usual covenants of war-

ranty, and upon the same date the said Henry Mack signed a paper setting forth that said premises were conveyed to said Aaron B. Champion upon certain trusts, "to be held by you (Champion) in trust for the use of James Mack, and in case of his death before the same expires, for the benefit of the heirs of said Mack." The said trustee was to "hold said premises, sell and convey the same in any way he might choose, mortgage, lease and convey the same, and the income derived therefrom to pay to said Mack, or his order, should the trustee so choose." He might, at his discretion, convey said premises to said Mack, or might turn over to him the entire net proceeds of sale of said premises, and by so doing the trustee was to be discharged from all liability under said trust, which was then to cease and determine. From the first proceeds of sale of said premises, he was to pay the mortgage existing on the same, and was also given power to convey to another person as trustee, and, in so doing he was to be discharged from liability under said trust.

That said Aaron B. Champion accepted the trust on the twenty-eighth day of April, 1887; entered upon the discharge of said duties, and is still in the discharge of said trust; that upon the seventh day of September, 1887, James Mack made an assignment for the benefit of his creditors to John Webb, Jr., by which he transferred all his real and personal property to said assignee, who was duly qualified and entered upon the discharge of his duties, and that the assignment is still in progress of adjudication in the probate court.

The court, in special term, entered a decree that the surplus arising from the sale of the said property, after the payment of costs, expenses of the trust, and the said mortgage claim and granite assessment belongs to said John Webb, Jr., assignee of James Mack, by reason of said declaration of trust and said deed of assignment. It is sought in this proceeding to reverse the judgment of the court below in so far only as it provides for a distribution of the funds arising from the sale, and involves a construction of the declaration of trust;

It is claimed by the plaintiff in error, that James Mack took a life estate only in the real estate in question with remainder to his heirs; that this was the intention of the party in declaring the trust, and being an executory and not an executed trust, the rule in Shelley's case will not apply.

It may be said that in one sense every trust is executory. At common law every use was a trust, but by the Statute of Uses certain uses were converted into legal estates, and, strictly speaking, every trust executed is a legal estate. In this sense the trust must be executory to bring this case at all within the jurisdiction of chancery. *Bagshaw v. Spencer*, 1 Vesey, 142.

But this is not the sense in which the term executory trust is used, as applicable to that class of cases in which equity will deal with the subject without regard to the legal signification of the terms in which the trust is declared. When the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust, and the distinction thus made between executed and executory trusts as administered in the court of chancery, has been recognized since the difference was first fully explained by Lord Chancellor Cowper in *Earl of Stanford v. Hobart*, 3 Bro. P. C. 31, (March 30, 1710). This distinction is completely settled in the English courts, and an examination of the authorities will show that the distinction rests in the manner in which the trust is declared. In cases where the limitations and trusts are fully and

perfectly declared, equity will not interfere and give effect to it in a construction different from what it would receive in a court of law.

It is only when the limitations are imperfectly declared and the intent of the creator is expressed in general terms, leaving the manner in which the intent is to be carried in effect substantially in the discretion of trustees, that a court of equity regards the trust as an executory trust, and will assume jurisdiction to direct the trust to be executed upon a construction different from that which the instrument creating it would receive in a court of law. *Cushing v. Blake*, 30 N. J., Equity, 689. These principles are fully and clearly stated by Lord Chancellor Sugden in *Boswell v. Dillon*, *Drury Chanc. R.*, 291, in the following words: "By the term, an executory trust, when used in its proper sense, we mean a trust in which some further act is directed to be done. Executory trusts in this way may be divided into two classes: one in which, though something is required to be done, for example, a settlement to be executed, yet the testator has acted as his own conveyancer, as it is called, and defined the settlement to be made, and the court has nothing to do but to follow out and execute the intentions of the party as appearing on the instrument. Such trusts, though executory, do not differ from ordinary limitations, and must be construed according to the principles applicable to legal estates depending upon the same words. The other species of executory trusts is, where the testator, directing a further act, has imperfectly stated what is to be done. In such cases the court is invested with a larger discretion, and gives to the words a more liberal interpretation than they would have borne if they had stood by themselves."

"All trusts," said Lord St. Leonards, "are in a sense executory, because a trust cannot be executed except by conveyance, and there is always something to be done; but this is not the sense which a court of equity puts upon the term "executory trust." *Egerton v. Earl Brownlow*, 4 H. of L. Cas. 1.

Chief Justice Beasley in *Weehawken Ferry Co. v. Sisson*, 2 C. E. Gr., 475, declares that a critical examination of the decisions will show that, to be executory so as to fall within the relaxation of the ordinary rules of construction, the limitations of the equitable interest must be incomplete, and something must be left to the trustee to define and settle.

It being a fundamental proposition that equitable estates are governed by the same rules as legal estates, and so when technical words are used in the creation of an executed trust estate, they will be taken in their legal technical sense. It is true that Lord Hardwicke in *Garth v. Baldwin*, 2 Ves. Sen., 645, added qualification: "Unless the intent of the testator or author of the trust plainly appears to the contrary," but this qualification has been time and again overruled, and is now an established canon that a limitation in trust perfected and declared by the settlor, shall have the same construction as in the case of an executed legal estate.

The rule in *Shelley's case* was never a rule of intention or of construction to reach and carry out the settlor's intention; but has been defined as it was established as an absolute rule of property to obviate certain difficulties that would arise in relation to tenures. If certain persons to whom the property was limited were allowed to take as purchasers and not by descent.

"But in order," says Perry on Trusts, sec. 359, "that technical words may receive their legal signification, and in order that the rule in Shelley's case may be applied to limitations of equitable estates, the trust must be executed and not executory. All trusts are executory in one sense of the word, that is, the trustee must have some duty, either active or passive, to perform, so that the Statute of Uses shall not execute the estate in the *cestui que trust*, and leave nothing in the trustee. But such is not the meaning of judges when they speak of executed trusts, and executory trusts. These words refer rather to the manner and perfection of their creation, than to the action of the trustee in administering the property. Thus a trust created by a deed or will, so clear and certain in all its terms and limitations that a trustee has nothing to do but to carry out all the provisions of the instrument according to its letter, is called an executed trust. In these trusts, technical words receive their legal meaning, and the rules applicable to legal estates govern the equitable estates thus created. On the other hand, an executory trust is where an estate is conveyed to a trustee upon trust, to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the direction thus given. They are called *executory*, not because the trust is to be performed in the future, but because the trust instrument itself is to be molded into form and perfected according to the outlines or instructions made or left by the settlor or testator."

The difference between the two trusts may be said to be this: In executed trusts the rules of property govern, and are not the intention of the settlor, if it is contrary to the rules of property; but an executory trust is settled and carried into effect according to the intention of the settlor.

The legislature of Ohio has abrogated the rule in Shelley's case in relation to wills, but it remains as a rule of property in Ohio, as to deeds. The rule as approved by Chancellor Kent may be stated as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." It may be added that the words "heirs," or "heirs of the body," are to be construed as words of limitation, and not of purchase, and that the words "child or children" are to be construed as words of purchase, and not of limitation.

There are exceptions to this rule, as when the grantor annexes words of explanation to the word "heirs," as to the heirs of "A" *now living*, showing thereby that he meant by the words "heirs" a mere *descriptio personarum* or specific designation of certain individuals, or when the grantor superadds words of limitation, and a new inheritance is grafted upon the heirs or grantees who take the estate. 4 Kent, \*215.

In the case of *Smith v. Hankins*, 27 Ohio St., 371, it will be observed that the conveyance was coupled with a *condition* that in the event the grantee die *without children*, then the estate should revert to and vest in the heirs of the grantor. The court says in the opinion: "The

property is conveyed in the granting clause to Thomas and his heirs, but the fee thus granted in general terms, by the more specific language that follows, is explained so as to mean a fee, qualified with the *condition* that if he died without issue, it should go to and vest in the heirs or issue of the grantor."

In the case of *McFeely's lessee v. Moore's heirs* 5 Ohio, 465, both parties claimed under the will of John Hale. The devise was in the following words: "To my son, Walter, I give and bequeath, as also to Phebe, his wife, the use of two lots; but, at their decease, my will is, that these two tracts of land descend to their heirs, to whom I bequeath the same to have and to hold said tracts to themselves, their heirs and assigns forever."

The plaintiff claimed title from the heirs of Walter and Phebe Hale. The defendant's title arose from the grantee of Walter and Phebe Hale. The court held that Walter and Phebe Hale had, under the devise, a fee simple in the land, and in commenting upon the rule under which the holding was made, uses this language: "If its policy be doubted, let the legislature be called to act; but if we should disregard a rule, which has prevailed so widely and subsisted so long, it would be an unfaithful interpretation of the law."

In the case of the *Continental Mutual Life Insurance Company v. Skinner et al.*, 4 Circuit Court Reports, p. 526 (Hancock county, April term, 1890.) In that case there was a grant to W. S., and A. J. S., husband and wife, of certain real estate unto the grantees and their heirs, with the qualification that the lands so conveyed "are to be held and enjoyed by the said W. S., and A. J. S., his wife, during their natural lives, and at their decease are to go and pass to their heirs." Held, that W. S. and A. J. S., took an estate in fee simple.

In the application of the principles which we have indicated to the trust in question, there can be but one conclusion. The limitations and trusts expressed in the instruments are not so perfectly declared, and do not vest such a discretion in the trustee; that the trust can be regarded as an executory trust. It is not such a trust as a court of equity will so deal with as to give legal effect to the general intent of the party creating it, but an executed trust, and one, if not recognized, would, in the language of the Supreme Court, be a disregard of a rule which has prevailed so widely and subsisted so long, and would be an unfaithful interpretation of the law.

Nor is there anything in the language of the instrument itself for which it can be inferred that the grantor intended to describe particular individuals. It is not *descriptio personarum* so as to take it out of this rule.

We hold, then, that the trust is an executed one; that the rule in *Shelley's* case is in force as to deeds in Ohio, and that it is within the rule, and that James Mack took an estate in fee simple.

MOORE and SAYLER, JJ., concurred.

John B. Boutet, Robert S. Fulton and E. E. Rooney, for plaintiffs in error.

Wright & Wright, for Champion, trustee; Follett & Kelley, for Webb, assignee.

(The Supreme Court, on Tuesday, June 23, 1891, overruled motion for leave to file petition in error in this case.)

## CRIMINAL LAW.

[Franklin Common Pleas.]

## \* STATE OF OHIO v. W. J. ELLIOTT.

1. A libel written by O. against members of E's family, is no justification for E's aiding and abetting the subsequent killing of O.; nor is that fact sufficient to reduce the killing to manslaughter; nor is it enough to show that the killing was done in self-defense.
2. One day is sufficient for "cooling time."
3. If E. permitted his passions to be inflamed by what was not a legal provocation, and while under the influence of such passions, and moved by such passions, he aided and abetted the killing of O., he is guilty of murder.
4. A case in which the proof demonstrated, to an absolute certainty, the truth of the charge of murder in the first degree, although the jury only returned a verdict of murder in the second degree.

MOTOIN for new trial.

PUGH, J.

A motion for a new trial, based on the usual grounds, has been made by defendant, and submitted to the court for decision. Although it was not argued, it is obviously appropriate for the court to make a few observations upon some of the grounds of the motion; indeed, it is his duty to do so. For that reason for some time (a couple of days) I have been engaged in reviewing the history of the case and of the trial. But no minute analysis of the evidence will be attempted; for there was such a large mass of testimony that it would be impossible.

One of the grounds assigned is that the court erred in admitting and excluding evidence. Doubtless this is chiefly predicated of the decision which excluded the alleged defamatory articles that were published against the defendant in the *Sunday World*. The claim was, that Osborn was the author of some of them.

The impression of the *World* offered for evidence contained three articles of a libelous character against the defendant and others related to him. It was not pretended, or intimated, that Osborn was the author of all of them. Without any proof whatever to identify which articles or article Osborn wrote, it was insisted that all of them were competent evidence. If the court had permitted them to be produced without identification, the jury would have been left in utter ignorance on this important subject. If Osborn did not write all of them, which was not claimed, the jury would have been at liberty to hold him responsible for what another had written.

Again, before this offer was made, no testimony tending to show that the original manuscript or manuscripts of either, or all, of these articles, was in the handwriting of Osborn, and that they had been lost or destroyed, was introduced. But, unless the court has studied the rules of evidence in vain, that was required before the articles, or either of them, became admissible.

The only testimony offered on the subject of authorship consisted of some very vague statements made by Osborn that he would write, or had

\* This judgment was affirmed by the Supreme Court, without report, January 19, 1892. Bradbury and Minshall, JJ., dissent on the grounds that the defendant was not tried by an impartial jury within the meaning of the constitution of the state, and that the court erred in not allowing the motion of defendant for a change of venue. For decision of common pleas on the motion for a change venue, see *ante* 253



written, for the *World*, articles relating to the defendant or his family. Even that testimony did not give such a description of characterization of the article that either court or jury would have been able, with any degree of accuracy, to identify, in the newspaper, the Osborn article or articles.

I am not unmindful of the fact that it was contended that Osborn and Levering had formed a conspiracy to defame and libel the defendant and his family. But the evidence relied upon to prove this was inadequate to establish, *prima facie*, such a conspiracy. The testimony of Dwyer, for illustration, only proved what Osborn intended to do. Osborn's statement of purpose, according to that witness, not only did not implicate Levering, but its language absolutely excluded him from any art or part in the purpose to "write up" the defendant or his family. The only other testimony on the subject of a conspiracy was that which showed that Osborn and Levering were in company on High street, and at a couple of saloons, and that in one of them they called for "fighting whisky."

None of this testimony, however, had been introduced before the articles were tendered in evidence. Therefore, on the hypothesis of a conspiracy, they were not admissible, until the other testimony, which I have just mentioned, and which was claimed to be *prima facie* proof of a conspiracy, was first introduced.

But even if the court did err in excluding the articles, when they were first offered, the error was partially rectified at a subsequent stage of the trial—so rectified that the defendant was not prejudiced by the first decision. In rebuttal, the State offered evidence to prove that one of the three articles in the *World* were written by Osborn and the other two by Levering. Thereupon, in sur-rebuttal, the defendant renewed the offer to put the articles in evidence. The court granted him leave to introduce and read the Osborn article and rejected the Levering articles as having no relevancy to any issue made in the case, but the defendant refused to put the Osborn article in evidence. This resolution of the court was sustained by the opinion of Judge Parker in the Selfridge case, which appears in the full report of the case, but not in "Horrigan & Thompson's Self-Defense."

Instructed by this history of the controversy over these articles, the court is unable to recognize that even a technical error was committed in the ruling made on the subject.

There is still a stronger reason for this conclusion. What purpose would these articles have subserved if they had been admitted? They did not constitute a legal provocation which would alleviate murder into man-slaughter. The authorities are unanimous in holding that written or spoken calumny, no matter how grievous it may be in character, cannot reduce an intentional homicide, done with a dangerous weapon, from murder to manslaughter. A legal provocation, in manslaughter law, means personal violence, or personal violence accompanied by words. Only a few of the cases are recited. *Beauchamp v. The State*, 6 Blackf. (Ind.) 299; *State v. Barfield*, 8 Iredell, 844; *State v. Carter*, 76 N. C., 20; *People v. Butler*, 8 Cal., 435; *State v. Starr*, 38 Mo., 270.

The object of the rule as to provocation is to "guard human life from brutal rage" and at the same time "palliate human frailty." Nothing would be gained by substituting for this rule the fluctuating rule, which is often contended for in desperate criminal cases, by which each man shall "be judged according to the excitement natural to his peculiar

temperament when aroused by real or fancied insult given by words alone."

There was not a single element of manslaughter proved by the evidence in this case. If the jury had found a verdict of manslaughter, it would have been a gross miscarriage of justice. It is true manslaughter covers a wide zone. It is the middle zone between that of murder on the one side and of excusable homicide on the other. It is also true that manslaughter and excusable homicide sometimes approach each other very closely. "In excusable homicide the slayer could not escape if he would; in manslaughter he would not escape if he could."

There was absolutely no evidence to show that Osborn was killed in the heat of anger, upon the spur of the moment and upon great and sudden provocation or in a sudden quarrel or fight. If all that the defendant claimed, and all that he and his witnesses testified to as to what Osborn did at the time of the shooting and just before, were conceded to be true, these facts only tended to show self-defense, and not manslaughter. Osborn's acts, as ascertained from their testimony, were not calculated to beget a sudden transport of passion. If the Elliotts shot first, and if there was no legal provocation before that, consisting of personal violence, or personal violence accompanied by words, upon the part of Osborn, Osborn's shooting at the Elliotts, after they began the shooting, was no legal provocation sufficient to depress the crime to manslaughter. It was no legal provocation for what the Elliotts did, either before or after Osborn shot. There having been no legal provocation, and Osborn having been killed with a dangerous weapon, whether the defendant's passions were aroused by the newspaper articles was not material. They should not have been aroused. There was legally nothing to provoke that gust of passion and dethronement of reason. Being without the reasonable cause, the existence of such passion was no mitigation. If his passions could only be appeased by taking Osborn's life, it was, in legal contemplation brutal ferocity, and aggravated the defendant's guilt. This condition of his passions made it dangerous for him to be at liberty.

Moreover, more than twenty-four hours intervened between the publication of the alleged libels, and also the perusal of them by the defendant, and the killing of Osborn—ample time for his passions to cool and his reason to "resume her empire." This is said upon the hypothesis that there was enough in the admissions of Osborn to prove that he had written a libel or libels on the family of the defendant.

A homicide committed after due interval of consideration of such a wrong, and because of that wrong, is murder. The law only extends its compassion to "sudden and momentary frays," and reduces the killing done therein to manslaughter. Thirty minutes have been judicially held to be a sufficient "cooling time." The court cannot be influenced by the sentiment that the defendant was extremely sensitive to the attacks upon the honor and chastity of his female relatives. That would have been an effective argument in the "transition period between the reign of force and the reign of law."

Again, these newspaper articles were not germane to the issue of self-defense. It was not even pretended that they contained any threat against the life or bodily safety of the defendant. There is no more firmly settled principle of the criminal law than this, that mere words, written or spoken, do not place the person against whom they are written or spoken in physical danger, and do not justify the killing of the author of the words. Self-defense cannot be erected on such a frail foundation.

It was said, if my memory is not at fault, that these articles were admissible to prove that Osborn was maliciously hostile towards the defendant. But, unless the defendant had the legal right at the time he shot Osborn, or aided or abetted his brother in killing him, to consider the writing of these articles by Osborn as one of the reasons for believing that he, or his brother, was in imminent danger of death or bodily harm from Osborn, they were clearly not admissible. The defendant had no legal right to reason that Osborn would kill him or his brother simply because he, Osborn, had traduced him or his family in the *World*. No well considered case can be cited to sustain the affirmative of this proposition. There may be some hasty and feebly digested decisions on that side.

In this connection the question whether the verdict should be set aside because the evidence proved that the defendant acted in self-defense, may be considered; for one of the other grounds of the motion is that the verdict was against the weight of the evidence. The contention was that the defendant acted on the principle of self-defense when he shot Osborn on the sidewalk, and that his brother did likewise when he killed Osborn in the hat store. They testified that before the defendant fired, Osborn moved his hand in such a manner as to indicate that he was drawing a revolver out of his pocket, and that Osborn fired the first shot. Three or four other witnesses for the defense testified to facts from which it might be inferred that Osborn fired the first shot. One witness (Hewitt) testified that he saw Osborn have a revolver in his hand before the defendant fired; another testified to Osborn changing his position just before or at the time the defendant and his brother reached the pavement near him. Only two witnesses corroborated the defendant and his brother in saying that Osborn did any overt act, besides shooting, which was indicative of a present purpose to kill him or his brother.

Opposed to this testimony was that of not less than twenty disinterested witnesses. By their testimony it was proved, to the exclusion of every reasonable doubt, that the defendant fired the first shot.

Six witnesses gave testimony which directly or inferentially showed that Osborn made no movement with his hand which would have signified to a reasonable person that he was about to draw a revolver. It was an unauthorized presumption that Osborn was about to draw and use a revolver because he either put or had his hand in his pocket. The defendant had no right to rely on such an unsubstantial act as that. Something more than bare fear or imagination was necessary to justify or palliate the acts of violence against Osborn. The pretext for taking life under reasonable fear has been refined to a subtlety of sentiment not contemplated by the law.

The only testimony that tended to prove that P. J. Elliott acted in self-defense in the hat store was his own testimony. The testimony of three or four witnesses touching what they saw in the store of the relative positions of Osborn and P. J. Elliott, and the testimony of a large number of other witnesses in regard to P. J. Elliott's conduct on the outside of the store, conclusively demonstrate that his claim was unfounded.

But it was a matter of indifference, in the light of other facts which were incontestably proved, whether Osborn or the defendant or P. J. Elliott fired the first shot. Grant that Osborn may have been the aggressor outside of the store; grant that his purpose may have been to kill the Elliots; still the undisputed fact is that he declined to continue the contest, and retreated to the hat store. He had received a dangerous

wound from the defendant, and was dazed and bewildered. He retreated in good faith. He did not make a fortification of the store room against the Elliotts. The evidence failed, utterly failed, to show that he fired a shot after he got in the store room, or that he retreated there to gain an undue advantage. He was found when dead thirty-six feet from the front door of the store. His abandonment of the conflict should have ended it. After his withdrawal, neither the defendant nor P. J. Elliott had any legal right to pursue him into the store and renew the contest; because his withdrawal removed all just apprehensions of harm to either of them. His pursuit was not necessary to remove the danger to either or both of them. P. J. Elliott, by following him and renewing the contest, and the defendant, by aiding and abetting him, became wrongdoers; the right of self-defense was restored to Osborn, and his killing was unjustifiable murder. *Stoffer v. State*, 15 Ohio St., 47; *State v. Howell*, 9 Ire., 485.

It has not been forgotten that it was claimed by P. J. Elliott that he retreated to the hat store as a place of refuge and rest; that he was not pursuing Osborn; that he did not know that Osborn was in the store until he arrived at or inside of the door, and that Osborn was accidentally killed. But that was pure invention. "The improbability of the story breeds suspicion and incredulity itself." No juror could believe it; no juror had a right to believe it. With striking pertinence the maxim of Aaron Burr, slightly varied, applies to this branch of the defense—"Truth is that which is uttered with effrontery, enforced with persistence and imbedded by reiteration."

Not less than thirteen witnesses testified that P. J. Elliott pursued Osborn into the store, and either by firing at him, or by some other unmistakable conduct, showed that his purpose was hostile and not peaceable. It is no exaggeration to say that the overwhelming proof is that the claim of P. J. Elliott, which has been mentioned, was a pure fabrication.

Further considering the ground of the motion to set aside the verdict as contrary to the weight of the evidence, the proof that the defendant was an aider and abettor in the killing of Osborn was enough to convince the most skeptical. Not less than a dozen reputable witnesses testified to the defendant's encouragement of his brother in doing that deed; that he exhorted him to kill him, emphasizing it with an opprobrious epithet. The claim that P. J. Elliott did not hear the words of encouragement was a mere afterthought.

Other acts of the defendant, done on the occasion of the shooting, tending to prove his complicity in the killing of Osborn were proved. The shooting was one continuous conflict; there were not two conflicts. The defendant took part in that conflict.

There was also an abundance of evidence to sustain the hypothesis of the State that the defendant and P. J. Elliott formed a conspiracy against the life of Osborn.

The crushing weight of the evidence in this case shows that the defendant and P. J. Elliott began the shooting; that they were acting in concert; that they were aiding and abetting each other, and that Osborn acted in self-defense when he shot at the Elliotts. It was their fault that he did any shooting. His shooting was justifiable, because their conduct made it so. *Lingo v. The State*, 29 Ga., 470.

The evidence which proved that Osborn was killed from deliberate and premeditated malice was not equivocal or ambiguous. It was suffi-

ciently cogent to dissipate the reasonable doubts of minds, the most exacting of proofs in such case as this. Three or four unimpeached witnesses swore that the defendant, on the sixteenth of February, A. D. 1891, declared that he would kill Osborn if he answered his article in the *Capital* and impugned the character of his family. According to the defendant and his testimony, the contingency upon the happening of which this threat was to be fulfilled occurred on the next Sunday when Osborn "wrote him up" in the *World*.

Taylor and Townsley, who certainly were not prejudiced against the defendant, swore to vehement and unequivocal threats against the life of Osborn, made by the defendant on the twenty-second day of February, that being the time when he asserted that he would, if necessary, kill Osborn and Levering in a church.

Other witnesses testified to prior threats made by the defendants against the life of Osborn.

Four unimpeached witnesses testified that just before the defendant fired at Osborn he used an expression which was conclusive of hate and malice entertained by him against Osborn—"Let the s—n of a b—h have it," or "shoot the s—n of a b—h."

Out of the mouths of twelve or fifteen reputable witnesses the fact was proved that the defendant, during the shooting, directed his brother to kill Osborn—the very strongest evidence of malice, deliberate and premeditated malice. The defendant admitted on the witness stand that he might have used the expression charged against him. One credible witness swore that at the city prison, when the shooting was fresh, and before there was opportunity to prepare a colored version of the affair, the defendant expressed his gratification that Osborn had been killed, not in polished, but in very emphatic language. The most incredulous mind could not require more convincing evidence of malice than this.

The preparation of revolvers, the testing of a revolver, and arming himself on that day with two revolvers, were most persuasive evidence of malice, premeditation and deliberation.

The defendant's explanation of his possession of the two revolvers was simply disingenious and incredible. No juror was obliged to believe such a story. "Innocence is simple, plain and direct; guilt is a crooked, intricate, inconstant and various thing."

The immediate circumstances of the shooting, its locality, unmistakably showed that malice instigated the assault on and the killing of Osborn. It was done on a crowded street. This was an important factor. It evinced a heart "fatally bent on mischief," and a disregard of social duty.

When persons "run amuck," as it were, in a crowded street of a large city like this, courts and juries may reasonably infer from that circumstance that they are moved by malice.

The relation of the defendant to this case could be stated in a few words. For some time before the killing of Osborn, Osborn and Levering on the one side, and the defendant on the other, had turned upon each other their sluices of abuse and vulgarity. This wordy war finally culminated—and this is said in the light of the evidence—on the twenty-second day of February, 1891, in indefensible attacks on the defendant and his family or relatives, which were published in the *Sunday World*. I mean they were indefensible in law. The defendant was outraged by these attacks. His passions were aroused and inflamed to a towering

pitch. To a man of his imperious temper and violent disposition, this was not strange. Then it was that he conceived the purpose to kill Osborn, and probably Levering. The crop of dire threats on that Sunday and his preparation of dangerous weapons on the succeeding day, make this manifest. He also conceived that it would be a popular act to kill such assassins of character as he believed Osborn and Levering to be. The courts were open to him for redress of the wrong, if any there was, that had been done to him. He could not be the avenger of his own wrongs. But instead of resorting to legal redress he concluded to be a law unto himself, and himself redress the wrong. But the law of the state, which is the security of all her people, did not sustain such conduct. If people who, or whose friends, have been libeled and slandered, are allowed to take the law into their own hand and to kill the libelers and slanderers, crime may as well be licensed.

There were some witnesses in this case who were not entitled to credit from the jury—indeed, they committed wilful perjury; and if this was the close of the investigation of the affair of the twenty-third day of February, 1881, the court would point them out.

The overwhelming proof establishes the fact that the killing of Osborn was a deliberate, premeditated and calculated murder. If a host of witnesses have not committed wilful perjury, the defendant was one of the responsible murderers of Osborn, and in the part he played in the assassination, he was actuated by frozen, merciless and unrelenting malice. The verdict of the jury was not contrary to the weight of the evidence. If the jury had found a verdict of acquittal they would have dipped their hands in the blood of A. C. Osborn and in other blood that was shed on the twenty-third day of February, 1891.

The motion for a new trial is overruled.

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## SPECIFIC PERFORMANCE.

[Hamilton Common Pleas, July, 1891.]

HARRY T. AMBROSE V. EDWARD KUHN.

1. In an action to enforce the specific performance of an agreement to purchase land, a court of equity will not grant this relief where there is pending another action materially involving the title, which action is instituted by claimants who are strangers to the equity action at bar, and who are proceeding in good faith and without any collusion with the defendant, or any suggestion or any interposition on his part or in his behalf.
2. In such case the court will not form or announce any opinion as to the validity of the title or upon the issues in said pending action. But it will inquire into the issues so far as it may be necessary in order to determine whether the claim therein made is so groundless as to justify the court in denouncing it as frivolous and in decreeing, notwithstanding its pendency, a specific performance of the agreement.

SHRODER, J.

Plaintiff seeks to enforce the specific performance of an agreement to purchase land. The defendant refuses to accept the deed tendered, claiming the title to be defective. There is a dispute about the terms of the contract; but it is unnecessary to decide it, since whichever party is right a court of equity would not, upon either contention, decree

specific performance by the defendant in the case unless the plaintiff would be able to convey a marketable title—that is, one which the defendant could again sell or mortgage to a reasonable purchaser or mortgagee. 115 N. Y., 586; 86 N. Y., 576. The form of relief here sought is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised in consideration of all the circumstances of each case. This discretion is, however, controlled and regulated by precedent and established principles of equity. No positive rule can be made to determine the action of the court in all cases. In general the specific relief will be granted when it is apparent, under all the circumstances of the particular case, that it will subserve justice; and it will be withheld when it appears that it will produce hardship or injustice to the defendant. If such a result would follow, the court will leave the parties to their remedies at law for damages for breach of contract. *Railroad v. Railroad*, 13 O. S., 544, 549; 5 Wall., U. S. S. C., 557.

In *Jeffries v. Jeffries*, 117 Mass., 187, it was decided: Where the circumstances are such as that the specific enforcement of the agreement would transfer from the present owner to the purchaser the risk or inconvenience of defending the title against adverse claims, the specific performance would not be decreed. It is not enough that the title appears to be subject to adverse claims of such a nature as may reasonably be expected to expose the purchaser to a controversy to maintain his title or incidental rights, he must not be subjected to the necessity of litigation to remove what is only a cloud upon his title. As the court of appeal and errors of New Jersey, 23 N. J. Eq., 483; 24 N. J. Eq., 327, has expressed it: a court of equity will not compel the purchaser to purchase a law suit. It is certainly more reasonable and just to let the present owner resort to his remedy for damages, and himself undertake the risk of defending his title, than it is to award him a decree for specific performance, thereby transferring from him to the purchaser the task of defending the title.

It appears from the evidence that there is an action pending in this court wherein the plaintiffs claim title, as against the parties to this action, to a strip of land which cuts through the property about midway its length, a width of twenty-two feet. It is satisfactorily proved that this action is brought in good faith, and without any collusion with defendant, or any suggestion or interposition on his part or in his behalf.

The court will not undertake to announce an opinion upon the issues in that action; it will, however, inquire into them in order to determine whether the claim therein made is so groundless as to justify the court in denouncing it as frivolous; and, in decreeing, notwithstanding its pendency, a specific performance upon terms or conditions, of the contract here in question.

The pending action referred to, is brought by the heirs of O. M. Spencer, from whom the plaintiff, Ambrose, by mesne conveyances, derives title. Spencer duly recorded a plat of his land wherein he laid out these lots and street. His deeds of conveyance executed and delivered May 16, 1848, described the property by their plat numbers, which, by reference, made the street a boundary. The street was never opened or used. Its dedication was never accepted by the public. Whatever easement the public ever had in it, if any, as far as it affected the rights of the adjacent lot owners, has been extinguished. See Rev. Stat., sec. 4977.

The Spencer heirs claim that upon the non-acceptance of the street by the public, or upon the extinguishment of the public rights, the title reverted to O. M. Spencer and his heirs. The plaintiff contends that Spencer, by his deed, conveyed all his title in the street to the grantees—he also contends that by adverse and continuous possession of twenty-one years his title is good as against the Spencer heirs.

The proof of adverse occupancy rests wholly upon the evidence of two witnesses—both men advanced in years. If the claim of the Spencer heirs constitutes a defect in the title which this parol evidence must be called to remove, the contract will not, in such case, be specifically enforced. Lapse of time might either impair or wipe out the only evidence competent to cure or remove the defect, and the purchaser would then be left remediless. The same rule would apply to even an apparent incumbrance, which could only be explained or defeated by parol evidence. The exception is, where it is very clear that the purchaser will suffer no harm from the defect or incumbrance. 115 N. Y., 592-599; 86 N. Y., 575. In this case the pendency of the Spencer action makes the contrary very clear, to the extent that the defendant will be required to assume the inconvenience and the risk of that litigation.

It is also urged for Ambrose that the O. M. Spencer deed, by making the street a boundary, included it within the grant. 24 Ark., 102; 142 Mass., 85; 68 Me., 371; 26 Pa. St., 223. There are, however, authorities which hold that this rule does not apply to mere paper streets, which do not "exist in actual use, but only in contemplation." 21 Pick., 296; 33 Me., 315; see 5 Wharton Pa., 18.

In view of the state of the authorities on this question, and other circumstances already spoken of, it cannot be said that this pending action is so groundless as to warrant the court to disregard it and to grant the relief prayed for.

The decision in this case does not require an opinion upon the validity of the title.

It is placed upon the conclusion that the circumstances of the case are such as would not justify the granting of the specific relief here sought in a court of equity.

The petition is therefore dismissed.

Paxton & Warrington, for plaintiff.

V. Abraham, for defendant.

## COMPULSORY EDUCATION.

[Lucas Common Pleas, April Term, 1891.]

### \* STATE OF OHIO V. PATRICK F. QUIGLEY.

- 1 The neglect of the principal of a school to make the report required by sec. 11 of the act of April 25, 1890, is an offense against the act, and is punishable by a fine as prescribed in sec. 13.
- 2 Said offense is within the jurisdiction of the court of common pleas, and may be prosecuted by indictment.

\*This judgment was affirmed by the circuit court; opinion 3 Circ. Dec., 310. The circuit court was affirmed by the Supreme Court; unreported, May 10, 1892.



**PUGSLEY, J.**

The defendant in this case was found guilty by the jury of violating sec. 11 of the act of April 15, 1889, as amended April 25, 1890, in neglecting, as principal of a school, to report to the clerk of the board of education the names, ages and residence of the pupils in attendance at his school. Two motions have been filed and argued—a motion in arrest of judgment, and a motion for a new trial. Upon the argument, two grounds only were urged in support of these motions.

First. That the law does not prescribe any penalty for the neglect by the principal of a school to make the report required of him—in other words that such neglect is not a punishable offense.

Second. That the offense of neglecting to make the report, if it is an offense, is not within the jurisdiction of this court, and cannot be prosecuted by indictment.

Section 11 of the act provides that it shall be the duty of all principals and teachers of all schools, public and private, to report to the clerk of the board of education the names, ages and residence of all pupils in attendance at their schools.

Section 13 provides that any person or officer mentioned in the act and designated as having certain duties to perform in the enforcement of any of its provisions, neglecting to perform any such duties, shall be liable to a fine of not less than twenty-five dollars nor more than fifty dollars for each and every offense.

No other section of the act prescribes any penalty for the violation of duty by the principal of schools; so that in order to support this indictment, it must clearly appear that principals of schools are embraced within the terms of this section.

It is admitted that the principal of a school is a person mentioned in the act and designated as having certain duties to perform, but it is denied that he has duties to perform "in the enforcement of any of its provisions." It becomes necessary therefore to determine the sense in which these words "in the enforcement of its provisions" are used in the statute. It is contended in behalf of the defendant that a person having duties to perform in the enforcement of any of the provisions of the law, is one who is required not simply to obey the law, but to enforce obedience to the law, or to compel others to obey the law, thus construing the statute as if it read "any person having duties to perform in the enforcement (by himself) of obedience to the law" or "any person whose duty it is to compel others to perform their duties under the law." And it is claimed that, as the principal of a school is not required to see that the duties which the law imposes upon others are performed, he has no duty to perform in the enforcement of any of the provisions of the law, and is therefore not liable to the penalty prescribed in sec. 13.

The duty of enforcing the law, that is, of seeing that the provisions of the law are carried out, rests primarily with the board of education. By sec. 6 of the act, in cities of the first and second class, the board of education is required to employ one or more truant officers to assist in the enforcement of the act, and in special, village and township districts the board of education is required to appoint some constable or other person as truant officer. In sections 6, 7, 8, and 9 the duties of the truant officer are defined. The duties are to investigate all cases of truancy; to make complaints against parents and other persons having legal charge of children for neglect to send such children to school, to institute proceedings against those who violate the law, and generally to render such services as the superintendent of schools or the board of education may deem necessary for the preservation of the morals and good conduct of school children, and for the enforcement of the act. An examination of the entire act will show that truant officers are the only persons named in the act, who are required to see that the various duties imposed by the act are performed. All other persons named in the act, parents, guardians, minors, employers, the superintendent of schools, the clerk of the board of education, and principals and teachers of schools, are required only to perform certain specified duties. These duties are important and essential in the carrying out of the provisions of the law, but none of these other persons are required to enforce the law; that is, in the sense in which the word "enforce" is used by counsel, to compel others to perform their duties. It follows, if these words "in the enforcement of any of the provisions of the act" have the meaning ascribed to them, that truant officers are the only persons who are subject to the penalty prescribed in sec. 13.

Two reasons are apparent why such a construction of the statute is not reasonable. In the first place, if truant officers alone were intended to be made liable to the penalty, it is not probable that the legislature would have used so much

circumlocution to express their meaning. Instead of the provision that "any person or officer mentioned in this act, and designated as having certain duties to perform in the enforcement of any of its provisions, neglecting to perform any such duties shall be liable to a fine," a simple provision "that any truant officer neglecting to perform any of his duties shall be liable to a fine," would have been sufficient.

In the next place, in construing a statute, effect, if possible, must be given to every clause, and to every word. The words of the statute are, "any person or officer neglecting his duties shall be liable to a fine." If the construction of the statutes contended for is correct, the words "any person" are redundant, and must be rejected as meaningless. It is said that the words "any person" were inserted as well as "any officer" out of abundant caution, as the board of education in township districts is authorized to appoint a constable or other person as truant officer. But truant officers, when appointed, whether by the board of education in cities or in townships, are known only as officers, and are so designated throughout all parts of the act. I conclude that other persons than truant officers were intended to be made subject to the penalty for non-performance of duty, and am of the opinion that the language of sec. 13, when fairly construed in connection with all other parts of the act, clearly indicates such intent.

The language of a statute must be construed, not in any strained, or narrow, or unusual sense, but in its fair and ordinary sense, with reference to the context and in view of the general scope and purpose of the statute. The entire act must be considered. One part must not be construed so as to render another part of no effect, or so as to defeat the manifest intention of the legislature, but if possible, all parts should be made to harmonize, each with the other. A construction which will promote the object of the law should be favored, not one which will defeat it.

The enforcement of the law, according to the ordinary meaning of the word, is putting the law in execution, the carrying out of the provisions of the law. In a legal and popular sense, a law is enforced when all its provisions are carried out; when all the duties imposed by it are performed. The enforcement of the act necessarily includes the performance by principals of schools of the duty to make these reports. If the duty is not performed, the act is not enforced. So that it is properly said that the principal of a school has a duty to perform in the enforcement of the act (not in the enforcement of the act by himself—the law does not say that), but in the enforcement of the act by those empowered to enforce it, or in the carrying out of the provisions of the act.

In sec. 11 of the act it is provided that principals of schools shall make the reports in order to facilitate the carrying out of the provisions of the act—that is, to render easy or less difficult the carrying out of the provisions of the act. In the opinion of the legislature it is important, if not essential, to the efficient workings of the law, that these reports should be made. With the aid of the information thus obtained, the board of education will know what children are attending school as required by law, and will so be better able to accomplish the purposes of the act. If the making of these reports facilitates the carrying out of the provisions of the law, as the legislature have declared, certainly the duty of making the reports is one that is incumbent upon the principals of schools in the enforcement or carrying out of the provisions of the law.

A narrow construction of these words "in the enforcement of any of the provisions of this act" renders the power to enforce the act given to truant officers entirely nugatory so far as principals of schools are concerned, and makes the different parts of sec. 13 inconsistent with each other. The proper inquiry is whether in the enforcement or carrying out of any of the provisions of the act, the principal of a school is required to perform any duty. Clearly he has such a duty to perform, and therefore for a violation of his duty he is subject to the penalty prescribed by sec. 13.

The second ground urged in support of the motions is that this court has no jurisdiction over the offense. The act as originally passed made no provision as to the courts in which violations of the act should be prosecuted, but sec. 13, as amended April 25, 1890, contains this provision: "And mayors, justices of the peace and probate judges shall have jurisdiction and try the offenses described in this act, and their judgment shall be final." It is claimed that by virtue of this provision no other court or tribunal than those named has jurisdiction; in other words, that the jurisdiction of mayors, justices of the peace and probate judges is exclusive. Under the constitution of the state the court of common pleas has such jurisdiction as is conferred upon it by law. Sec. 456, of the Rev. Stat., defines the jurisdiction of the court of common pleas in civil and criminal cases. As

to criminal cases it provides as follows: "The court of common pleas shall have original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in justices of the peace, or that may be vested in courts inferior to the common pleas." Under this section, without any doubt, the court of common pleas has jurisdiction over all the offenses against this act, unless the exclusive jurisdiction of such offenses is conferred upon mayors, justices of the peace and probate judges. Exclusive jurisdiction is not conferred upon these magistrates in express terms. Is it conferred by necessary implication?

It is well settled that when jurisdiction over an offense is in one court, and a statute is passed simply conferring jurisdiction over the same offense upon another court, this leaves the jurisdiction concurrent in both courts, and either can try the case. And the rule requiring a strict construction of penal statutes does not apply to the matter of jurisdiction; all doubts and presumptions are in favor of the jurisdiction of the tribunal exercising it. Vol. 1, Bishop on Crim Prac., sec. 315; Bishop on Statutory Crimes, secs. 164, 198; Com. v. White, 8 Pick., 453; Com. v. McCloskey, 2 Rawle, 369; Smith v. People, 47 N. Y., 330, 341.

While not disputing these propositions, counsel claim that this case comes under another well-established rule, which is, that when a new offense is created by statute, or when an act is made unlawful which was lawful before and the statute provides a specific remedy against such new offense by a particular sanction and method of proceeding, that method of proceeding and none other must be pursued. Comr's v. Bank, 32 Ohio St., 194. It is not clear upon authority how far this rule extends in the matter of the jurisdiction of courts in criminal cases, when there is a general statute conferring jurisdiction upon a particular court over all offenses.

The English case of Rex v. Robinson, 2 Burrows, 799, decided in 1759, is usually referred to as containing the first clear exposition of this rule. In that case the defendant had been convicted on an indictment for refusing to obey an order of the general quarter sessions requiring him to maintain certain minor children. The statute under which the indictment was found fixed a particular penalty and prescribed a summary remedy for recovering the penalty. A motion was made by the defendant to arrest the judgment on the ground that the summary remedy given by the statute was exclusive. Lord Mansfield refused to arrest the judgment, and held that the offense was properly indictable. In deciding the motion he said that "the true rule of distinction seems to be that when the offense intended to be guarded against by a statute was punishable before the making of such statute, prescribing a particular method of punishing it, then such particular remedy is cumulative, and does not take away the former remedy; but when the statute enacts 'that the doing of any act not punishable before, shall for the future be punishable in such and such a particular manner,' then it is necessary that such particular method be specifically pursued, and not the common law method of indictment."

No case is cited holding that, when a general statute confers jurisdiction upon a particular court over all offenses, such jurisdiction is taken away by a later statute creating a new offense and conferring jurisdiction over the offense on another court, but not making it exclusive. On the other hand, there is authority for holding that in such a case the jurisdiction conferred by the general statute still remains.

I refer to the case of Allen v. State, 5 Wis., 329. That was a conviction in the circuit court of Wisconsin, under an indictment for selling intoxicating liquors without a license. I will read from the opinion of the court, on page 334, what is said on this subject. "The first point made is, that the circuit court has no original jurisdiction of this offense, it not being indictable by the law of the state. Sec. 5 of chap. 162, of the session laws of 1851, provides that if any person shall sell intoxicating liquors without first having obtained a license according to the provisions of this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine. The sixth section gives to justices of the peace power to try and determine all offenses growing out of the provisions of the act, but the act nowhere professes to give the justices' court exclusive jurisdiction of such offenses, or to prohibit the circuit court from taking cognizance of them by indictment. Such being the case, the circuit court undoubtedly has original jurisdiction of all offenses against the act. By sec. 8 of article 7 of the constitution the circuit courts have original jurisdiction of all matters, civil and criminal, not thereafter prohibited by law, and by sec. 6 of chap. 83 of the Rev. Stat., the said courts have power to hear and determine all cases of crime and misdemeanor not exclusively cognizable by a justice of the peace. The act of selling

intoxicating liquors without license, being made a misdemeanor by the statute and the justice court not having exclusive jurisdiction of the offense, the circuit courts have original jurisdiction of the offense."

See also *State v. Wister*, 82 Mo., 892, *People v. Hogan*, 55 Hun., 391.

But conceding the rule to be as broad as is claimed, does this case come within the rule? In other words, is the offense with which the defendant is charged, a new offense, created by the act of 1890, which confers jurisdiction upon mayors, justices of the peace and probate judges?

Section 11 of the act as originally passed April 15, 1889, required all principals of all schools to report the names, ages and residence of the pupils in attendance at their schools.

This section was first amended April 2, 1890. The only change made by the amendment was in requiring these reports to be made in special districts as well as in city, village and township districts. The section was again amended April 22, 1890. The only change made by this last amendment was in making it the further duty of principals to report to the truant officer all cases of truancy in their schools.

Section 13 of the act providing for the penalty, as originally passed, April 15, 1889, was precisely the same as it is now, except that by the amendment of April 25, 1890, the cause was added conferring jurisdiction upon mayors, justices of the peace and probate judges.

It will thus be seen that continuously from the time the original act went into effect down to the present time it has been the duty of all principals of schools in city districts to report to the clerk of the board of education the names, ages and residence of the pupils in their schools. No change of the original law, in this particular, was made by any of the amendments. And the defendant is charged in the indictment only with a violation of the duty. He is not charged with a violation of any of the new duties imposed by the amendments. It will also be observed that continuously from the time the original act went into effect down to the present time, the violation of this particular duty has been an offense for which the punishment has always been the same; namely, a fine of not less than \$25 nor more than \$50. So that the offense with which the defendant is charged is not a new offense, created by the act of 1890, which confers jurisdiction upon mayors, justices of the peace and probate judges. It was an offense before the passage of that act, punishable in the same manner as now, and over which the court of common pleas had undoubted jurisdiction. It follows that nothing but express words of exclusion will oust this court of the jurisdiction which it had over the offense under the general statutes of the state. The prosecution of the offense under the act of 1890 was governed not by that act, but by sec. 456, Rev. Stat., which gives to this court jurisdiction. This section was in no way affected by the repeal of the act of 1889, but still remains in full force. If we suppose that sec. 456 Rev. Stat., under which the court had jurisdiction over the offense, had been in terms incorporated in the act of 1889, and that it still remained unrepealed, it could not be successfully claimed that the amendment of sec. 13 would deprive this court of jurisdiction. In effect, that was the state of the law at the time the amendment was passed.

The offense charged in this indictment was indictable under the general statute at the time of the passage of the act of 1890, which conferred jurisdiction upon mayors, justices of the peace and probate judges, and such jurisdiction not being in terms exclusive, and the general statute still being in force, the offense is still within the jurisdiction of this court, and may be prosecuted by indictment. Each of the motions made in this case is therefore overruled.

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## PARTIES.

[Hamilton Common Pleas, 1891.]

CORA E. SIEBERN V. WM. H. MEYER ET AL.

It is not a misjoinder to sue the sureties on a guardian's original bond and those on his additional bond in a single action.

On March 14, 1883, the defendant Meyer being appointed guardian of four minor heirs named Siebern, gave bond as such for \$8,000, with two of the defendants as sureties. One year later, the estate exceeding

the penalty, of that bond, he voluntarily gave an additional bond for \$15,000, with the other three defendants as sureties. On June 8, 1888, his account was filed and confirmed, showing \$12,037.03, due from him to his wards, no part of which has ever been paid over, the guardian having put it into his business from time to time and failed.

Plaintiff sued on the first bond, but on a query from this court whether both bonds could not have been sued, they have amended and join all the sureties on both bonds in the action, and a demurrer for misjoinder is filed.

BATES, J.

It seems not to be suggested but that both bonds are liable; that is, cover the same defalcations. They certainly largely overlap each other, and doubtless the second bond related back to the beginning of the trust in view of Rev. Stat., sec. 6261, which shows that the insufficiency of the amount of the original is one of the grounds for ordering additional bond; and also in view of the decisions in *Foster v. Wise*, 46 Ohio St., 20; *Case v. West*, 1 Ohio Dec. Re., 486, and *State v. Crooks*, 7 Ohio, 2 pt., 221. Can both be sued in one action?

At first glance it would not seem possible to join two separate contracts of different dates and amounts and two independent sets of obligors, each set bound by a promise distinct from the other.

On the other hand, the desirability of such a consolidation is apparent; If there were two actions, the questions would be the same in both, the same evidence to show the appointment of the guardian, the plaintiff's right to recover, the amount of the estate, the times, amounts and methods of the defalcations. And only should the execution of the bonds be denied would any difference arise in the proofs; a difference, however, which could arise between the signers of a single bond. Why then should the plaintiffs be compelled to prove all these facts twice in order to realize on a single liability, and get back the inheritance on which their support and education may depend? Would a creditor having distinct pledges for the same debt have to foreclose each separately?

Moreover, if the entire amount is collected in a suit on one of the bonds, the suffering sureties would have to sue to get contribution, and if part only were collected from the one bond, and the remainder from the other, these, and the suit for contribution would make three actions before final adjustment.

If judgment is got against the guardian alone, Rev. Stat., sec. 5371 permits the sureties on his bond to be made parties to the judgment; and if this means all his sureties on all the bonds, it would seem to follow by analogy that all can be sued in the first instance as well as those on one bond.

The Code, Rev. Stat., sec. 5006, allows any person to be made a defendant who claims an interest in the controversy adverse to the plaintiff, or is necessary to a complete settlement of a question. And sec. 5019 allows the joinder of contracts and also causes of action included in the same transaction or connected with the same subject; provided, sec. 5020, they do not require different places of trial and affect all the parties to the action.

It often occurs in a single bond, especially if its penalty is large, that the sureties will sign and qualify for different amounts thus variously limiting their respective liabilities; yet it would not be pretended that more than one action on one claim would be necessary thereon.

In the present case the different sureties undertook a common burden, and assumed the same responsibility, and as was said in *Ammons v. People*, 11 Ill., 6; *McGlothlin v. Wyatt*, 1 Lea (Tenn.) 717, 719; *Hammond v. Beasley*, 15 *Id.* 618, might just as well have signed the original bond.

The decisions of the courts of this country are unanimous in sustaining a joinder in cases such as ours; the following collection I think comprises about all there are, yet none of them are noticed in the text books on sureties or bonds, and it is to be still more regretted that none of these cases give a reason or explanation of such joinder or attempt to quadrate it with the rules of the code or the logic of the law. In *Powell v. Powell*, 48 Cal., 234, a joinder of all the sureties on an administrator's general bond, and on his bond for the sale of real estate, was held proper. I find that the California Code, sec. 383, permits the joinder of sureties liable on separate instruments, which injures this case as a precedent for our practice. In *Sutton v. Williams*, 77 Ga., 570, a joint suit on the old and new bond of a guardian, the new releasing the old, was sustained, and the plaintiffs held entitled to judgment for the entire defalcation against the new bond, and for a proper share of it against the old, leaving the sureties to settle *inter se* afterwards. See also *Alexander v. Mercer*, 7 Ga., 549, an equity suit against the sureties on successive bonds of an administrator for a discovery of the amount and times of the devastavit, in order to charge each set according to their respective liabilities. In *Allen v. State*, 61 Ind., 268, a joint suit against the guardian's original and additional bonds were sustained, the court saying either or both could be sued. A statute has now been passed authorizing such joinder in Indiana. (Laws of 1889, c. 127, p. 264.) In *Hutchcraft v. Shroat*, 1 T. B. Mon., 206, a guardian's original and additional bonds were jointly sued, and the judgment was reversed because of the omission of a surety; the court says there is no privity between the bonds, but that equity delights in equality, but gives no other justification for the joinder. This case was followed in *Frederick v. Moore*, 13 B. Mon., 470, *Boyd v. Gault*, 3 Bush., 644, and *Elbert v. Jacoby*, 8 Bush., 542, where on a guardian's general bond given in one court and his bond on selling real estate given in another court, all the sureties were held to be joint sureties as to their liability to the plaintiff. In *Lewis v. Gambs*, 6 Mo. App., 138, separate bonds of an administrator were held each liable for the total property, enforceable by a single action and judgment against all, on the ground that the statute that the court shall enforce its judgment against the administrator and his sureties does not contemplate several actions on the several bonds, for the evidence might vary, and varying sums be found due, which would be absurd. A *dictum* in *State v. Berning*, 74 Mo., 87, 98, is to the same effect. In *Loring v. Bacon*, 3 Cush., 465, a guardian's bond and his new bond, given because the estate exceeded the amount of the first, were both sued in one action and judgment against each for the penalty of the bond executed by each. The court said the defendants are co-sureties and liable to contribution, but the plaintiff has no concern in that, and that a guardian could file several bonds with a single surety on each, instead of one bond with joint sureties. In *Matthews v. Copeland*, 79 N. Ca., 493, an officer serving for two successive terms, gave a bond for each in the same amount and with the same sureties, and but one act constituted a breach of both, and a suit on both was held proper, the court saying the effect of the two was the same as if there had been but one bond for twice the time. In

Holeran v. School Dist., 10, Neb., 406, the bond of a school treasurer and his additional bond, were held properly joined, the court saying: "the demand against the sureties is indivisible;" but no cases are cited nor reasons given. In Tennessee Hospital v. Fuqua, 1 Lea. (Tenn.) 608; Collins v. Knight, 3 Tenn. Ch., 183, and State v. Parker, 8 Baxter, 495, several biennial renewal bonds of a guardian were held cumulative as to the ward, though liable *inter se* in their inverse order, and all the sureties bound all at once in a single action. In Love v. Keowne, 58 Tex., 191, on a bill in equity for discovery and account, it was held that the joinder of sureties on both bonds was not a misjoinder of parties or actions, and proper, not only, for the protection of the estate, but to adjust equities between the sureties themselves, and to avoid multiplicity of suits.

So in controversies between sureties it has been said that the sureties on additional bonds are co-sureties with those on the original in the proportion of the respective penalties in Stevens v. Tucker, 87 Ind., 109; Bond v. Armstrong, 88 *Id.*, 65; Jones v. Blanton, 6 Ired. Eq., 115; Jones v. Hays, 3 *Id.*, 502; Commonwealth v. Cox, 36 Pa. St., 442. And are to be regarded as parties to a common undertaking, Deering v. Earl of Winchelsea, 2 B. & P., 270, 273; s. c. 2 Cox, 318; Pendlebury v. Walker, 4 Y. & C., 424; Kethler v. Thompson, 13 Bush., 287; Enicks v. Powell, 2 Strobb. Eq., 196; Gleen v. Wallace, 4 *Id.*, 149, and it has also been said that the words "new bond," "additional bond," etc., mean merely more security, and that the sureties could just as well have signed the original bond, Ammons v. People, 11 Ill., 6; McGlothlin v. Wyatt, 1 Lea, 717, 719; Hammond v. People, 15 *Id.*, 618.

The unanimity of judicial opinion in favor of the joinder is thus apparent. Unfortunately the decisions nowhere give a reason or ground to justify the doctrine other than its convenience and justice, and thus leave their rulings to appear as a species of legislation. But the *ratio decidendi* must certainly be the following: the failure of the guardian finally to account is a single transaction under the code, Rev. Stat., sec. 5019, and as the rights and liabilities of each set of sureties depend for their extent on a correct ascertainment and adjustment of those of the other set, each is interested in the result of the litigation with the other; hence all the parties to the action are affected as required by the code, sec. 5020. In Cloon v. City Ins. Co., 1 Handy, 32, a person by having secured a steamboat from disaster had a claim for salvage against the several owners and insurers of the boat, not jointly, but proportionately against each; but Judge Gholson held they could all be joined in a single action by reason of the interest of each in correct adjudication as to the rest, and that the judgment could be several, against each in proportion to his interest.

The above reasons and authorities require me to disregard a contrary dictum in State v. Crooks, 7 Ohio, 2 pt., 221, and the demurrer, therefore, will be overruled.

Oliver B. Jones and J. D. Creed, for plaintiff.

D. S. Oliver, Chas. D. Phares and Bode & Spiegel, for defendants.

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## FIXTURES.

[Superior Court of Cincinnati, Special Term, 1891.]

## CENTRAL TRUST AND SAFE DEPOSIT CO. V. CINCINNATI GRAND HOTEL CO.

Chandeliers and gas brackets, if annexed to a building by its owner with the intention of making it a part of the building, become fixtures, and upon a sale of the realty by the owner, pass to the vendee as a part of the same.

SMITH, J., (orally.)

The original action was for the foreclosure of a mortgage on the Grand Hotel, in the city of Cincinnati, and, the mortgage having been foreclosed and the property sold, an order was made by this court directing the sheriff to deliver possession of the premises to the purchaser, which was accordingly done. Meanwhile the Grand Hotel Co., the defendant mortgagee, had made an assignment under the insolvent laws of the state to C. B. Warrington and Samuel Wolfstein, for the benefit of its creditors.

A controversy having arisen between the purchaser and said assignees as to whether the chandeliers, brackets and other gas fixtures passed to the purchaser as a part of the realty so purchased, or passed to the assignees as part of the personal estate of the Grand Hotel Co., upon proper motions filed in this court, these questions have been submitted to me for determination.

The impression which I had as to the law, and the application of it in this case, and that I retained during the argument, has only been confirmed by an examination of the authorities, together with the facts as they appear in evidence.

The law of fixtures is not as difficult and confused as it would appear to be from the apparent conflict in the decided cases. The apparent conflict of the decisions arises from the application of the law to the facts of each case. In *Teaff v. Hewitt*, 1 Ohio St., 511, it is said that the true criterion of fixtures in the united application of the following requisites, to-wit:

"1. Actual annexation to the realty, or something appurtenant thereto.

"2. Appropriation to the use, or purpose, of that part of the realty with which it is connected.

"3. The intention of the party making the annexation to make the article a permanent accession to the freehold."

And in *Brennar v. Whitaker et al.*, 15 Ohio St., 446, 451, the court says:

"A discussion of the general principles to be regarded in determining when additions of personal property become a part of the realty, is here deemed unnecessary. The only difficulty arises in the application of these principles to the solution of particular controversies as they arise; and whether an article has been annexed to the realty so as to become a permanent accession to it must, in a great degree, be determined by the circumstances of each particular case."

The principle is also laid down, as a general statement of the law, in 2 *Smith's Leading Cases*, 1455, where it is said: "'It is impossible,' says Chief Justice Morton, in the case of *Hubbell v. East Cambridge Sav-*



ings Bank, 132 Mass., 447, 'to lay down any precise test by which to determine whether machinery, or other articles, attached to, or used in a building, become part of the realty. It depends upon the relation of the parties, the character of the articles, their adaptation to, and the manner in which they are annexed to, or used in the building, and generally upon the circumstances of each case, as indicating the intention of the parties.'"

Now, that being the rule of law generally, the only question in this case, is, whether the fixtures, or the personal property which is claimed to be fixtures here, did become so by such annexation as the law requires. I have examined all the authorities which counsel for the assignees have cited to me, and I think probably they sustain the proposition that, generally speaking, in the absence of anything to the contrary, gas fixtures are not part of the realty. Most of the authorities which they cite are reviewed in the case cited by counsel for the purchaser—*Funk v. Brigaldi*, 4 Daly's Reports, 359; and there the distinct doctrine is announced that gas fixtures are no exception to the general rule of law, that where personal property is annexed with the intention of making it a part of the realty, it so becomes. In *Funk v. Brigaldi*, *supra*, page 360, it was held that the evidence satisfied the court that the chandeliers and brackets had been annexed by the vendor, originally, with the intention of making them part of the realty. And, after reviewing most of the authorities, though not all of them, which counsel for the assignees cited, the court in that case announced this as its conclusion:

"This case (by the affirmative extrinsic evidence uncontradicted by the plaintiff) conforms to the requirements, in this respect, accepted and adopted as law in the most recent decisions on the subject by the court of appeals, in *Potter v. Cromwell*, 40 N. Y., 297.

'First—Actual annexation to the realty, or something appurtenant thereto.

'Second—Application to the use, or purpose, to which that part of the realty with which it is connected is appropriated.

'Third—The intention of the party making the annexation to make a permanent accession thereof to the freehold.'

"It furnished evidence that the gas fixtures had been put in 'to enhance the general value of the estate, and not for its temporary enjoyment', which, being uncontradicted by the plaintiff, present as a witness on the trial, became conclusive on that point. I am of the opinion that the proof of plaintiff's statement tending to show the gas fixtures had been annexed by the owner for that purpose, was admissible; and that fact being shown affirmatively, they strictly became annexed to the freehold, within the principles of *Hill v. Cromwell*, and also *Vorhees v. McGinnis*, 48 N. Y., 278."

Now, the only question in this case is, whether the chandeliers and brackets did become so annexed, at the time of the construction of this building, that the owners of the property intended to make them a part of the property.

Upon that point the purchasers have introduced certain evidence. The assignees have introduced no evidence whatever. The evidence upon the part of the purchasers consists of the minutes of the vendor corporation during its organization as such and its ownership of the property, and also its ledger, in which is contained an account of all the expenses and items which went to make up the "construction account" of the building. It appears from the latter book that, under the head of

"construction account," are placed the gas fixtures, and that that account is afterwards carried over to the "real estate account;" circumstances tending to show, I think, that the gas fixtures were intended to be a part of the real estate. It is urged by the assignees, upon the other hand, that there are carried into this real estate account other items of expense which under no circumstances could be fixtures, and that, therefore, the mere fact that the fixture account was carried into the real estate account does not conclusively show that there was any intention upon the part of the corporation to make them part of the realty. While that contention is not without force, yet it may be said, I think, fairly, that the testimony of the latter is testimony to a certain extent tending to show that the intention of the corporation was to make them part of the realty; because the other items of expense to which counsel for the assignee refer were merely incidental expenditures of money as the work of construction progressed, and did not go towards purchasing either fixtures for the building or personal property to be used in it. But, if there is doubt about the soundness of that contention, that doubt seems to be removed by the lease which was made to the lessee, and which is found on page 172 of the Minute Book, in which the assignees' assignor, in describing the property, (which necessarily included these gas fixtures, for they were on it at the time, there being no dispute about that), said, "Together with the building or buildings thereon and all the privileges and appurtenances to the same belonging." And in the mortgage which they afterwards made, under which, in foreclosure proceedings, the purchaser claims title, and which is found on page 207 of the Minute Book, the same description is substantially used.

Now, to my mind, in the absence of any evidence submitted by the assignees of the corporation, these declarations by the Grand Hotel Company, taken in connection with the fact that the gas fixtures passed to and were used by the lessee, are conclusive evidence that the corporation did regard these chandeliers and brackets as a part of the realty, or part of the building; and, that being so, they were annexed necessarily, with the intention of making them part of the building, and are now a part of the same.

The other evidence which was submitted also tends to confirm me in that finding of fact. The testimony of Mr. Carson, who was in the gas fitting business at the time of the construction of the hotel, and who had the contract for the same, was that many of these chandeliers were designed especially for this building, and that, if removed, their value is comparatively insignificant, but remaining there they are of great value. It also appears that many of the rooms, especially the rotunda and dining-rooms, would have been practically useless in the evenings without large and appropriate chandeliers. It also appears that this hotel was constructed, not entirely as a money-making enterprise, but by public spirited citizens of Cincinnati, who, realizing the need of the city of Cincinnati to have a large, modern hotel, associated themselves together for the purpose of erecting one which should supply this want and be a credit to the city. They did not attempt to furnish and run the hotel, but, immediately upon its completion, leased the same to Gilmore & Co., who furnished the same and ran it as a hotel for several years.

As the Grand Hotel Co., therefore, had no intention of managing the hotel themselves, but intended only to lease it after having erected and completed the building for that purpose, it seems that this circumstance is one that is entitled to considerable weight in reaching the conclusion

which I have, that at the time they placed these fixtures in the building they intended that they should be a part of the building, as much so as the doors, or windows, or anything else that made the hotel a fit one for the purpose for which it was constructed.

My conclusion, from all the testimony, is, that these fixtures were annexed to the realty; that they were annexed to the realty with the intention of permanently being there a part of the realty; and, in the language of the court in 4 Daley, *supra*, "that the gas fixtures were put in to enhance the general value of the estate, and not for its temporary enjoyment, which, being uncontradicted by the plaintiff," (in this case the assignees) becomes "conclusive on that point." The assignees had abundant opportunity to produce the officers of the assignor corporation to prove that it was not the fact, and the absence of any such testimony only confirms me in the opinion that they are a part of the realty, and that they were placed there with that intention.

It might fairly be presumed, too, that if the Hotel Company regarded these gas fixtures as personal property, their tax return of "personal property" should include them. But no such tax return has been submitted to the court.

Counsel may prepare an entry in accordance with the principles I have announced.

Ramsey, Maxwell & Ramsey, for the purchasers.

Kramer & Kramer, and Samuel Wolfstein, for the assignees.

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## RELIGIOUS SOCIETIES.

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[Cuyahoga Common Pleas, 1891.]

A. M. SAMPSELL ET AL. V. J. J. ESCHER ET AL.

1. The pecuniary rights of a member of a religious association to any of its funds and property, so far as by its discipline, they depend upon his church relationship or status, depend upon the decision of the proper church judiciary, which decision is as conclusive, when assailed in the civil tribunals, as any other judgment.
2. If the judgment of the church judicatory comes in question in a civil court, the merits of the issues cannot be inquired into. Such judgments will not be affected by informalities, and can only be impeached for want of jurisdiction, or fraud working a patent and gross deprivation of justice.
3. A provision of the discipline, that "if a bishop be accused of immoral conduct, three of the elders are to meet and examine the bishop," does not require them to go to his home to personally meet him, when he has previously told them that he will not submit to examination by them.
4. Where the discipline directs that if the examining elders "are actually of the opinion that the bishop is guilty of the alleged crime," they shall call a trial conference, parol evidence is admissible to show that they were actually of such opinion, and where the proof shows they held such opinion, and they do call a trial conference, and in communicating with the trial conference say, "We were unanimously of the opinion that the said charges against the bishop are of so grave and serious a character, and sufficiently well founded to require a thorough investigation," this shows a compliance with this requirement of the discipline.
5. A discharge of the examining committee being plead as depriving the trial conference of jurisdiction, *held*,
  - (a) Such examination is merely preliminary to a trial, and a discharge thereon is not a bar to another examination, or to a trial, either by legal analogy or the practice of the church judicatories.

- (b) The evidence does not show the two sets of charges to be the same.
- (c) This is a defense which should have been plead at the trial conference, and which cannot be interposed now.
6. If members of the trial conference were disqualified, or prejudiced, they should have been challenged at the trial. If this is not done, and the failure so to do is not caused by fraud or violence, it is now too late to raise the objection in this hearing.
  7. Where a bishop is tried on three different charges, each charge composed of a number of different specifications, each setting forth with due certainty different occasions on which the defendant was guilty of the principal charge, a finding by the trial conference as follows: "1. That specifications 1 and 10, under charge 2d, are not sufficiently sustained by direct testimony. 2. That all the other specifications under charges 1, 2 and 3, are sufficiently sustained by the testimony presented to this conference to convict the bishop of conduct unbecoming a minister and bishop of the Evangelical Association," may or may not be sufficient in a court having power to directly review the proceedings, but the judgment pronounced thereon by a tribunal having jurisdiction of the person and subject-matter being sufficiently clear and certain, the civil courts cannot hold the judgment void.
  8. It would be a too rigorous adherence to the letter of the discipline to hold that an annual conference had not the right to refuse its chairmanship to a man who, having been elected bishop, was present at its meeting, but had been suspended, or was insane or intoxicated, or just before its meeting had been guilty of a crime of great moral turpitude, for which he had not yet been tried.
  9. A court has the power, even at a preliminary hearing, to grant a mandatory injunction where the facts are clearly proven, and the grant of the injunction was imperatively required to prevent irreparable injury, but it will not grant one for the payment of money merely.
  10. Although the court may be of the opinion that the editors of church papers have misconstrued the directions of the general conference in refusing to permit criticism of general conference, officers of boards, still, when they claim to be exercising their discretion as editors in good faith, it will not, on a preliminary hearing, make an order as to publications in these papers.
  11. A preliminary injunction will be granted to prevent the payment of the salaries of legally suspended bishops.

#### HAMILTON, J.

In October last, after a hearing of some days duration upon the petition, demurrers thereto, and many affidavits and exhibits, a restraining order was granted by this court to remain in force while the application for a temporary injunction was pending, and until such application had been heard and a decision thereon announced.

The hearing on application for temporary injunction was set for November 3, 1890: but when that time arrived, and for several weeks thereafter, the parties, one or both, were not ready to proceed, and finally it was not until some time in May last that, on application of plaintiffs' attorneys, this case was advanced on the docket and set for final hearing on the fifteenth of June last. This order was made with a view of making a final decree in the case, so far as this court could do so, and thus avoid a lengthy hearing on the application for a temporary injunction during the pendency of the action, and again, going over the same ground by the same court in another long trial with oral and documentary evidence to arrive at a final decree.

Accordingly, on the fifteenth of June the trial was commenced, and oral testimony for two or three days was taken. But the court soon became convinced that the property rights of the Evangelical Association of North America, and its members, so far as the same are involved in this controversy, depended largely on two questions, viz.:

1. Whether Bishops Escher and Bowman were legally examined, tried, and suspended.

2. Whether the Platte River, the Des Moines, the Oregon and the Illinois conferences as represented by and under the control of plaintiffs and their associates are in fact the true and legally constituted conferences for their respective districts, or whether said Platte River conference, though not opposed by any other organized conference in that district, is nevertheless entitled to any recognition as such—or whether the opposing conferences in the Oregon, Des Moines and Illinois districts, organized by and acting under the domination of defendants and their adherents, are the true conferences for those districts respectively, and entitled to be recognized as such.

The court was of the opinion that the ecclesiastical status of these bishops and of the members of these conferences, and the church relations of the organized conferences themselves to the Evangelical Association of North America was and are, primarily, questions to be adjudicated by the ecclesiastical tribunals of that association, and that any pecuniary right of a member of the association to or in any of its funds or property, so far as it is by the rules of discipline of the church made solely dependent upon his church relationship and status, must depend for its determination upon the decision of the proper church judicatories, and such adjudication I suppose to be final—in the absence of fraud or its equivalent, working a patent and gross deprivation of justice. I suppose this is so, not because there is anything sacred about the adjudication of a church tribunal more than that of a secular one, nor because, as has sometimes been said by distinguished jurists, that church tribunals are presumed to know more about ecclesiastical law and doctrines than civil courts, but rather because every member of the Association, when he joins it, agrees to come under and abide by the rules and regulations embodied in its discipline, and that discipline usually provides a tribunal to arbitrate and determine all matters of church polity, including any violation of the discipline, and the infliction and enforcement of the penalties therein prescribed.

But when church tribunals have heard these questions, and their findings have passed into judgment, it is still believed that where a property right of the citizen is involved in such judgment, the civil courts, when called upon to protect the citizen from an alleged invasion and injury to such property rights, may, and should inquire, if need be, into any question of alleged fraud or want of jurisdiction in the church judicatory pronouncing the judgment, to the same extent as though such judgment had been pronounced by a civil tribunal.

It is conceded by all the parties hereto that this court cannot, in this action, inquire into the merits of the issues that were tried by the trial conferences which pronounced sentences of suspension as to Bishops Escher and Bowman. If those sentences were not void for want of jurisdiction in the trial conferences, or for fraud or its equivalent, then for the purposes of this case at this time their findings and judgment must be held to be an adjudication of the question therein involved, and the sentences valid, and will so continue until modified, or annulled by the action of the general conference in October next, which conference alone has the power of again hearing the evidence, and passing final judgment thereon. The action of the trial conferences in terms suspended the bishops from office until the next general conference, which,

in the language of the Discipline "shall then determine the whole matter." The decree of suspension then was only temporary in its character, and could not be otherwise, and was operative only until the next meeting of the general conference, which conference must then act and determine the matter, whether an appeal in form be taken or not, and hence the decrees of suspension by the trial conferences, called by the examining elders, while final in the sense that it was complete so far as the exercise of the full powers conferred upon these tribunals were concerned, yet cannot be said to be final in the sense of a complete and permanent adjudication. In some respects the judicial acts of these trial conferences are analogous to the proceedings of our examining courts and those of grand juries; in other respects the analogy ceases. But in either case full force and effect must be given to their adjudications and orders when valid, while they continue to exist.

But this court being precluded from hearing any evidence upon the question whether these suspensions were rightfully or wrongfully made—except so far as it bears upon the questions of jurisdiction of the trial conferences, or fraud—was unwilling to make a final decree based upon the temporary suspension, even though valid, of the bishops by the trial conferences, especially in view of the fact that such basis of its decree might be wholly annihilated by the action of the general conference so soon as the early part of October next, by its determining that such suspensions ought never to have been made.

Entertaining these views, the court proceeded with the further hearing of the case with the view of determining whether a temporary injunction should be granted; and if granted, what the order should be.

The pleadings are so voluminous that only a summary can be made of the main points therein. The plaintiffs consist of certain members and preachers of the Evangelical Association of North America, and the incorporated conferences, known as the Des Moines, Oregon, Illinois and Platte River, who claim to sue for themselves and many thousands of other members of said Evangelical Association, whose property, it is alleged, is being diverted by defendants from the uses and purposes for which it was given, and who are denied the benefits and uses of the same as set forth in the petition.

The defendants are Bishops Escher and Bowman, the incorporated board of publication, the incorporated missionary society of said association, and sundry members and preachers comprising the editors of the publications of the association, the treasurer of said corporations, and its book agents, etc., and the petition avers that all the property and funds mentioned were acquired by monies contributed by plaintiffs and others for the purpose of being held in trust, to be administered impartially in accordance with the discipline of the Association, and for the benefit of all the members thereof, and for the propagation of the tenets of the church, and that all of said property is so held by defendants.

That said association comprises about 150,000 communicants, divided into twenty-five annual conferences, located in the different states of the Union, and in Canada, Germany, and Switzerland.

That these conferences have adopted and are subject to the rules and laws of the association, printed and set forth in their Book of Discipline, and that all members are subject to said rules and laws.

That among the agencies used by the denomination is a book and printing establishment at Cleveland, O., conducted and governed by said board of publication through the board, its executive committee, and

the book agents, and that they hold its funds and property in trust for the equal benefit of the whole association, and for distribution as provided in said discipline; and that its business produces large profits.

That among its publications are the newspapers: "Der Christliche Botschafter" and "The Evangelical Messenger," and many other periodicals therein named.

That the value of the property invested in the printing establishment, is about \$500,000; that the discipline provides that the profits arising from the establishment, after a sufficient capital to carry on the business is retained, shall yearly be divided among the annual conferences, one half thereof being first equally divided among the conferences in North America, the other half among the various annual conferences in proportion to the amount paid to the publishing house by each, said sum to be applied as directed by each annual conference to the support of the superannuated and worn out itinerant preachers thereof and their families, and the widows and orphans of such preachers.

The petition then states that the amount of certain of these profits, to be so divided, have been determined by the board of publication, and are due to the Platte River, Illinois, Des Moines and Oregon conferences.

The petition also avers that the discipline and form of government for the association provide for a general conference which has the power to elect bishops for the term of four years; that these bishops receive a salary of \$1,800 per year, and are authorized—except as therein stated—to preside at the annual conferences, and are *ex officio* members of said board of publication and of the executive committee of said missionary society; that a bishop, on charges being preferred against him, may be examined by three elders, and if they "are actually of the opinion that he is guilty of the alleged crime" they shall call not less than seven elders and preachers who are to constitute a trial conference "and if two-thirds of them find the bishop guilty of the charges they may suspend him from office until the next general conference," which general conference "shall then determine the whole matter," and that "none of our ministers thus excluded can in any wise perform official function."

That the general conference in October, 1887, elected defendants Escher and Bowman as two of its bishops for the term of four years; that defendants Escher & Bowman, with R. Dubs, also elected bishop of said association at that time, until their suspension as set forth, composed the executive committee of said board of publication chosen by said board under said discipline, and which under the board has the management and control of the book and printing establishment; that Escher and Bowman are now acting as such executive committee, claiming to have the right to do so, and will continue to so act, and will be permitted by the board to do so unless restrained by this court, notwithstanding that said Escher was on March 21, 1890, and said Bowman on March 7, 1890, duly suspended from office as bishop and preacher of said association until the next session of the general conference in October, 1891. The charges, notices and proceedings of the examining committees and trial conferences, with findings and judgments, are then set out, and it is averred that by reason thereof defendants Escher and Bowman were each suspended from performing the functions of bishop, and have neither of them any right to preside at annual conferences, or to act as *ex officio* members of said board of publication or as members of its executive committee, or as a member *ex officio* of the executive committee of the missionary board.

It is also averred that at the regularly appointed time and place, on April 10, 1890, the Illinois conference, and on March 13, 1890, the Platte River conference, met. In both instances defendant Escher appeared and insisted upon his right to participate in, and preside over said conferences, and was by the conferences not permitted to do so; by the Platte River conference because of the charges then pending against him, although no trial had then been had, and by the Illinois conference because at the time of its meeting the charges had not only been made, but the trial had and judgment of suspension pronounced against him; that both conferences elected presiding officers and transacted its business; that Bishop Escher with a small minority of the members of the Illinois conference seceded, and at another place organized an alleged conference, presided over by defendant Escher, claiming to act as bishop, and claimed to be the Illinois conference, and to transact business as such.

It is also averred that on April 3, 1890, the Des Moines conference met at the duly appointed time and place and refused to admit defendant Bowman to preside at its session for the reason that he had been tried upon charges and found guilty and suspended, whereupon Bowman, with a small minority, seceded and in another place organized, with defendant Bowman presiding and claiming to act as bishop, another conference and pretended to do business as such, claiming that it was the true and legal Des Moines conference.

That there was a like action by the Oregon conference for the same reasons, and a like secession by a small minority, meeting under the presidency of Bowman, and a like claim by the seceding minority that it was the legal Oregon conference.

It is charged that the secession meeting, presided over by Escher, was not the legal Illinois conference, and that those presided over by Bowman were not the lawful Des Moines or Oregon conferences, and their pretended acts as such were wholly void.

As to the missionary society, its president, secretaries and treasurer are named among the defendants, as well as the members of its board and executive committee, said committee comprising among its members the bishops; and it is averred that said society is supported and maintained by contributions of these plaintiffs and the other members of the Evangelical Association, and by bequests of members given for supporting missions at home and abroad, and has an endowment fund at Cleveland of \$75,000 for the purpose aforesaid; that it is required by the discipline that each annual conference where missions have been, or are to be established, shall appoint a mission committee who shall annually make an estimate of the probable cost of each mission under the supervision of its conference, and make report of such estimates to the general board of missions at its annual meeting by the representative of conference missionary society, in order that an appropriation for costs may be made; that said Illinois, Platte River, Des Moines and Oregon conferences have caused said estimates to be duly made and presented to the general board of missions, and said general board did, at its annual meeting in 1889, appropriate for each of said conferences a certain sum; that said Escher and Bowman, still claiming to be entitled to act as bishops, notwithstanding their suspension, and in consequence of being bishops to act as members of the executive committee of said general board of missions, and together with defendant Goesele pretending to be appointed by said seceding minority of the Illinois conference, and de-



defendant Yerger claiming to be appointed by the seceding minority of the Des Moines conference, are acting as such, and controlling the funds and distribution thereof of said society, and will so continue to do unless restrained by this court.

That the moneys so due to the annual conference of Illinois, Des Moines and Oregon from said printing house and missionary society either have been or will be paid to the treasurers of said seceding minorities, and the money so due the Platte River conference has been and will be withheld.

And it is averred that defendants are diverting the trust funds held by them from the objects and purposes of the trust, and are using it to pay the expenses of litigation against their party in the church, brought to enforce the performance of their trust obligations, and to pay the salaries of Escher and Bowman as bishops, though suspended, and in various other ways, and will so continue unless restrained.

Again, it is averred that by rules adopted by the general conference in 1863, and since in force, it is provided among other things "that our periodicals: The Botschafter and Messenger, shall publish all proceedings of the general and annual conferences, missionary society and board of publication and other official documents, when presented for publication, and shall not make abbreviations so as to alter the sense thereof." Also, that "all well written communications composed according to the meaning of the foregoing resolutions shall be treated impartially, and that in controversies of such nature each interested party shall be accorded the same rights, and be allowed to speak at least twice through the papers." That there is much controversy over the suspension of all three of the bishops, and many disputed questions arising therefrom; that all of the defendants belong to the party of Escher and Bowman, and have conspired together to use the trust property and powers vested in them for the benefit of the party in the church to which they adhere, and to the injury of the plaintiffs and those for whom they sue, by depriving them of the benefits of their membership in the association, and excluding them from the enjoyment of said property so vested in defendants for the equal and joint benefit of all; that defendants have and will refuse in administering their trust to recognize any conference or members who treat as valid such suspensions; have and do refuse to pay any money due to, or publish any proceedings of such conferences, or articles by such members, though giving place to the proceedings of said seceding conferences, and to articles attacking said members and their views.

Among other things, plaintiffs pray that said board of publication and said missionary board and their disbursing agents be ordered to pay the annual conferences named the amounts respectively appropriated to them; that Escher, Bowman, Goesele and Yerger be enjoined from acting as member of said boards, or executive committees, and said board of publication be enjoined from continuing to pay Escher or Bowman any part of their said salaries; that defendants be enjoined from refusing, to recognize, in the management and disbursement of said printing establishment and missionary society, the conferences and members who recognize such suspensions, and from refusing publication to official proceedings, and from denying to members—parties to the controversy—the right to be heard through said papers, and from treating with partiality written communications, and from using the property and instrumentalities entrusted to them for the benefit of the said party of Escher

and Bowman alone, but be ordered to use them for the benefit of the whole church, and with impartiality towards each part and member thereof.

By the various answers, joint and several, of the defendants it is admitted that the bishops were elected as averred in the petition; that the defendant corporations exist and hold the property in trust to be administered impartially under the discipline for the benefit of the whole Evangelical Association, and that the persons elected bishops become and are members of the board of publication and of executive committee of the missionary society, not, as is said by virtue of their episcopal office, but because of their election by the members of said corporations respectively, as required by law, and aver that both of said defendant bishops are life members (with the right to vote) in said missionary society, and also honorary members thereof with the right to participate in its transactions without the right of voting; that they became such members, not by virtue of being bishops, but by payment of moneys as provided by its constitution and laws; and that both of them are also members of said board of missions by virtue of their election as delegates to said board by certain conference societies.

They admit that by the action of the last general conference the defendant bishops were to receive \$1,800 per year, and say this amount is made up of voluntary collections wherever they preach, and if these are not enough to make up said amount, the deficiency is paid out of the proceeds of the book establishment.

Admit that under the discipline a bishop may be suspended from office, but deny that there is any provision therein by which a bishop so suspended cannot perform official functions, nor be acknowledged as bishop while so suspended.

They admit that if no bishop be present at an annual conference, such conference shall elect a chairman, but say that in no other event is it lawful under the discipline to elect its own chairman; that a bishop, if present, is a necessary part of every conference.

The defendants deny that either Escher or Bowman have been duly suspended from office as bishop or preacher of said association, and aver certain omissions and irregularities in the proceedings of the examining committee and trial conferences, setting up want of notice, failure to make requisite findings, and an entire want of jurisdiction in the pretended trial conferences over the persons of defendants, or the subject-matter; also, that before any of the alleged suspension proceedings were instituted, each of the defendant bishops had been examined and acquitted by a committee of elders, on charges preferred which were in substance identical with those on which they are said to have been suspended, and which acquittal, they say, is a bar to any subsequent examination or prosecution. That the trial conferences were fraudulently composed of their enemies, and prejudiced persons, and in Escher's case they say he was entitled to be examined and tried at his home in Chicago, Ill., instead of being examined and tried, as alleged, in his absence many hundred miles distant at Reading, Pa.; and in Bowman's case they say that if properly put on trial the finding or verdict is insufficient to sustain the judgment.

They aver that the Oregon conference was held under the presidency of Bowman, and deny that there was any secession therefrom.

They admit that Escher was excluded from presidency at a meeting of members of the Platte River conference, also that of the Illinois con-

ference; also that Bowman was so excluded from a meeting of members of the Des Moines conference, and aver that the only legal conferences were organized by them, known as the Illinois, Des Moines and Oregon conferences.

They deny that any funds or property of the association is being diverted, or has been, from its legitimate uses and purposes, or that there is any conspiracy among defendants for that purpose, but charge that the plaintiffs and their so-called party have been, and are, antagonizing the interests of the printing establishment and the association, and have established a corporation to that end in Harrisburg to publish periodicals and other literature there and at Chicago, in opposition to and competition with those of the association, and are issuing the same with the purpose and object of destroying the patronage and profits of said printing establishment.

They deny that any money has been, or will be, paid to the treasurer of seceding minorities of said conferences, and aver that the board of publication and the board of missions, in October, 1890, directed no money to be paid hereafter to any of said annual conferences until after the meeting of the general conference in October, 1891, and that said boards are amenable only to said general conference.

They admit that the book agents have, and will continue, to pay (unless restrained) to the bishops from the funds of the book establishment, any deficiency in the bishops' compensation.

They aver that in 1889 the board of missions appropriated to the Platte River conference \$1,500, to the Des Moines conference \$800, to the Oregon conference \$4,500, but say these sums are not due or payable to either until the sessions of the conferences in 1891, and that certain appropriations were made to them in October, 1890, due and payable in 1892, and say that defendants Goesele and Yerger, are the rightfully appointed delegates to the board of missions by the Illinois and Des Moines annual conferences.

They admit the adoption and binding force of the resolutions as to editors and publications, passed in 1863, and say they have been strictly complied with, and deny all averments of the petition not admitted.

The plaintiffs replying deny that it was necessary for the examining committee to personally meet Bishop Escher at his home or elsewhere, especially where he refuses to be examined anywhere, or that he be tried at his home, but that he can be tried at any place in the territorial jurisdiction of his bishopric, where he must necessarily go in the performance of his official functions,—notice, time and opportunity being given for his attendance, which they say was done in this case.

They deny that the defendant bishops were ever examined and acquitted as alleged by them, or that the charges were the same or in substance the same on which they were tried and found guilty, or that they were ever acquitted on any charge properly preferred, and if they were, acquittal by an examining committee of elders constitutes no bar to a subsequent examination and trial, especially when not set up as such at such trial; and they say if they were ever so examined and acquitted it was not done *bona fide*, but was so done by fraud and collusion.

They deny that the monies appropriated to said conferences in 1889 are not due and payable until 1891, and say that if said boards have directed that no monies be paid to these conferences until after the meeting of the general conference, and that no appropriations were made in 1890; that it was so done in pursuance and furtherance of the con-

spiracy to defraud and injure them as set up in the petition, and deny that the publishing house, established at Harrisburg, was incorporated for, or is used for any of the purposes alleged by defendants, and say that the periodicals issued by it, and that published at Chicago, came into existence solely because of the exclusion by defendants of plaintiffs and others from any hearing, official or otherwise, through the church periodicals; and plaintiffs deny generally all matters of defense not admitted.

I have thus stated as briefly as I might, the main issues made by the pleadings, and it is not my purpose, on this preliminary hearing, to argue, or cite authorities upon the questions involved, but only briefly to state the conclusions I have reached.

First—Having already stated how far the jurisdiction of the trial conferences, which pronounced the judgment and suspensions, could, in my opinion, be inquired into, I now inquire as to the defendants' objections:

1. That the examining committee investigated the charges against Bishop Escher at Reading, Pa., instead of doing so by personally meeting him at Chicago, Ill.
2. That from the report of the finding of that committee upon the charges against Escher, and as appears from the evidence, the committee were not "actually of the opinion that the bishop was guilty."
3. That the proof shows Escher had no notice of the place where his trial was to be held.
4. That the alleged prior examination and acquittal of both bishops, defendants herein, is a bar to any subsequent trial, whether set up as a defense at that trial or not.
5. Prejudice and fraud, actuating the members of the trial conference, which defendants say, resulted in reaching a verdict and judgment preconceived and determined upon before the hearing.
6. That the verdict or finding of the trial conference in Bishop Bowman's case is not responsive to the charges, and the judgment of suspension based thereon is void, because to sustain it the jurisdictional fact of a prior conviction is wanting.

In view of the fact that Bishop Escher notified the examining committee in his letter of February 10, 1890, that his prior examination had taken place before his receipt of committee's first letter, and that "this then ends our correspondence on this matter," and in his postscript adds: "for the reasons above stated I could not and would not submit to a second examination," it would seem unreasonable to require the committee to travel several hundred miles to personally meet and examine the bishop at his home in Chicago, which he has already told them they shall not do; and to so interpret the letter and spirit of the discipline as to hold that under it no examination of one of its bishops can be legally made whenever he refuses to permit it, would also be unreasonable.

Again, I can come to no other conclusion from the evidence than that Bishop Escher not only in fact was advised of the place as well as the time of his trial, but that the same was announced in his presence and to him and to others by the secretary of the committee at the Shamokin conference, and that he purposely abstained from attending the trial conference mainly because he denied its jurisdiction.

Again, notwithstanding the examining committee do not, in their declaration or report to the trial conference, say in the language of the discipline that they "are actually of the opinion that the bishop (Escher)

is guilty of the alleged crime," yet we have the affidavits of each of the committee that such was their opinion, that the ballot of each was "guilty," and they did call a trial conference which they were not authorized to do except on a finding of guilty. And further, it does not appear that any law of the church requires such declaration or report to be in writing; judging therefore from the written report which they did make and what they did, and from what they now testify about it, I cannot now say they were not "actually of the opinion that he was guilty" within the meaning and intent of the discipline, but must find the contrary to be true.

As to the plea in bar, namely former examination and acquittal, I think there is no sufficient evidence as to what the charges were upon which they were acquitted so as to advise the court as to whether they were the same as those upon which the subsequent examinations and trials were had or not; neither do I think, if they are assumed to be the same, that such examinations which are purely preliminary steps to a trial, can be held to be a good plea in bar, either in analogy to the practice in examining tribunals under the law of the state or by the practice or precedents in the judicatories of the Evangelical Association as shown by the evidence in this case. But if I am mistaken as to both of these propositions, I am yet quite sure that in this collateral inquiry the judgments of suspension cannot be invalidated by pleading as a bar a defense, which if it ever existed, should and ought to have been interposed to prevent the rendition of such a judgment.

As to disqualification and prejudice of the trial conferences, objections of that kind also should have been interposed at the time of such trial. If made, a reviewing court could doubtless take cognizance of them; but it is not perceived how this court, having no such power of review, can do so. If by fraud or violence a party should be prevented from making his defense, it is possible that a judgment might be attacked, wherever sought to be enforced, but however that may be, there is no evidence of such a fact here. As to the form of the verdict in Bishop Bowman's case, I should say that if the sufficiency of the findings of ecclesiastical tribunals are to be tested by their analogy to those of civil courts, then in my opinion a court, sitting with power to arrest the judgment, or review the proceedings on which the judgment in Bowman's case was founded, should set aside or reverse that judgment for want of sufficiency in the findings of the verdict. But if that test is not to be applied, and a more lenient rule is to obtain in reference to the form and sufficiency of the proceedings of church tribunals as some authorities maintain, then it might be upheld. But however that may be, there is no want of definiteness and certainty in the language used by the trial conference in their judgment or sentence on the verdict, viz.: "that, therefore, in accordance with the direction of our discipline, Bishop Thomas Bowman be suspended from office as bishop and preacher of the Evangelical Association until the session of the general conference in 1891." As this court cannot review that judgment, I have reached the conclusion that I must hold that no mere defect of form or irregularity of proceedings can be allowed, in this hearing, to invalidate the judgment of suspension. For the purposes of the present hearing I shall therefore hold that the conferences, pronouncing these judgments, had jurisdiction over the persons and subject-matter, and that the sentences of the bishops must be respected as valid until modified or annulled, or expire by their own limitation.

By the discipline it is made obligatory upon the board of publication and board of missions that these boards shall elect the bishops to certain positions thereon, but it is believed that their power to act in such positions depends directly, and in a legal sense, not upon the rules of the church requiring their election, but upon the act of the board in the exercise of their corporate powers, derived from the state, in electing them to such positions; and when performing the duties of such positions, I think it cannot be said that the bishops are in any sense acting as bishops, or performing episcopal functions of any kind. Their suspension, then, as bishops, cannot operate to prevent them from serving in corporate positions on these boards to which they have been duly elected.

As to Goesele and Yerger, representatives on the board of missions from the alleged seceding conferences, I shall not now undertake to determine whether they rightfully represent anybody; but in any order I may make I shall, as was done when the restraining order was heretofore granted, direct it against the action of these corporate bodies, rather than that of the separate actors of their individual members.

Under the discipline a bishop, when present, is to preside at all annual conferences. He is such presiding officer not because of any election as such by conference, but he takes the chair without election and solely because he is bishop, under a law of the church imposing that duty upon him as such bishop. But if he be suspended from performing all official functions of a bishop, how can he be said to be qualified to do an act the duty and right of doing which his office as bishop alone imposes upon him? It would seem a too rigorous adherence to the letter, rather than the spirit of the discipline to so interpret it, that if a man, elected as bishop, was present at the meeting of a conference, though suspended, or perchance insane, intoxicated, or just before that time guilty of a crime of great moral turpitude, he must nevertheless preside over its deliberations, and if not permitted to do so the acts of the conference would thereby be invalidated.

But in view of the order I propose to make I shall not pursue this inquiry further, for it is not my purpose, at this time, to determine as to which are the true conferences.

In reference to the power of the court on a preliminary hearing to allow a mandatory injunction, while it must be conceded that the authorities are not in harmony, it is believed that the great weight of authority is in favor of the existence of such right and power but only when the facts are clearly proven and its exercise imperatively required to prevent irreparable injury.

The court is asked, among other things, to enjoin the defendant corporations from refusing to pay over certain monies, said to be due the Platte River, Illinois, Des Moines and Oregon conferences on the ground that the proper execution of the trust and the urgent need of the ultimate beneficiaries demand it; but waiving for the present the question whether at the time of the commencement of this action, any, and if so, how much, was due, and whether the conferences so asking relief are the true conferences and entitled to claim and receive these monies, I have come to the conclusion that I ought not, in this preliminary hearing, to order the monies in controversy between the parties, to be paid over to one of them, especially so when the facts are in dispute, and the general conference, the ultimate arbiter between these parties, and one chosen by themselves, will, in a few weeks, undertake the task of adjusting their differences. Indeed, unless under special statutes, such as alimony pro-

ceedings, I know of no instance where any fact is disputed in which any court has, on preliminary hearing and by way of mandatory injunction ordered, either directly or indirectly, the payment of a sum of money by one of the parties to the other, thus giving the final relief sought before final hearing is had. I suppose the reason to be that the mere non-payment of money can seldom, if ever, make a case, requiring the immediate acting of a court of equity to prevent—in a legal sense—irreparable injury. No such imperative necessity appears by the evidence in this case.

The court is also asked to enjoin the defendants from refusing to publish official proceedings and written communications of members in the official periodicals of the church, and from refusing to comply with the resolutions of the general conference of 1863, in relation to publications therein. In view of the extended circulation of these periodicals, and of the great influence they must necessarily exert over the members of this denomination, it is important to the best interests of the association that all controversial matters be fairly treated, and both sides be given a hearing, so that members in the election of delegates, and the delegates themselves to the general conference may act advisedly as to the matter in dispute which the conference is to decide. By the resolutions the papers are to be edited "according to the Spirit of Holy Writ, and of our church discipline, and all subjects are to be treated from a christian standpoint throughout, and having in view the honor of God, and the welfare of mankind in their moral, religious and civil relations. The periodicals shall guard and advocate and defend the interests of the Evangelical Association, shall publish the proceedings of the conferences when officially presented, and shall publish all well written communications composed according to the meaning of the foregoing resolutions." This court hesitates about placing itself in a position where it will be called upon to exercise a censorship over these periodicals, and to determine whether the letter and spirit of these resolutions are being obeyed. Even the protecting care of courts of equity over trusts ought not to require that secular tribunals adjudicate spiritual things; much is left to the discretion of the editors, and it is insisted that they have been, and are, exercising that discretion in good faith under the direction and with the approval of the board of publication. Whether this is all so or not, I believe the editors mistake their duties when they undertake to reject manuscripts simply because, though in temperate and appropriate language, they criticise the official acts of church officers or the conference. Infallibility in any one is not a tenet of this church. If, however, any order were made it could only be in the most general terms, and from its very want of definiteness would, I fear, lead to endless contest in this christian warfare over alleged violations of such order, and this court might, from time to time, be called upon to decide whether the subjects discussed in any rejected manuscript were treated from a "christian standpoint throughout," were "well written" and "guarded the interests of the Evangelical Association," and what were the motives and reasons which actuated the editor in the rejection; whether the exercise of an honest discretion and judgment, or otherwise. Besides, until the court is ready to determine which of the contending conferences are entitled to recognition, it is manifest no order can be made as to the publication of their official proceedings. I have therefore concluded to make no order at this time as to publications.

I am also asked to restrain the further payments of salaries to the suspended bishops. It is conceded in the pleadings that defendants, through the book agents, will continue to pay any deficiency in these salaries, unless restrained from so doing, because they say their contract obligations require them so to do, for the bishops are still such, even though they be suspended. On the other hand it is urged that the bishops must be held to have contracted to conduct themselves as such bishops in accordance with the discipline and rules of the church, and subject to suspension for misconduct as therein provided, and that having been properly suspended they stand convicted and adjudged of violating their contract, and being thereby prevented from performing their official functions, by reason of their own wrong, they are not entitled to compensation while so suspended. On this subject my attention has been called to but one case, viz.: 8 Cowen, p. 457, and in that, by a divided court, the views of the plaintiffs are sustained, and it is held that a preacher, when duly suspended, has not performed a condition precedent, viz.: service, which condition is implied by his contract, and upon which his compensation depends, and although the facts in the case at bar are not entirely analogous to those reported in Cowen, and the decision itself possibly open to doubt as to its correctness, yet for the purpose of preserving these trust funds intact until the general conference can pass upon the validity of these suspensions, and until the further order of this court, an injunction will be granted, enjoining the book agents and the board of publication and its officers and agents from paying such deficiency in the salary or compensation of each of said bishops.

By the restraining order heretofore allowed in this case, the defendants and each of them were enjoined "in any allotment made by either of said boards, of funds arising from the profits of said book establishment or funds belonging to said Missionary Society, from refusing to recognize any of the twenty-three conferences of the Evangelical Association of North America, and said boards were enjoined from determining in said allotment who constitute any of the following annual conferences, viz.: The Illinois, the Des Moines, the Platte River and the Oregon, and from refusing to recognize in the management and disbursement of said book establishment any member of said board, elected at the last general conference, and such of said defendants as are or may be charged with disbursing said funds are hereby enjoined from refusing to disburse to any one who may be entitled to the same, any of the funds arising from said profits or from said missionary fund, on account of his or their recognition of the alleged suspension of Bishops Escher and Bowman, and further that no part of the money allotted to the Platte River, the Des Moines, the Illinois or the Oregon annual conferences be paid to any person or persons until a further order of this court. That order so far as recited is now renewed, and a temporary injunction allowed for that purpose, together with an order enjoining the payment of said deficiency in the salary of the bishops as above indicated.

An injunction bond in the sum of \$500 to be given by plaintiffs according to law.

J. E. Ingersoll and White, Johnson & McCaslin, for plaintiffs.

Boynton, Hale & Horr, C. E. Pennewell, G. M. Barber and Judd, Ritchie & Esher, for defendants.



## STREET RAILWAYS.

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[Lucas Probate Court, 1891.]

**\*THE TOLEDO ELECTRIC STREET RAILWAY COMPANY V. THE TOLEDO CONSOLIDATED STREET RAILWAY COMPANY ET AL.**

In proceeding by one street railway company to condemn the right to use the street railway tracks laid in the streets of the city of Toledo by another street railway company. Held:

1. Proof of the corporate existence of plaintiff is made out by placing in evidence its articles of incorporation, its certificate of subscription to the capital stock, and the record book of the company, showing the election of officers, etc.
2. The right of the plaintiff to make the appropriation, is shown by establishing that the appropriation is for a public and not merely a private purpose.
3. The inability of the parties to agree as to the compensation for the property taken is established by proof of bona fide attempts to reach a settlement, and not merely colorable, formal efforts; no special or set forms of words is necessary, and acts showing a desire and effort to agree may be as convincing as speech itself.
4. The necessity for the appropriation by one street railway company of the joint and equal use with another company of street railway tracks laid in a public street in Toledo, by the other street railway company will not be defeated by proof that no physical impossibility exists to prevent the plaintiff company from operating a slightly different route. The discretion conferred upon council to first pass upon the necessity and need for a street railway is not to be disregarded by the court.
5. Seniority of rights in a street confers no priority of right, and a junior street railway company is entitled to take a joint and equal use of tracks with a senior company.
6. Proof of a street being a business center where the people largely seek to go, will establish the necessity for such appropriation. And the people of one portion of the city will not be given a greater opportunity to go there by street railway than those of another portion.
7. The police powers of the city are ample to regulate the joint use of the tracks by the different companies.

**MILLARD, J.**

This is a proceeding by plaintiff street railway company to condemn the right to use equally and jointly with defendant certain street railway tracks laid in the streets of Toledo, under sec. 3440 R. S., as amended April 11, 1890, 87 O. L., 178.

After three months of motions, arguments, consideration and evidence, we are at last at the point where the court is called upon to decide the four jurisdictional questions by it to be determined under sec. 6420 of the Rev Stat. of Ohio. These are:

1. The existence of the corporation, making the application.
  2. The right to make the appropriation.
  3. Its inability to agree with the owner of the property.
  4. The necessity for the appropriation.
- I. In proof of its existence plaintiff introduced its articles of incorporation, or charter, the certificate of subscription of capital stock, and the record book of plaintiff company sufficiently identified, showing its organization by election of officers. And also showed the fact to be that they have since such incorporation and organization exercised their franchise conferred by the state. This makes sufficient proof of the existence of the corporation for the purposes of this proceeding.

II. The right of plaintiff to make the appropriation.

In argument this was treated as largely of the same nature as and closely blended with the fourth question, or the necessity for the appropriation. It is

\*This judgment was affirmed by the circuit court; opinion 3 Circ. Dec., 493. See 50 O. S., 603 on question of compensation.

true that the right to appropriate depends largely on the existence of all and each of the other three grounds, but the legislature had in view some distinct and separate idea when making this requirement a special and distinct question. This, I take it, was that the corporation must be created and exist for a purpose public in its nature, and for the public accommodation and advantage. The state may employ such agencies as it thinks best calculated to promote the interest of the general public, and when it has authorized a corporation, from the existence and operation of which the people at large are to derive a benefit and in the carrying on of which people generally are interested, or from which they may derive a benefit, that corporation has the right to condemn such private property, or appropriate it, as it may need for the purpose of its creation. In other words, it must be a public and not a private need to authorize the exercise of the power of eminent domain. Plaintiff having been created for a purpose beneficial to the public, and seeking to exercise the power of eminent domain for the public good, it is entitled to make the appropriation.

### III. The inability to agree.

On this question much testimony was offered, and of a conflicting character. David Robison, Jr., on behalf of plaintiff, testified that he had tried to arrange with defendant for the use of the property described in plaintiff's application. That at the time of the trial of the Adams street case he had a talk with Mr. Hale of the consolidated system and tried to make an agreement by which the electric cars of the plaintiff could be run over these tracks. That at the request of Mr. Hale, he and E. D. Potter, Jr., went to Chicago to agree with defendant, if possible, for such use. That this trip to Chicago was made after the Adams street condemnation verdict was rendered; that the streets under consideration, in the conference with Ream and Hale, in Chicago, were Summit, Monroe, Perry street, bridge, Ottawa street and Broadway; that at that conference Mr. Ream said that the first thing that they wanted to do was to buy the poles and wires of The Toledo Electric Street Railway Company; that he refused to sell, and that after some talk Mr. Ream offered to let them run cars over the parts of streets desired at a rental of \$3.00 per car per day; that he figured up the price thus proposed, and said to the gentlemen that the price was utterly ruinous and could not be paid; that he then took the Adams street award as a basis for computation, and, for the length of track now desired, offered to pay such a sum of money as would be equivalent to six per cent. on the value of the track used, and that all his talk was for equal use or rights.

E. D. Potter, Jr., testified, that he was present at the Chicago interview; that Mr. Ream and Mr. Robison did most of the talking, and that Mr. Hale and himself only talked occasionally; that Mr. Ream proposed a price of \$3.00 per car, but that coupled with the proposition was a condition that The Consolidated Company should own the poles, wires, overhead connections, etc., of the electric road; that he inquired of Ream and Hale whether they would entertain a proposition of \$1.00 per car per day, for not less than 15 cars, and that they refused to entertain such an offer. Mr. Potter said that joint and equal use of tracks was considered, and that his recollection was that Mr. Robison proposed to Mr. Ream and Mr. Hale to pay a sum of money, in cash, which would be on a basis of the reward, of the jury in the Adams street case. He further testified that he knew that Robison submitted a proposition to pay them a sum of money based on the Adams street award and that Mr. Hale was very warm over the thing, and warm at the court. He said in concluding his cross-examination, "Our object in going there was to adjust the whole difficulty. I think that the matter was discussed in almost every phase, car rent, trackage, as to who should control cars, etc., all through, and my recollection is that Mr. Robison's offer was a sum on the basis of the Adams street award." Mr. Robison also testified that, approximately speaking, he had been to the office of The Consolidated Company on Summit street twenty times to try and arrange for this use. The history of the attempted arbitration and of interviews, between Mr. Lang and Mr. Robison need not now be recited. Mr. Hale in his testimony said, very positively, that no offer was ever made by plaintiff to agree on compensation for this property now desired by plaintiff. Mr. Ream was equally clear and positive on this point. Mr. Lang, as the court recollects, was also of the same opinion. I believe that both sides desire to be equally truthful and honest in their evidence, and there must be a shade of meaning or an interpretation of words on the one side not used or viewed in the same sense by the other side, to warrant these conflicting statements from gentlemen of such high character. On this question of the inability of the parties to agree, I think that Judge Campbell in the case of *The Grand Rapids and Indiana Railroad Company v. Hubert Weiden et al.*, reported in 70 Mich., 390, lays

down the true rule. He says, "A railroad seeking to condemn land can not truly aver inability to agree with the owner, without an effort, by some one authorized to bind it, to induce him to accept an offer made honestly, and not merely formal or colorable. The disability is a matter of substance, and of form." Was such offer honestly made to induce an agreement? While the testimony is conflicting, it does not seem reasonable to me that Mr. Robison and Mr. Potter should have gone to Chicago, as they say, for the purpose of arranging this matter, and then did nothing looking to such agreement when there. No special or set form of words is necessary, in my judgment, to be used in order to establish this inability, but that acts showing a desire to agree and an effort in that direction, may be quite as convincing as speech. I think, that all things considered, I am warranted in holding that plaintiff has shown, in substance, the inability to agree; if not in a positive and unquestioned phrase, as might have been used, yet sufficiently so to show an inability to agree, which warrants the assertion thereof in plaintiff's petition.

IV. The necessity for the appropriation is the last question for consideration.

This case differs somewhat from ordinary appropriation proceedings. Both plaintiff and defendant in this action are creatures of the law, and by the terms of the constitution of Ohio, are subject to have their rights limited or changed, and in many respects do not get such vested rights as natural persons may acquire; and as to the streets of a municipality, can get no exclusive rights therein.

In discussing this question of necessity, the defendant raised several grounds of objection. One of these was, that plaintiff could just as well take another route, and sufficiently well accommodate such part of the public as might pass over its lines; and suggested Huron street to Jefferson, on either side of Jefferson street, and then to Summit street, for all which the city council has not granted any right. It is, perhaps, a sufficient answer to this proposition to read sec. 2501 of the Rev. Stat., which is as follows: "No corporation, individual or individuals shall perform any work in the construction of the street railroad, until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed, and operated, and the streets and alleys which shall be used and occupied therefor. The legislature having exercised this discretion and placed with the city council the right and power to determine the route which it adjudges will best subserve the public good, it does not seem to me that this court has any authority to revise the opinion of the council or its proper exercise of the discretion so given it by the legislature. The arguments on this point should have been made to that body deciding the proper route for this system of cars. Another ground urged was, that if the court found any necessity existed for plaintiff to have any part of the property of the defendant, it should be limited to such part only as would enable it to reasonably well accommodate its patrons. That if by going over Ontario street to Jefferson street, and thence to Summit the plaintiff can accommodate the public reasonably well, no necessity exists to appropriate any of defendant's property; and that if by taking defendant's tracks from Jefferson to Monroe streets, it can, in like manner, serve its patrons, that it should not be allowed to appropriate that part between Adams and Jefferson streets. This, however, appears to me as only another form of the same proposition last discussed, and was a matter to be addressed to the discretion of the city council and not of this court. The council can only give a corporation a right to use the streets designated in its contract ordinance, when such use is for the public good or convenience. The right and duty of the council under section 2501 is to determine and declare the streets to be used which will serve that interest, and its finding is, that by the use of the designated streets in the ordinance set forth, the public convenience will be best subserved. This finding of the council, as I said on a former occasion, is not altogether the statutory necessity to be found by this court, but is one that the council must find to exist to warrant it in authorizing parties to occupy certain streets of the city with their structures. Evidence has been offered by the plaintiff to show a necessity, on its part, to have an equal and joint use of tracks with defendant, and by defendant that such use would be destructive to its property. Defendant shows that a car now passes between Adams and Monroe streets, in either direction, every minute and a half; that its transfer depot is situated near Adams street and Summit street, at which point passengers change from one car to another, and that they are now so crowded as to interfere with the prompt service which the public interest demands. They also show by evidence that 60 per cent. of the riding population go upon Summit street; that a street railroad gathers passengers 1,500 to 2,000 feet from its tracks in each direction at right angles, and

that if the road passes within 1,500 to 2,000 feet of the point to which they wish to ride, that is an accommodation of the public. Mr. Lang, in his testimony, gives above evidence, and says that the above distance is about three squares, and that street cars will get that traffic whether they have competition or not; and adds, "unless, of course, the road runs immediately past a person's door, because that accommodates them a little better." Mr. Hale gave much the same evidence; and Seagrave thought it would not be wise to put more cars on Summit street; that concentration of facilities was a good thing for the public until it reached a crowding point, and that there was danger that we would soon be at that point on Summit street, without admitting a new line of street cars. Mr. Ream, Mr. Hale, and Mr. Lang, regarded a joint and equal use as destructive of their property. On this point I can only say what I said before. The effect which the appropriation may have in making or unmaking the value of the stock of either company, or on the income of the plaintiff or defendant, can not be considered at this time in this proceeding. The law contemplates that the jury will make such an award as will cover all loss or damages occasioned to defendant by the appropriation. As to the accommodation of the public by carrying them within three or four blocks of the point which they wish to reach, I think that while they would be somewhat accommodated, if living a considerable distance away, that I must agree with Mr. Lang, when he suggests that they will be better accommodated if cars pass the point they wish to reach.

The evidence of David Robison, Jr., was that it would not be adequate for plaintiff to take less than an equal and joint interest with defendant in the property sought, and that such use would not be destructive of defendant's property.

Evidence was introduced, of other street railroad men, to show that such use would not necessarily interfere, to any unreasonable degree, with defendant's use of tracks. As suggested in the commencement of this consideration, as between the parties, neither has any vested right or interest not subject to be disturbed when public interest so requires. Seniority in right in the streets does not avail or withdraw such property from the right of a junior company to acquire a like right therein, or to prevent an appropriation, under secs. 3438 and 3440, Rev. Stat., of such property as is needed to make available to the new company the full franchise granted it by the state. As is said in case of Railway Co. v. Railway Co., 30 Ohio St., 604, "Such appropriation to be used on equal and common terms, does operate as a subversion or destruction of the former public use. It is only an increased burden upon its use imposed for public purposes." While this decision was rendered in a railway crossing case, regulated by statute, its reasoning, it seems to me, applies equally in the present case, authorized as it is by special statute.

The evidence of all parties agree that, at the present time, Summit street is the center of attraction and the objective point of nearly all street railway travel in Toledo; that the plaintiff has constructed about 14 miles of street railway, reaching out in many directions; that its Huron street and Asylum line is intended as one line, and to have its cars operated from North Toledo to the Asylum without change and for a single fare; that at present passengers desiring to make this trip must walk from Broadway and Morris street to the corner of Adams and Summit streets—something like a half mile—or pay additional fare to another road; and the same is true of other parts of its route; and, as I said on a former occasion, the evidence also shows that all boat landings, business and pleasure centers and connections with the Union depot are near to or along the parts of streets which plaintiff now seeks, by this proceeding, to reach. That all the principal dry good stores and general trading points for the families of the city are along Summit street, between Adams and Monroe streets, or near thereto and that within this limit is some place which nearly every family of Toledo desires to reach frequently. If this be true, the council certainly was warranted in finding that public convenience would be subserved by placing plaintiff's route along, and as near to these points of universal resort as possible. This certainly would be so, unless the inconvenience and delay to the consolidated system would be so much as to overcome the advantages to the patrons of the other road; and to hold this, I should have to hold that a portion of our citizens have a greater right in some of our streets than others, and this I am not prepared to do. The plaintiff could undoubtedly be accommodated on other streets, but its patrons could not, as I see it, from the evidence adduced. Lewis on Eminent Domain, sec. 393, says in reference to this class of cases. "To warrant the denial of the application, it should appear that what is sought is clearly an abuse of power on the part of the petitioner. If the petitioner is acting in good faith and shows a reasonable necessity for the condemnation, in view of its present and future business, the ap-

plication should be granted." Were I to hold, that because the defendant corporation is now running as many cars over these particular portions of tracks as they can easily manage, or because the growth of their own traffic will soon make it desirable to have sole control of this territory, therefore the plaintiff should not be allowed on these parts of streets, it would be, in effect, to hold the defendant company has what the law says it can not have, an exclusive right to use the streets; and that this company, and not the common council, have the custody and control of these streets and can designate the route to be occupied by competing street car lines. As I do not feel warranted in making this decision, I must hold that public necessity exists to warrant this proceeding.

Upon the subject of the trouble and difficulty that may arise by reason of having rival and competitive companies operating street cars over the same tracks, I believe that, through the police powers of the common council and the general laws of Ohio, by which all species of property and interests therein may be regulated and controlled, no harm will come to any one, after the jury has once determined the amount of damages which defendant will sustain, by having plaintiff and defendant both on these streets with equal rights therein, and that the general public will derive a very perceptible advantage from such use and occupation. Per consequence on all four of the jurisdictional questions I hold for the plaintiff.

Frank H. Hurd, Orville S. Brumback and John F. Kumler, for plaintiff.  
Baker, Smith & Baker, Doyle, and Scott & Lewis, for defendant.

## ASSESSMENT INSURANCE.

183

[Hamilton Common Pleas, 1891.]

### \*ISAAC GRAVESON V. CINCINNATI LIFE ASSN.

Where a policy holder in a mutual life insurance association upon the assessment plan has by his neglect forfeited his membership, and where by the terms of the policy he could be restored by furnishing a new and satisfactory application and medical examination according to the forms of the association, *held*,

1. That upon the policy holder's furnishing the requisite application and medical examination, a court of equity has power to enforce his restoration to membership.
2. That equity will not under its general powers afford relief against a forfeiture caused by the member's neglect.
3. It seems, where special provisions are made by the parties for relief in case of forfeiture, that equity will follow these provisions only, and grant no other relief than thus specially provided.
4. Where the description of the thing to be performed must absolutely, clearly and necessarily be satisfactory to the mind of a designated person, and furnishes no other criterion of performance, then this contract makes the mind of that person the sole test of performance; and in such case if the performance is not satisfactory to his mind, equity will not afford relief against such person's conclusions arrived at in good faith.

SHRODER, J. (oral).

This is an action in equity for a decree which would in effect restore the plaintiff to his membership in the defendant company. The defendant is a mutual life insurance association upon the assessment plan. On April 14, 1881, the plaintiff, being then fifty-five years of age, was accepted as a member. A policy insuring his life in the sum of five thousand dollars, was issued to him, thereby constituting the contract between the parties creating the respective rights and obligations involved in this controversy. By express agreement certain by-laws of

\* For decision of the circuit court on appeal of this case, see 6 Circ. Dec., 327.

the association were made part of the policy, of which the following, article 15, is relied on by the plaintiff as the foundation of his claim.

Article 15 of the by-laws, caption "Forfeiture," reads:

"Any member failing to pay any assessment within fifteen days after notice has been duly served or sent him, shall forfeit his membership and all benefits therefrom. Any member having forfeited his membership by failing to pay any assessment within fifteen days after notice has been served or sent, may be restored to membership, he being alive, by paying all arrearages thirty days after sending the notice.

"Any member having forfeited his membership by failing to pay his assessment, who has also failed to pay, within thirty days after serving or sending notice, may be restored at any time thereafter by furnishing a new and satisfactory application and medical examination, according to the forms of the association, and paying all arrearages."

At the time of his acceptance as a member of the company the plaintiff gave to it his business place for his postoffice address, where it was to send his assessment notices. He entrusted the receiving of the assessments and their payment entirely to his bookkeeper who had been in his employ for many years. It was the plaintiff's habit to make occasional inspection and examination of his cash books and individual receipts. As to the cash books, however, he confined his attention to entries of large sums.

It appears that on March, 1890, an assessment was made by the defendant, and a notice duly sent to plaintiff at his given address. The bookkeeper received it, but failed to pay the assessment within the thirty days after its service. The day after the delinquency he attempted to make the payment but without success, the company refusing to accept it, upon the stated reason that the membership had been forfeited and cancelled in accordance with the policy and the by-laws. Of all this the plaintiff was wholly in ignorance and continued so until early in November, 1890. At this latter date his bookkeeper absconded and has not been heard of since. At this juncture the plaintiff made an examination of his individual accounts and papers. According to his testimony he had expected, from the course of the defendant's business with him, under his policy, to find among his papers a larger number of these assessment receipts than were actually there. This disclosure led to his making inquiries of the company, and to his discovering that his membership had in March previous been forfeited under article 15. He then availed himself of his rights under this article, and presented a new application and medical examination to the defendant's medical director under its constitution and by-laws. The medical director rejected it as not being satisfactory, and thereupon the defendant refused to recognize him as restored to membership. This action was then commenced.

Upon a demurrer to the petition, the court held that a court of equity would take jurisdiction to grant relief in actions of this character. The holding was that where the arrearages and new and satisfactory applications and medical examination had been tendered and furnished according to the prescribed form, and had been refused on the ground that the membership had been forfeited, and where it is necessary for intelligent action for the parties to know at once what their respective rights and obligations are, the court has jurisdiction in equity to determine the rights of the parties under the by-laws, and, if the membership therein ought to be restored, to compel the same to be done. 73 N. Y., 524; 50 N. Y., 610; Insurance Co. v. Tullidge, 120 N. Y., 496; 39 O. S., 240.

An answer and reply having been filed, at the hearing upon the issues presented by the completed pleadings the plaintiff contended that he was entitled to equitable relief upon two grounds :

First—That his default of payment of the March assessment was due to the defalcation of a trusted employee, and that this ought to be regarded as such an accident as would authorize the court to relieve him against its consequent forfeiture.

Second—That by his contract with the defendant, article 15, his membership was restored upon his furnishing a new and satisfactory application and medical examination, and that he had done so.

The defendant took issue with him upon both propositions. As to the latter, the plaintiff claimed that the condition of satisfaction as to the medical examination was fulfilled when the examination was one which would be satisfactory to a reasonable mind. The defendant claimed that it required the examination to be satisfactory to the medical director of the company.

In this connection, it may be said at this point that the plaintiff, in his pleadings, has wholly omitted any charge against the integrity of the medical director's judgment or decision, and at the trial in open court his counsel disavowed making any impeachment or any issue with the medical director in that respect. These omissions and disclaimers eliminate from this inquiry all question as to whether or not the decision of the medical director was anything but in good faith.

As to the first point, the plaintiff bases his claim to relief upon what he asserts was an accident ; that is, the defalcation of a bookkeeper in whose integrity he had a right to confide. There is no evidence of any fraud on the part of his bookkeeper, in March, 1890. From all indications the bookkeeper intended to pay that assessment, but was too tardy. He was, to this company, the agent of the plaintiff, and his tardiness could not be viewed otherwise than as negligence of the plaintiff. There was no fraud or accident which prevented the payment of the March assessment. The forfeiture was at that time incurred by his carelessness ; for which the plaintiff must be held answerable. There is no question that it was the defendant's duty to its members at the time to declare the membership cancelled. If the delinquency of the bookkeeper had been discovered in March, the plaintiff could not have urged his bookkeeper's neglect as a ground for relief against the forfeiture. He would have been remanded to his legal rights under article 15, for the restoration to his membership. The delay until November in making his discovery, assuming that it was the result of his bookkeeper's fraudulent concealment, did not operate to his prejudice. Had this disclosure been made even in March he would not have been in a more advantageous position. It follows that the plaintiff can not take anything by any supposed suppression on the part of the bookkeeper, and that the forfeiture of his policy was wholly due to the neglect of his agent.

Were this reasoning unsound, the court would not be able to see anything but carelessness on his part in suffering the period from March to November to elapse without making more of an inspection of his private papers and his cash account than what he in fact did make. Had he given to them but ordinarily careful attention, bearing in mind his statement in court of the number of receipts which he expected to find, he would have been led to make, at a very early date, the investigation which he subsequently undertook. He now claims that it is his bookkeeper's suppression or concealment of dishonesty which constituted the

accident or surprise; but this claim is completely answered by the proof that his want of care contributed to the result which he now ascribes to this constructive accident or surprise. But the solution of this question does not require the last mentioned consideration. Plaintiff suffered no prejudice by delay in the discovery, however such delay was caused. And the forfeiture, being a consequence of neglect and not of any accident or surprise, could not be set aside by a court of equity. *Pomeroy Equity Jur.*, pp. 452-856.

In addition to what has already been said, it is doubtful whether a court of equity has power to grant relief against forfeiture where the parties themselves by their contract, as in this case, under article 15, especially make provision for relief.

Again, it has been held that where, in an association of a number of members, the enforcement of payments is aided by a special by-law, or by a contract providing for a forfeiture in case of default, a court of equity will not grant relief against a forfeiture so incurred. Where a member's stock was forfeited by reason of his default in paying an assessment, *Judge Sharswood, (Germantown Passenger Ry. Co. v. Fittler, 60 Pa. St., 131)*, held that equity will not relieve against such a forfeiture, and that that had been the settled doctrine of the courts ever since *Sparks v. Liverpool Water Works, 18 Ves., 428*. He said: "The reasoning of Sir William Grant in that case admits of no answer. He considered the charter as a contract between the subscribers. And here he quotes the words of Sir William Grant, as follows: 'The parties might contract upon any terms they thought fit, and might mince terms as arbitrarily as they pleased. It is essential to such transactions.' This struck me as not like the case of individuals. If this species of equity is open to parties engaged in these undertakings they could not be carried on. It is essential that the money should be paid, and that they should know what is their situation."

But, as already seen, it is not necessary for the decision of this question to pass upon this point; it appearing that the forfeiture was incurred, not by reason of any accident or surprise, but in consequence of the neglect of the plaintiff through his agent in March, 1890.

The second point arises under article 15 of the by-laws. This prescribes as a condition precedent to restoration of membership, that the plaintiff should furnish a new and satisfactory application and medical examination. The controversy turns upon the construction to be given to this clause, and especially the word "satisfactory."

The requirement of satisfactoriness is subjective in its nature. In order to be satisfactory, the quality or condition to be looked for is not so much of itself the object as it is its effect upon the mind in giving it that repose which results from having its demands complied with. A necessary term of the qualification of being satisfactory is that it is such to some person's mind; and in this case the issue presents the question whether the parties to the policy, by agreeing to article 15, intended that it was the mind of the medical director which was to be satisfied with the application and medical examination, or whether it is sufficient if the mind of any reasonable person would be satisfied; or if it referred to the mind of the medical director, that it required him to be satisfied if, in reason or law, he ought to have been satisfied. In the course of the argument decisions of courts were referred to and invoked on both sides in support of their contentions. Writers are found who say that the decisions are in conflict upon the subject. An examination of the cases,



however, will show that the conflict is only apparent. Were we to assume that the use of this language was in all cases uniformly to convey the same intention, then it could be said that there was a decided contrariety of views held by the courts as to what this meaning was. But the assumption is neither reasonable, nor necessary. Provisions of this character do not require any departure from the established canons of construction, which teach that, to ascertain the meaning of parties from their language, we must, if possible, accept their language in its ordinary meaning, and bring to our aid, whenever necessary, the considerations arising from the context of the provision itself, and other associated provisions, from the subject-matter dealt with, from the reasonable expectations of the parties under the circumstances, from the objects and purposes to be accomplished by the contract, from the respective as well as mutual interests to be subserved by the making of the agreement. When examined in the light of the principle just suggested, the various decisions will be found consistent with one another. This statement may be exemplified by referring to a few of the cases which present the question in its various phases of fact.

Where the purpose of the contract is to gratify the taste, or serve the personal convenience, or refer to the sensibilities or emotions of an individual, the intention might reasonably be to refer the purpose to the mind and opinion of that individual, honestly entertained. *Duplex Safety Boiler Co. v. Garden*, 101 N. Y., 390.

Another case is where the contract is pressed upon an unwilling party who evidently yields upon conditions attached in his own personal favor. The provision of satisfaction may reasonably be understood to have been made to depend upon his exclusive *bona fide* opinion. The case of *Wood Reaping and Mowing Machine Co. v. Smith*, 50 Mich., 555, is of that class. Smith, a solicitor for the Reaper Machine Company, effected the sale of a reaper to an unwilling purchaser who succumbed to his importunities, and made a contract with the condition spoken of. The court fairly inferred that under all the circumstances the parties intended to leave the decision wholly to the vendee, who might be supposed to have insisted upon having his honest opinion accepted as a finality without dispute.

Where the case is one of service actually rendered upon specified work, the circumstance that work actually done can not be recalled, and would necessarily be available only to the employer, would induce the inference that the parties intended that the employer was not to be dissatisfied without good reason. Such was the case of the *Duplex Safety Boiler Company v. Garden*, 101 N. Y., 387.

There is a line of cases in New York which seems to be in conflict with the general current of cases in other states so far as reported in *Miell v. Globe M. Ins. Co.*, 76 N. Y., 115; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y., 387; *Dennis v. M. B. Association*, 120 N. Y., 496, and in their opinions the judges follow the rule of *Folliard v. Wallace*, 2 Johnson, 395.

In this case the defendant covenanted that in case the title of a lot conveyed to him by plaintiff, should prove good and sufficient in law against all other claims, that he would pay to the plaintiff three months after he was well satisfied with the title a certain sum of money. The title was good, but the defendant claimed that he was not satisfied therewith and refused to pay. In the action on the covenant, the court held that plea ought to set forth the reason of his dissatisfaction, and Chancel-

lor Kent there held that he would be supposed to be satisfied if the law says he ought to have been satisfied. And this principle is repeated in all other New York cases mentioned.

It is to be noticed that in that case the thing contracted for is sufficiently described in the contract, and the condition of satisfactoriness is supplemental only. There the principal would be that if the thing could be performed (if sufficiently described), without reference to the mind of the other party, then by leaving it to the mind of the other party as a supplemental condition the parties intended that he should be satisfied, if he ought to be satisfied, and he ought not to be dissatisfied unless he had good reason therefor. The standard of performance did not exclusively rest on the satisfaction of the other party.

In the case already referred to of Duplex Safety Boiler Co. v. Garden, the contract was with the plaintiff to do the work upon boilers, and that if the boilers, as changed, were a success, and if the other party was satisfied, a payment was to be made. The contract clearly specified the character of the work to be done, which could be judged of without reference to the mind of the other party.

In the case of Dennis v. Massachusetts Benefit Association (120 N. Y., 496), a lapsed policy was to be restored if the policy holder would give valid reasons to the officers of the association. What the provision intended, was sufficiently described as "valid reasons;" that the officers of the association should be satisfied with it was simply supplementary for the protection of the association, and it could be reasonably inferred that they were to be reasonably satisfied according to the expectation of the parties; if the insured had fulfilled his part of the contract by furnishing "valid reasons," they ought to be satisfied unless there were good reasons to the contrary.

In the New York cases, following Folliard v. Wallace, the thing contracted for was so described that it could be ascertained without reference to the mind of the other party. The performance of the thing so defined was clearly the leading purpose of the agreement. The condition that the other party was also to be satisfied with the performance seemed to be added, not so much as another qualification of the thing itself, as it was a provision for the benefit of the other party, in order that he might not be forced to accept a performance with which he might have good reason to be dissatisfied. In holding that such would reasonably be the intention of the parties upon such state of facts, the New York cases are in harmony with the decisions of the other states. But where the description of the thing to be performed absolutely, clearly, and necessarily refers it only to the mind of the other party, and furnishes no other criterion, then this kind of contract will make the mind of the party the sole test of the performance. No New York case has been found to the contrary, and if so, it would be in conflict with the weight of the authority.

Now, in cases of construction contracts, that is, contracts for the construction of public works, or of buildings, the nature of the work to be done, consisting of numerous and frequently of technical details, warranting an anticipation that differences may arise requiring settlement by decision, the inference is drawn from an agreement making certain rights of the parties dependent upon an opinion or decision of the engineer, architect, or other supervising agent, that the parties intended to make such decision, if made *bona fide*, binding upon themselves. Such is the American doctrine.

It is thus seen that the decisions are harmonious, and that their divers conclusions are but the logical results of applying the same rule of construction to different states of fact. For discussions upon the subject see notes to cases reported in 25 Am. L. Reg. 14, and 27 Am. L. Reg. 576. (New Series.)

The contract in the case at bar is found in certain special by-laws to which the policy, by making them a part of itself, expressly directs the attention of the parties.

The plaintiff, in accepting the policy, must be held to have had knowledge of the fact that the medical director was the person to whom the application and medical examination was to be furnished by him. The by-law provides that they ought to be according to the forms of the association, and these forms were written out by the applicant and the medical examiner respectively, and both of them were submitted to the medical director. In this particular the precise agreement is that the applicant was to furnish the medical director with certain writings, called "Application and Medical Examination." Neither the contract nor the by-laws, nor the scheme of the association intends that the functions of the medical director were to be any other than to examine and pass on these written certificates. It does not militate against this conclusion, that the person holding that office might, in local cases, act also as a medical examiner, and draw up the certificate from his own personal physical examination. The by-laws offered in evidence, especially article 2, make it clear that the application and medical examination spoken of in this article 15, consist only of the certificates in writing, made out on the company's blanks. The contract requires the plaintiff to furnish these certificates to the medical examiner. It is these certificates which must be satisfactory. The certificates form, by means of questions and answers, an inquisition into the personal family and physical history and condition of the applicant. These are calculated to enable a diagnosis to be made for the purpose of life insurance. The facts elicited are such as would be submitted for an opinion to the professional physician only. They certainly must be required to be satisfactory to a medical man. It could not have been the intention to let the opinion of any other person be the criterion. The inquiry clearly addresses itself to the knowledge of the medical man alone. A limitation is here put to the mind which must be satisfied. One step in the inquiry is, "are these certificates satisfactory to the reasonable mind of the physician?"

But the certificates themselves, on blanks like those on which the plaintiff's original examination in 1881 was made, and on which the policy was then issued, suggest whether that is the only question. There are interrogatories to the applicant himself as to his having sought other life insurance, and having been refused; and there are interrogatories to the medical examiner, whether the applicant's life is safely insurable, and there is a call upon the medical examiner for a recommendation in that respect. The answers are intended to be passed on by a physician possessed not only of medical knowledge and skill in his profession, but also of special knowledge of the requirements which would make applicants safe risks for life insurance purposes. Now, in agreeing to the terms of article 15, the parties could not have supposed that physicians in general would possess both qualifications. The last named would most likely be possessed by medical men with life insurance experience, and acquainted with the test of safe risks, which

experience and other means of information have taught life insurance companies and their officers in this particular. This consideration would compel the inference that it is he who was thus qualified whose mind was to be satisfied with the certificate, and in as much as the inquiry was scientific and special in its character, the parties most likely intended to refer it to the official whose opinion was made decisive on the original application.

It must not escape our observation that this article 15 is not like a stipulation run into the context of an agreement between parties. It is characterized as a by-law, is a by-law, and as such is identified when made part of the contract by express terms of incorporation. The interpretation it bears as a by-law is the meaning it ought to have in the agreement. When looked upon as a by-law it must be considered, what purpose was it intended to preserve for the association, and what for the individual member? So far as the by-law is intended to protect the association against dangerous risks, each member is identified in interest with the association. It is to be noticed that the waiver of forfeiture is extended "to any time thereafter," and that after a considerable lapse of time when large arrearages have accumulated, the privilege would most likely be disregarded by persons whose risks would be good and safe, and claimed by such persons whose risks have become unsafe. In view of such probability, it is ordinary prudence to provide a guard against imposition. This is done in article 15, and it is a reasonable inference that while this protection was made to consist of having the risk passed upon by some expert, that expert shall be the officer to whom, in all other cases, the subject is referred. This conclusion is verified by the policy itself, which stipulates for the payment of five thousand dollars, or such proportion as is provided by the by-laws, having direct reference to article 16 of the by-laws, made a part of the policy. By article 16 it is provided, within sixty days after due notice and satisfactory proof of the death of a member of the association, the board of officers shall cause to be paid to the family or heirs of the deceased member an amount according to his policy, to-wit: A five thousand dollar policy shall receive all the money in the death fund accruing from one assessment, providing it does not exceed five thousand dollars; a four thousand dollar policy shall receive four thousand dollars of all the money in the death fund accruing from one assessment, providing it does not exceed four thousand dollars, and similar provisions following as to two thousand dollar and one thousand dollar policies." The agreement here made is to pay only the money in the death fund, but not above a certain amount.

This article 16 makes every individual member interested not only in continued maintenance of the association, but in the size of the membership, upon whom the assessment could be levied. For the amount in the death fund, depending upon this assessment would necessarily depend upon the number of persons assessable. That is to say, each member is not only interested in the longevity of the association, but in its vigor and health. The self interest of each member, when agreeing to article 15 as an associate, would also suggest that the intention was such as would prevent the increase of risks above a calculated average. And in this view article 15 ought to receive the construction spoken of, which is further supported by the associate article 10.

Article 10 reads: "Policies shall be issued in the amount of one thousand dollars. No member shall hold more than one policy at the same time. Any policy holder may have his policy changed to one of

greater amount by furnishing a new and satisfactory application, medical examination, and the payment of five dollars as set forth in the amount of the assessment."

This article provides for the increase of insurance. It is clear that to the extent of the increase it is the same as a new membership policy and ought to be placed upon the basis of a first application. To obtain such increase the member must furnish a new and satisfactory application and medical examination. No doubt in this respect the application must be accepted by the medical director and no other, as is provided for in the first policy, by article 11. Now, article 15 may be regarded *in pari materia* with article 10, and if so, the identical phrase, word for word, found in both articles 10 and 15, ought to have the same meaning. The conclusion being that the medical examination, by virtue of article 15, must be satisfactory to the medical director, and it being conceded that his judgment therein was exercised in good faith, and it being found, as a matter of fact, that he rejected the medical examination and the application, because that was not satisfactory to him, it follows that the plaintiff has not fulfilled the condition precedent to the restoration of his membership under his contract of article 15. The petition will therefore be dismissed.

Stephens, Lincoln & Smith, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, *contra*.

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## HUSBAND AND WIFE.

201

[Franklin Common Pleas, 1891.]

### CHARLES RICHTER V. EXRS. OF AMELIA RICHTER.

1. It is the duty of the husband to bury his wife, from which he is not absolved by their having lived apart, and where the husband has paid the funeral expenses of his wife, he cannot be reimbursed from her estate, notwithstanding her will provides that the expense shall be paid from her estate.
2. The undertaker may recover such expenses from the estate of the wife, or from the husband, or from both.

PUGH, J.

This case was brought by a husband to recover his wife's funeral expenses from her separate estate. Mrs. Amelia Richter, wife of Charles Richter, died possessed of an estate in her own right. She had not been living with her husband for some time prior to her decease. Mr. Richter saw to her funeral arrangements and paid the expenses, amounting to about \$100. Mrs. Richter left a will, one of the clauses of which provided for the payment of her funeral expenses out of her own estate. Subsequent to the reading of this document, Mr. Richter made a demand of his wife's executrix to be reimbursed and the claim being disallowed he sued for that amount. The case was decided on demurrer to the petition. Judge Pugh held that it was the common law duty of husbands to bury their wives as well as provide for them during life, and the fact that the parties have lived apart does not absolve husbands from this duty. Undertakers have recourse to both the estate of the husband and the separate property of the wife in recovering for such expenses. The court's conclusion was that Mr. Richter had no right to recover from his wife's estate.—(*Editorial*.)

## 215

## STREET ASSESSMENTS.

[Superior Court of Cincinnati, Special Term, 1891.]

J. S. CRAWFORD V. CINCINNATI (CITY) ET AL.

Where council before an improvement is made, determines by ordinance that the cost shall be assessed per front foot upon the property abutting thereon, the question of benefits cannot be considered.

This was an action to enjoin the collection of an assessment made on plaintiff's lot, situated on Blue Rock street, at its intersection with Colerain avenue. Colerain avenue crosses Blue Rock street obliquely, and the improvement in front of the west end of plaintiff's property is a triangler space tapering to a point. Plaintiff claimed that the assessment "was excessive, and far beyond the amount of benefits that had been conferred upon his said property by said improvement," that the action of the board of city affairs in passing the assessing ordinance "was irregular and illegal, because they had assessed the property along the said improvement by the foot front solely, and had no regard to the amount of benefits conferred on the lot by the improvement, and did not take into consideration the benefits of the improvement to this plaintiff's property; and further, that the cost of improving the aforesaid triangular intersection of Blue Rock street and Colerain avenue was assessed upon the plaintiff's property where, under the law, it should have been borne by the city of Cincinnati.

SAYLER, J.

The ordinance to improve Blue Rock street, provides that one-half of the entire cost of said improvement shall be paid by the city of Cincinnati, and the other one-half of entire cost of said improvement, including interest on bonds, if they be issued, shall be assessed per front foot upon the property abutting thereon, according to the laws and ordinances on the subject of assessments for such improvements, etc. Section 2293a, paragraph 7, Rev. Stat., provides that one-half of the cost of such improvements shall be paid by the city at large, and that such payment shall be held to include all other costs of such improvement required to be paid by the corporation, including the cost as to intersections.

I think the meaning of this provision is that the one-half paid by the city, includes all it shall pay, and that the remaining one-half of the entire cost shall be paid by an assessment under sec. 2264 Rev. Stat. If that be correct, then, the city having paid its one-half, the question of costs of the intersections is no longer considered, but the remaining one-half of the entire cost is to be paid by the assessment under the statutes. Not considering sec. 2293a Rev. Stat., and only considering sec. 2275 Rev. Stat., the property owner is relieved from the payment of the cost of intersections; but considering sec. 2293a, the property owner is relieved from the payment of one-half of the entire cost of the improvement.

Under sec. 2264, the assessment may be on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, as follows: First, either in proportion to the benefits which may result from the improvement, or, second, according to the value of the property assessed, or, third, by the foot front of the property bounding and abutting upon the improvement, as the council by ordinance, setting

forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions therein contained.

By the ordinance the council determined before this improvement was made, that the cost should be assessed per front foot upon the property abutting thereon.

The question of benefits therefore is not to be considered, or rather the act of council precludes the consideration of benefits sec. 2271, Rev. Stat., providing that the assessment shall not exceed 25 per centum of the value of the land after the improvement is made.

The case of Chamberlain v. Cleveland, 34 Ohio St., 551, was a case in which the assessment was levied on the lots benefited by the improvement, and is not applicable to the case at bar; but in that case the court say, on page 558, "all the assessment cases heretofore decided in this court were frontage assessments, and apportioned by frontage. It is well settled that such assessments, when properly made by municipal corporations to pay for street improvements, are constitutional."

The case of Wewall v. Cincinnati, 45 Ohio St., 407, has reference to a sewer assessment, and the only similarity between such an assessment and an assessment for street improvements is that in both cases there are limitations.

I think from the evidence that the property abuts 159.80 feet on the improvement.

The petition will be dismissed at plaintiff's costs.

Affirmed in general term.

Keam & Keam, for plaintiff; W. H. Whittaker, assistant corporation counsel, contra.

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## ALIMONY.

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[Franklin Common Pleas, 1891.]

CLARA E. WARNER v. ORIN S. WARNER.

Alimony *pendente lite* cannot be recovered where the petition charges that there never was a valid marriage.

Mrs. Warner married before she was sixteen, and she therefore claims that the marriage ceremony was void. The couple separated before Mrs. Warner became of age. As she was still under age when she filed her suit for divorce she was compelled to bring it through an uncle, a Mr. Jennings, asking that her marriage be declared null and void. The other day she asked for an allowance of temporary alimony, and this was the matter the court passed on. Judge Pugh held that as the suit is now before the court, it is both an action to annul a contract and an action for divorce. The claim was made by her that there never had been a marriage in law, and the Judge decided that under the circumstances Mrs. Warner was not entitled to a decree of temporary alimony. To get alimony the papers in the case will have to be amended and the charge that there never was a marriage eliminated. Mrs. Warner also has a suit in court to set aside a deed made by her husband to his mother of his property. She charges that he transferred the property to beat her out of her dower. If she was not legally married she has no dower in the property.—(Editorial.)

## CORPORATION—AGENCY.

[Hamilton Common Pleas, February, 1891.]

## HENRY ARNKENS V. GEORGE L. ROUSE, TRUSTEE.

1. The contract of an agent for his principal, made with himself, is *prima facie* void, and if it shows the agent's double and antagonistic capacity on its face, it carries notice to subsequent holders.
2. Hence notes of a corporation, signed in its name by its president and secretary, payable to the president's order, are presumptively unauthorized; and subsequent indorsees, though for value and in good faith and before maturity, take with notice.

This suit is brought to compel the trustee in insolvency of the T. J. Nottingham Manufacturing and Supply Company to allow as a valid claim, and pay a dividend upon four notes held by the plaintiff, aggregating \$1,831.50, each signed by the The T. J. Nottingham Manufacturing Supply Company, by T. J. Nottingham, president, and H. C. Whitson, secretary, to the order of F. J. Nottingham, and indorsed by him and payable respectively in two, three, four, and five months after date, and all dated May 15, 1884.

The plaintiff was an employee of the Nottingham Manufacturing Company and owned about \$1,800 of stock. In May, 1884, fearing its solvency, he tried to sell the stock, and finally offered it to Nottingham, who promised to let him know in a day or two, the plaintiff saying that instead of cash he would be satisfied with security for the price.

On May 15th, Arnkens went to the company's office, and there Nottingham said he would buy the stock for \$1,800, and said I guess these will be satisfactory, handing him the four notes already drawn up and dated on that day. Arnkens then handed over the stock and took the notes in good faith, Nottingham saying they were all right and that the company was good. Six weeks afterward, on June 24th, the company assigned for benefit of creditors.

The defendant, who succeeded the assignee for benefit of creditors, has declared partial dividends, but refuses to allow this claim.

T. J. Nottingham was president of the company, at a salary of \$2,000 per annum. He also owned the leasehold of the premises on which the business was carried on, and the company paid him a rent therefor of \$3,600 per annum. But in fact nothing was due him at the date of the notes, he being then deeply indebted to the company. He had full power of making notes in the company's name, and frequently did so in the course of its business.

The plaintiff claims that, as Nottingham might have been a creditor of the company by reason of the salary and rent account, these notes were, therefore, within the scope of his authority, and hence that plaintiff's position as endorsee for value before maturity cannot be attacked unless bad faith is shown.

## BATES, J.

As between Nottingham and the company these notes were worthless. It is very apparent that if he had never parted with them, but sued upon them himself, he could not have recovered against the company, for it owed him nothing.



Had the transaction been upon the company's account, as for the purchase of supplies or the payment of a company debt, the notes would have been perfectly good in the plaintiff's hands. But the plaintiff confessedly acquired them in a transaction with Nottingham unduly, and not on company account, and the conclusion is irresistible that Nottingham was using the company's name as security for his own debt, or giving its credit for his individual use. And if the plaintiff knew this, the notes would be as void as if made payable directly to him instead of to Nottingham. But the plaintiff did not know this, and being a workman, inexperienced in business, did not for an instant suspect that the notes were unauthorized.

For the plaintiff the principle is urged of *Johnson v. Way*, 27 Ohio St., 374, and *Kitchen v. Loudenbach*, 2 Circ. Dec., 129, that a bona fide holder of a note cannot be defeated because he was negligent, or because the circumstances ought to have excited the suspicions of a prudent man unless actual bad faith or want of honesty on his part be shown. This is undoubtedly the law in order to favor the untrammelled use of negotiable paper, but it does not apply to supply a want of power to execute, on the face of the paper. The principle of law controlling this case is that an agent authorized to contract for his principal, cannot bind the principal by a contract made by or with the agent in favor of himself. The actual presence of a private interest in the agent always disables him from binding his principal in the transaction, and marks the limit beyond which no authority can go unless expressly conferred for the occasion. And if the contract or note announces on its face the presence of this antagonistic relation and inconsistent attitude, it carries warning to every subsequent taker. Now certainly, every corporation note carries on its face a warning that the person making it may not be authorized, for he is but an agent using his principal's name. If the corporate business is such as to require the use of credit, the authority of the officer may be safely assumed if the note is in ordinary form. But if the note is payable to the officer himself, who signed the company's name to it, it is not in a usual form, and carries on its face the announcement that such officer may be using the powers of his agency where his personal interest is or may conflict with that of his principal, and is entitled to exactly the same consideration, and no more, that a note signed by a private person per agent, payable to the agent himself, would receive. No matter in whose hands, such a note imposes on every taker—unless taken in the principal's business—the obligation to inquire into the agent or officer's authority to make it. The duty to inquire is not even dispensed with where the agent is the only accessible person and would probably give a false answer, as was held in one of the Doughty over-issue cases. *Cin. N. O. & T. P. Ry. v. Third National Bank*, 1 Circ. Dec., 109.

A brief examination of the authorities will show the correctness of the above postulate that a note made by an agent to himself carries warning in its face. Thus where a note, made by the Marine Lumber Co., by J. C. Maxwell, its president, payable to Road & Maxwell, of which firm the president was a member, was discounted by a bank for Road & Maxwell, on Maxwell's statement that it was for a debt due him from the Lumber Co.—it was held that the face of the note carried notice, and imposed on the bank the duty of ascertaining the agent's authority. *Third National Bank v. Marine Lumber Co.*, (Minn., 1890), 46 Northwestern Rep., 155.

The same principle was applied in the case of an individual principal where G. Tysen, as agent of D. Tysen, signed a note D. T. per G. T.,

payable to G. & T. & Co., and this firm indorsed the note to the plaintiff, and the court said the face of the note was enough to raise a strong suspicion, not to say conviction, that the whole was a fraud on the principal. *Stainer v. Tysen*, 3 Hill., 279. See also *Stambak v. Bank of Virginia*, 11 Gratt., 281.

So where a cashier made four certificates of deposit in the name of the bank per himself, payable to his own order, and indorsed them over, and the bank having failed, its assignee refused to allow the claim; the certificates were held presumptively void on their face. *Lee v. Smith*, 48 Mo., 304.

A person who receives from an officer of a corporation its notes for the officers private debt, does so at his peril, and is deemed to take them with notice of the rights of the corporation. *Wilson v. Metropolitan Elevated Ry.*, 120 N. Y., 145.

So where a cashier fills up stock certificates, signed in blank by the president, to his own order, and uses it to obtain a loan. *Morris v. Citizens National Bank*, 15 Fed. Rep., 141, (Affirmed 111 U. S., 156).

Or where the directors made a note to one of their number who sold it to the plaintiff. *Gallery v. National Exchange Bank*, 41 Mich., 169.

If the name of the corporation is written as security by an officer on his individual paper, this, of course, carries notice. *West St. Louis Savings Bank*, 95 U. S., 557.

This principle is well known in the law of partnership; if the firm name appears as security, it is prima facie unauthorized, and binds only the signing partner. See *Bades on Partnerships*, secs. 349-351.

Where a person bought bonds of a school board from one whose name appeared on them as one of the directors, and they had in fact been redeemed, but not cancelled and destroyed, he has notice from their face of the want of authority. *Board of Education v. Linton*, 41 Ohio St., 504, 513.

Some cases go farther, and hold not merely that such paper carries notice and is merely presumptively unauthorized, but that it is wholly void. Thus, where the cashier of a bank certified his own check, and it was held by one who had given full value, the certification was ruled to be wholly void, even if the cashier had funds, because of his double relation to the paper. *Claffin v. Farmers' and Citizens' Bank*, 25 N. Y., 293 (reversing 36 Barb., 540). So a note by the president and secretary of the People's Steam Navigation Company, payable to the president and directors, was held to be wholly void in their hands, on the doctrine that directors cannot make notes to themselves. *Wilber v. Lynde*, 49 Cal., 290. So where the president made a note of the corporation to a person who loaned him money, and the directors, by his casting vote, allowed him a salary, and ratified the note, part of the proceeds being used to pay the salary, and a subsequent board of directors repudiated the act, the note was held void as to the corporation. *Chamberlain v. Pacific Wool-Growing Company*, 54 Cal., 103.

The result of this case must therefore be very plain. A corporation note is made by the officer, payable to himself; there is therefore no question of the degree of negligence or diligence affecting an indorsee, for the note itself informs him that the authority to execute at all is presumably absent, and that no rights not possessed by the payee can be acquired. Hence the judgment must be for the defendant.

*Wilson & Herrlinger*, for plaintiff.

*Stevens, Lincoln & Smith*, for defendant.

## MUNICIPAL CORPORATIONS.

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[Superior Court of Cincinnati, Special Term, December 19, 1890.]

## SIMMON M. JOHNSON V. CINCINNATI (CITY).

1. Municipal corporations are political bodies, clothed with certain legislative and discretionary powers, and equity is adverse to interfering by injunction with the exercise of such powers at the suit of a private citizen.
2. The act of the general assembly, entitled "an act to amend sec. 1777, of the Rev. Stat., as amended April 14, 1884, and sec. 1778, of the Rev. Stat." passed April 1, 1890 (O. L. Vol. 87, p. 122), provides a legal remedy in the event of the abuse of corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption.

## HUNT J.

This is a motion to dissolve a temporary injunction.

The petition alleges that on the — day of —, 1890, the defendant, Isaac J. Miller, made application for the establishment of a street-railroad route in the city of Cincinnati, known as Route No. 23; that such application was duly transmitted by the board of public improvements to the council, and that afterward the council passed an ordinance establishing the proposed route. The ordinance directed, among other things, that the right to operate said route should be for the period of twenty-five years from the date of the grant, and further directed that the consent of the majority of the property owners of front feet on each street on said route should be filed with the board of public improvements—a provision already embodied in the statute—except on Warner street, where the consent of all the property owners should be secured.

In pursuance of the resolution of the city council, advertisement was duly made for sealed proposals for the construction and operation of said railroad Route No. 23, and bids were required to be made therefor in accordance with the provisions of a certain ordinance of the city of Cincinnati, passed the fifth day of September, 1879—the proposals to specify the rate of single cash fares, the number of commutation tickets in packages to be sold for one dollar (\$1.00); the number of commutation tickets in packages to be sold for fifty cents, and the number of commutation tickets to be sold for twenty-five cents.

The plaintiff further says, that in pursuance of said advertisement for proposals, he duly made proposal for the construction and operation of said Route No. 23, in accordance with the terms and conditions of the ordinance, and of the advertisement, at the following fares: Cash fares for adults five cents each; cash fare for children under the age of ten years, three cents each; commutation tickets in packages of thirty for one dollar (\$1.00); commutation tickets in packages of seven for twenty-five cents.

It is further averred that proposals were opened on October 2, 1890, by the board of public improvements, but no consents of abutting property owners were then filed with the board or elsewhere, but that said consents were afterwards filed with the board of public improvements, which made the award of said route in favor of said Isaac J. Miller, and recommended to the council of the city of Cincinnati, that the grant of said route be made to said Miller, and has transmitted to said city council an ordinance making said grant of said route to said Miller, and nam-

ing him therein as the person making the proposition to carry passengers over said route at the lowest rate of fare; or if said ordinance and recommendation have not yet been transmitted to council, the same will be transmitted in the course of this day, and that said city council will pass said ordinance unless enjoined from so doing.

It is further claimed by the plaintiff that the defendant, Isaac J. Miller, was not the lowest bidder for the carriage of passengers over said Route No. 23; but in fact, was the highest, and the plaintiff was the lowest bidder therefore, and that the board of improvements should have awarded said contract for the construction of the route and the carriage of passengers over the route to the plaintiff and not to the defendant Isaac J. Miller, and should have inserted his name in the ordinance transmitted to council, instead of that of defendant Miller, and should have recommended the passage of an ordinance making said award to the plaintiff as such lowest bidder.

The plaintiff further alleges that the ordinance in question granting said route to Isaac J. Miller, if passed, will be void for the reasons hereinafore stated; that he believes and avers that there would inure to Miller great profit in the construction and operation of said street railroad Route No. 23, at the rates of fare named in his bid, and that by the award of the said route to Miller, and the passage of said ordinance, making the grant thereof to said Miller, and the execution of a contract with said Miller, in pursuance thereof, plaintiff will sustain great and irreparable injury.

The plaintiff asks that the city of Cincinnati, its officers, servants, agents and employees, and each of them, be enjoined from the passage of any ordinance granting the right to construct and operate said Route No. 23 to the defendant Isaac J. Miller, and from making any contract with said Miller therefore, and that the defendant Isaac J. Miller, be enjoined from entering into any contract with the city of Cincinnati for the construction of said street railroad Route No. 23, and that the board of public improvements be enjoined from executing such contract on behalf of the city of Cincinnati, and for any and all further relief the plaintiff may be entitled to in the premises.

The defendant Isaac J. Miller, by a separate answer, alleges that the plaintiff is not the real party in interest in this action; that the pretended bid of the plaintiff for the construction of Route No. 23 was not in good faith, but was a false and fraudulent bid; that he was the lowest and only bidder for the construction of said Route No. 23 within the provisions of the statute of Ohio, and in accordance with the law and ordinances of the city of Cincinnati, he furnished the written consents; and that the plaintiff instituted this action after the said board of public improvements had transmitted the ordinance awarding him the said contract to the city council of said city, and after he had paid the sum of one hundred dollars (\$100.00) for printing said ordinance, and after the same was pending in the said city council in accordance with the laws and ordinances of the said city.

The separate answer of the city of Cincinnati alleges that on the sixteenth day of October, 1890, the defendant Isaac J. Miller, having obtained and filed with the board of public improvements the consent of the property owners owning a majority of the front feet of lots and lands abutting on each and every street respectively upon said Route No. 23, excepting Main street, and having obtained suitable private property upon which to build an incline plane from Browne street to Fairview av-

enue, and having paid into the city treasury \$100.00 to cover the expenses for printing and publishing the necessary resolutions, notices and ordinances of said city of Cincinnati for the construction, operation and government of street railroads, passed February 7, 1879, and having complied with all other requirements of said ordinances and of the statutes, the board of public improvements awarded said franchise to Miller as the lowest bidder who was able to comply with the necessary conditions to construct and operate said Route No. 23, and thereupon transmitted to the city council of Cincinnati an ordinance granting to Miller the right to construct and operate a street railway upon said Route No. 23 at the rate of fare contained in his bid, subject to the payment by him to the city of Cincinnati of a car license of four dollars (\$4.00) per lineal foot inside measurement, per annum, of each and every car operated upon said Route No. 23, and also a payment by him into the city treasury of two and one-half per cent. of the gross receipts received by him from all sources upon said route, including two and one-half per cent. of all receipts upon said incline plane which will be upon private property.

The answer avers that the granting ordinances contain other requirements of the grantee, all of which are beneficial to the public interests of the city of Cincinnati.

It is further alleged that the plaintiff Simeon M. Johnson, did not and could not obtain the consents of property owners as required by law; that the owners of a majority of the front feet on Warner street protested in writing against the construction of said railway upon said street, and none of the property owners owning property abutting thereon signed their consents, and the consents of the owners of a majority of the front feet on said Warner street could not in any event be obtained, which rendered it necessary for the successful bidder to purchase suitable property extending from Brown street to Fairview avenue upon which to construct said incline plane, but the said Simeon M. Johnson did not procure any property for such purpose, and neither did he advise said board as to any property upon which he could construct said incline plane, and neither did he tender to the city controller the one hundred dollars (\$100.00) required to be paid by said sec. 3. Nor did he comply or offer to comply with any of the requirements of said ordinance passed February 7, 1879, nor of the statutes. and for said reasons said Route No. 23 could not be constructed and operated under said Simeon M. Johnson's bid.

The answer further says that if said franchise is granted to Miller upon the terms of his bid, and the conditions expressed in said ordinance, it will be to the best interests of the city of Cincinnati, and its construction and operation will produce to said city a large revenue; and said bid is a reasonably low bid and the lowest that could be obtained for the construction and operation of said Route No. 23.

The defendant denies each and every allegation contained in the petition not expressly admitted in the pleadings.

A temporary injunction was allowed on the application of the plaintiff on October 14, 1890, and a motion is now filed to dissolve the order.

Section 2640 of the Rev. Stat., provides that "the council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges, within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

Section 2227 further provides that no grant of the use of a street or highway in any such city for the purpose of a street or other railroad, or an extension thereof, or for any other purpose whatsoever, shall be made or renewed unless first recommended by the board.

Section 2501 of subdivision 2 of chapter 5, of the general act relating to railways in corporate limits provides that no corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and the council by ordinance shall have granted permission, and prescribed the terms and conditions upon, and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, while sec. 2502 describes in detail the proceedings to establish a street railroad route.

It is evident from this legislation that the state in its sovereign capacity, has reserved no property interest in the streets in question. The revenues and profits that are to accrue from the use of the streets in the mode contemplated, will be the private property of the city in which the state has no interest whatever. *Cin. St. R. R. Co. et al. v. Smith et al.*, 29 Ohio St., 291.

The statute prescribing the steps necessary to establish a street railroad route declare that no such grant as mentioned in said preceding section shall be made except to the corporation, individual or individuals that will agree to carry passengers upon such proposed railroad at the lowest rate of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which said road is proposed to be constructed. The authority of the council in the matter is thus granted by statute, and must be substantially pursued.

It is contended in behalf of the motion that while the plaintiff may have in fact obtained the written consents of a majority of the property holders upon each street, or a part thereof, on the line of the proposed street railway, represented by the feet front of the property abutting on the several streets along which the street railroad is proposed to be constructed, yet the consents so obtained by defendant, were to inure to the benefit of the lowest bidder under the law.

It has been held in the case of *State of Ohio ex rel. Henderson v. Bell*, 34 Ohio St., 194, that the consents mentioned in sec. 412, which is now sec. 2502, need not, in terms, be given to the person who is the lowest bidder; for the contract can be awarded to him alone, and the consents, it matters not by whom obtained, or to whom given, are, in substance, assent to the construction and operation of the railroad in the designated streets, and hence must inure to the benefit of the lowest bidder. This rule is based on the broad ground, doubtless, that the streets of the city are acquired and dedicated to public uses, and that no individual or corporation can have a property right or interest in them. "The purpose of the law," says the court in *Mathers v. City*, 7 Dec. Re., 496, "is to throw open to the widest competition these street railroad routes, and to secure the best possible terms for the general public, and hence the lowest bidder must be preferred; provided, in other respects he complies with the law. \* \* \* No person was forestalled by the action of any other in competing for the privilege of constructing the road, because the consents were to be obtained afterwards. It was not the intention of the legislature in the change made in the section that any per-

son should be forestalled and competition prevented, but that the same competition for the benefit of the public should be invited as was invited before, but simply before any bid should be entertained that it should be ascertained whether the property holders would consent to the construction of the road, and therefore the consents obtained by any one party will inure to the benefit of all who may file their bids, and the provision of the ordinance that where a party does not file with his bid the necessary consents, if he file instead thereof his statement that he does not do so because these consents were obtained by other parties, is not contrary to law, and is valid."

The court therefore concludes in *The State ex rel. Henderson v. Bell*, 34 O. S., 198, that the ordinance is not a general authority inuring to the benefit of the company, which, or person who, may thereafter receive the award to construct and operate the railway; but a grant by the council directly to the corporation to which, or the individual or individuals to whom, the contract is then awarded. There can, in such case, be no grant without a grantee expressly named therein. But when these steps are taken, facts ascertained, and grant made, such corporation, individual, or individuals on complying with the conditions prescribed, will be fully authorized to construct and operate the railway."

It is true that the granting ordinance in this controversy involves the acquisition of private property for the construction of the proposed incline plane; but certainly the principle that consents must inure to the benefit of the lowest bid has been determined by our courts as the law which must govern in the construction of such railways under the statute.

It is unnecessary, however, in our view of the question presented by the motion to allude further to the matter of the written consents contemplated by sec. 2502 of the Rev. Stat.

The power of this court is invoked to restrain the city council from the passage of an ordinance recommended by the board of public improvements, and involves the question how far equity will interfere with the exercise of a discretion vested in a legislative body.

While it is true that equity may be invoked to restrain the proceedings of municipal corporations, at the suit of the citizens and taxpayers, when such proceeding will cause irreparable injury, it is equally true that the doctrine of equitable interference is modified when it is sought to interfere with or control the judgment or discretion of municipal bodies upon matters properly entrusted to them by law.

A municipal corporation is a political body, clothed with certain legislative and discretionary powers, and equity is averse to interfering by injunction with the exercise of those powers at the suit of a private citizen. "Nor," says 2 High on Injunction, 2d edition, sec. 1240, p. 814, "will the discretion of a common council of a city in matters pertaining to this legislative function be controlled by the writ of injunction."

It is contended by the plaintiff that in making a grant for a railroad franchise the municipal corporation of Cincinnati is not acting in a political or legislative character; it is not representing the state in any sense, but is disposing of the private (so to speak) property of the city which it holds in trust, and which it is bound to dispose of at certain prescribed terms, and not otherwise. A municipal corporation being regarded in equity as charged with and made the depository of a public trust, is amenable to the jurisdiction of a court of equity, for a breach of that

trust, and thus courts proceed upon substantially the same principles which govern this interference in cases of trust.

Some stress too, is laid by counsel in the demarcation between the two functions of a municipal corporation, namely: Political or legislative on the one hand, and proprietary or ministerial on the other, and the case of *Lessee of City of Cincinnati v. First Presbyterian Church*, 8 Ohio Rep., 299, is cited to show how the courts recognize that distinction. The force of this argument is conceded as well as the distinction made in *The People v. Sturtevant*, 9 N. Y., 263, and noted by counsel.

The Supreme Court of Iowa, in *Des Moines Gas Co. v. The City of Des Moines*, 44 Iowa, 505, where the direct question was on restraining the passage of an ordinance by the city council, Seevers, C. J., in referring to the very case of *The People v. Sturtevant*, said, "The only cases cited by counsel for the plaintiff, which apparently conflict with the view herein expressed, are *The People v. Sturtevant*, 9 N. Y., 263, and *Davis v. The Mayor*, 14 Id., 506. The former grew out of and is based on the latter. In the latter the power to enjoin a city council by ordinance from creating a public nuisance in the streets was affirmed. It is unnecessary to commit ourselves to this doctrine. There is, however, a clear distinction between the case cited and the one at bar. For it never can be a rightful subject of legislation to create a public nuisance, and if the passage of an ordinance, without more, created the nuisance, the mischief resulting therefrom might be irreparable, and we are not prepared to say its passage could not be enjoined. While it is not the province of the judiciary to interfere and arrest the passage of the ordinance, yet the doors of the courts are open for the purpose of testing its legality, and therefore the plaintiff is by no means remediless."

The petition of the plaintiff says "that said ordinance granting said route in said Isaac J. Miller, if passed, will be void for the reasons hereinbefore stated." If the ordinance sought to be enjoined is void because it does not contain the name of the plaintiff as the grantee, it cannot work an injury unless council could be compelled to insert the name of Simeon M. Johnson. A void law is no law, and this, without doubt, says the court in 44 Iowa, on page 510, is true as to an ordinance. No injury, much less one of an irreparable character, can be inflicted by such an ordinance. It is a well settled rule that the courts will not enjoin the passage of unauthorized ordinances.

"The general assembly," says the court again in indicating the rule in the *Des Moines Gas Co. v. The City of Des Moines*, 44 Iowa, 509, "is a co-ordinate branch of the state government, and so is the law-making power of municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. But the unconstitutional acts of either may be annulled. Certainly, the passage of an unconstitutional law by the general assembly could not be enjoined. If so, under the pretense that any proposed law was of that character, the judiciary could arrest the wheels of legislation." After its passage, the judiciary may declare the law unconstitutional, but previous to that time judicial power cannot be invoked. *Piqua Bank v. Knoop*, 16 How., 369; *Dodge v. Woolsey*, 18 How., 331.

This court in general term (January, 1874), has enunciated the same doctrine in the case of *Richard Smith, et al. v. The City of Cincinnati*, in these words, "We concede, that, with the exercise of authorized legislation, and the legislative discretion vested in the council of the city, no



court can interfere for the folly or wisdom of their action; in such cases, the members of such bodies are responsible and answerable only to their constituents. The powers they exercise, and the functions they perform, are part of those vested in the legislative department of the state government, all of which the legislature itself might exercise and perform, but which it has delegated for the public convenience and greater practicability. But, in granting such delegated legislative powers, the legislature invested the judicial department with authority to prevent and remedy the abuse of the corporate powers of these municipalities, which authority is to be invoked after the acts of legislation have been consummated, to prevent the same from being carried out or executed, or to afford adequate remedies for any such abuse after it had been effected, and will ordinarily act only when steps are taken to make them available." 1 Dillon Municp. Corp., p. 387, note; Chicago v. Evans, 24 Ill., 52; Smith v. McCarthy, 56 Penn. St., 359.

It has been held that if a party is unfavorably affected by an ordinance, he may have its validity determined before it is attempted to be executed. State v. Patterson, 34 N. J. Law, 163; State v. Jersey City, *Ib.*, 31.

The plaintiff, again, insists that there would inure to Miller great profit in the construction and operation of said street railroad Route No. 23, at the rates of fare named in his bid therefor, and that by the award of said route to said Miller, and the passage of said ordinance, making the grant thereof to said Miller, and the execution of a contract with said Miller in pursuance thereof, plaintiff will sustain great and irreparable injury.

The act entitled "an act to amend sec. 1777 of the Rev. Stat., as amended April 14, 1884, and sec. 1778 of the Rev. Stat.," passed April 1, 1890, (O. L., vol. 87, 122), provides a legal remedy in the event of an abuse of corporate powers in the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption.

The solicitor may apply, in the name of the corporation, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws and ordinances governing the same, or which was procured by fraud or corruption; or in sec. 1778, in case he fail, upon the request of any taxpayer of the corporation, to make the application provided for in the preceding section, it shall be lawful for such taxpayer to institute suit for such purposes in his own name in behalf of the corporation, provided that no such suit or proceeding shall be entertained by any court until such request shall have first been made in writing.

The court cannot consider the question that the city council and the officers of the city government may act hastily in passing the ordinance and give the grant before legal process could be invoked. The law exacts a duty of all public officers, and there is no presumption in law that that duty will not be properly discharged.

The motion to dissolve the restraining order is granted.

Harmon, Colston, Goldsmith & Hoadly, for the motion.

Isaac J. Miller, contra.

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## LIBEL—DELINQUENT DEBTORS.

[Superior Court of Cincinnati, General Term, 1891.]

## ZERAH GETCHELL v. MERCHANT TAILORS' EXCHANGE ET AL.

1. In an action of libel where the meaning of the defendant, by the language employed, is equivocal or doubtful, the question whether the publication is libelous or not is one for the jury.
2. Whether the meaning of the defendant by the language used, was what the innuendo avers it to be, if fairly susceptible of that meaning, is a question of fact, and not of law.
3. The merchant tailors of Cincinnati formed a corporation called the Merchant Tailors' Exchange, for their mutual protection and interest. One of the by-laws of the corporation provided that judgments obtained by the members against their customers might be assigned to the association in trust for collection or sale. A large number of such judgments (59) having been so transferred to the Exchange it caused publication to be made of such judgments in one of the daily newspapers of said city, in which publication such judgments were offered for sale, the names of the judgment debtors, their residence and place of business, and the amount of the judgment being given and the word "delinquent" so published as to apply to each person. The petition contained an innuendo that the defendant meant by such publication that plaintiff had dishonestly and dishonorably evaded and refused to pay said claim, and was a worthless and dishonest person not entitled to the confidence and respect of the community, etc. *Held*: That it was error upon the trial of said cause upon the conclusion of plaintiff's testimony to take the case from the jury.

SMITH, J.

The Merchant Tailors' Exchange is an association of merchant tailors duly incorporated under the laws of Ohio, and comprising in such membership the majority of the merchant tailors of the city of Cincinnati. The object of the association is succinctly stated in the preamble which succeeds their constitution and by-laws. It declares that,

"Whereas, the present system of conducting the business of merchant tailoring, with its varied custom of promiscuous extension of credit, entails unusual risks and consequent losses; therefore be it

"Resolved, That the Merchant Tailors of the city of Cincinnati do hereby organize themselves into an association for their mutual protection and interest."

Its articles of incorporation declare that one of the purposes for which it is formed is "to promote a higher standard of business standing and integrity," and "to devise ways and means for earnest and effectual mutual protection to legitimate merchant tailoring."

As a means of effecting these purposes its constitution provided in sec. 7 that "it shall be the duty of the assistant secretary to obtain from every member of the exchange a complete list of all objectionable, non-paying and otherwise characteristic customers, and accompanying the same to be stated the amount of the debt, the nature of it, when it was due, the reason why the same remains unpaid, and any remarks of value."

And in the same section it is provided that "any member having a judgment against a delinquent debtor shall have the privilege, in consideration of his membership and the benefits which such membership confers, and also in consideration of the mutual agreement made and entered into between the members of this exchange, of transferring such judgment to the Merchant Tailors' Exchange, of Cincinnati, in trust, for the purpose of collection or sale."

On the eighteenth of March, 1888, D. Bottemus, a merchant of Cincinnati, and a member of this exchange, obtained a judgment before a justice of the peace, against Z. Getchell, the plaintiff herein, for the sum of \$84.50, and in the course of time transferred the same, in trust, to the Exchange, as provided in the constitution and by-laws.

This judgment, with others which the Exchange held in trust for its members, were unpaid on the thirteenth day of October, 1889, at which time the Exchange caused to be published in the Commercial Gazette of this city a list of fifty-nine (59) persons against whom it had judgments, giving their name, place of business, residence, and the amount of the judgment against each. Among these names was that of the plaintiff. The publication was surrounded with large heavy black lines, and in addition to the detailed statement relating to each person, to which I have referred, contained the following language:

#### "JUDGMENTS FOR SALE.

"On Thursday, December 5, 1889, between the hours of 12 and 1 o'clock, the Merchant Tailors' Exchange will offer the following judgments for sale at the rooms of the Exchange, 257 Walnut street, fourth floor."

The detailed statement as to each judgment was given under four headlines, viz.: Delinquent; business; residence; amount; and in the case of the plaintiff was as follows:

Delinquent.	Business.	Residence.	Amount.
Getchell, Z.	Roofer and Asst. Preacher.	Grand Ave., Price Hill.	\$84.15 and costs.

As before stated, this publication was made on the thirteenth of October, 1889, and it was again made on the first of December, 1889.

Shortly after these publications the plaintiff began an action for libel against the Exchange, and alleged in his petition, by way of innuendo, that the defendant meant by said publications "that said plaintiff had dishonestly and dishonorably evaded and refused to pay said claim, and was a worthless and dishonest person, not entitled to the confidence and respect of the community; intending and designing thereby to subject plaintiff to public ridicule and contempt, and to cause him to be regarded as a dishonest and worthless person who would not pay the bills for his ordinary personal expenses, whether he was able to do so or not."

The case came on for trial before a jury, and the plaintiff among other things proved the publication as described, and the organization and purposes of the association, and rested. Thereupon the court, upon the motion of the defendant, instructed the jury to return a verdict for the defendant. To this action of the court the plaintiff excepted, and now prosecutes error here for a reversal of that judgment.

The law is settled beyond dispute that in an action for libel "where the defendant's words are capable both of a harmless and an injurious meaning, it will be a question for the jury to decide which meaning the hearers or readers would, on the occasion in question, have reasonably given to the words." Odgers on Libel and Slander, sec. 112; Townsend on Slander and Libel pages 508 and 129.

"And it is only when the judge is satisfied that the publication cannot be a libel, and that if it is found by the jury to be such their verdict

will be set aside, that he is justified in withdrawing the question from their cognizance." *Ogders on Libel and Slander*, sec. 94.

The rule in Ohio is not different from the general rule laid down in the authorities just cited. In the case of the *State of Ohio v. Smily*, 37 Ohio St., 30, where the court below quashed an indictment for libel on the ground that the words averred did not constitute a libel, it says:

"Where the meaning of the defendant, by the language employed, is equivocal or doubtful the question whether the publication is libellous or not is one for the jury. So too, whether the meaning of the defendant by the language used, was what the innuendo avers it to be, if fairly susceptible of that meaning, is a question of fact, and not of law."

Mr. Starkie states it to be "The duty of a court to determine whether the language will bear the meaning ascribed to it by the innuendo, and if it will, that the question whether such meaning was intended, must be submitted to the jury." *Starkie on Slander*, sec. 561.

The question, then, whether the court erred in instructing the jury that the publication complained of was not a libel, is to be determined by the application of this principle to it. If it is susceptible of the meaning alleged in the innuendo, then the question whether it was or was not a libel was to be determined by the jury.

It is contended on behalf of the defendant that this was merely the advertisement of a judgment for sale; that a judgment is property; and that it would be a restriction upon the sale of property to say that a mere advertisement for its sale was a libel.

But the law penetrates the form and tears away the disguises of a libel to ascertain its substantial significance and effect, and the question whether a publication is libellous is to be determined, not from its form alone, but from the text and from all the facts and circumstances under which it is made. *Commonwealth v. Kneeland*, 20 Pickering, 206; *Commonwealth v. Runnels*, 10 Mass., 518.

And so careful is the law that no mere form or subterfuge shall give protection to the libel, that it refuses, as in the case of fraud, to lay down any specific iron-clad rule by which every publication is to be measured to determine its libellous character.

"Where the modes of effecting mischief are of infinite variety, the illegality of acts must usually be defined by their actual consequences or immediate tendency, rather than by any detail of the means used. When the law says no man shall be allowed to degrade another from his place in society by deliberate and malicious publications which expose him as the object of hatred, contempt or ridicule, with what reason can the offender object that what may render a man odious or contemptible is not sufficiently defined. It is by the effect or immediate tendency only that such an injury can be described." *Starkie on Slander*, 44.

And upon this question that master of the science of law, Chief Justice Shaw of Massachusetts, says:

"The law cannot be eluded by any of the artful and disguised modes in which men attempt to conceal treasonable or libellous and slanderous meanings and designs; that if, in truth, language is published and circulated with intent to slander and defame others, though such intent is artfully concealed by the use of ambiguous technical or conventional terms or cant phrases, or in any other of the thousand forms in which malice attempts to disguise itself, still if it really does mean and import the criminal character attributed to it, it shall not escape legal animadversion and punishment, if rightly and sufficiently charged, so as to enable

the jury to receive proof of all those extraneous facts and circumstances which conspire to affix upon it such criminal character; and that when so charged and when the facts are proved which give it this character, the jury are not to shut their eyes to that which all the rest of mankind can see and know and understand." *Commonwealth v. Child*, 13 Pickering, 205, 206.

The facts in this case, taken in connection with the circumstance that the plaintiff's name is published with fifty-nine others and the whole surrounded by a deep black line, and the word delinquent applied to each person makes the publication one which is equivocal and ambiguous, and therefore should have been submitted to the jury to decide whether or not it had the tendency and effect alleged in the innuendo. The word "delinquent" which appears above the plaintiff's name is itself a word of ambiguous meaning. It may have the mild sense of a simple failure to perform a duty, or it may have the additional meaning that in failing to perform the duty there has been committed a crime or offense, or that there has been a moral failure of some kind in connection with the failure to discharge the duty. *Bouvier's Law Dictionary* defines a delinquent as "He who has been guilty of some crime, offense or failure of duty;" and *Webster* defines the word as "one who fails to perform his duty; an offender or transgressor; one who commits a fault or crime;" and in *Boyce v. Ewart*, 1 Rice (S. C.), 140, 140 in a dissenting opinion of two of the judges, it is said that:

"Delinquency cannot mean, when applied to a merchant, anything less than that he has proved to be dishonest and attempted to evade the payment of his debts."

In answer to the contention that is made that the intention of placing the word "delinquent" in the publication was merely to indicate that the debt, or the judgment was unpaid, it may be urged that where a judgment is offered for sale, the debt and the judgment are of course unpaid in whole or in part; and that as the fair presumption is that no word is to be regarded as surplusage, the word "delinquent" may be reasonably supposed to have another meaning than that of mere non-payment. It was for the jury to determine this question.

In the case of *Zier v. Thafflin*, 33 Minnesota, 66, it was held that the words "wanted E. B. Z. : M. O. to pay a due bill are not libellous on their face." But the court held that the circumstances under which they were used made them libellous. The principle there laid down is:

"But words which may be innocent of themselves may be rendered libellous by the place and circumstances of their publication, for such place and circumstances may impress on them a meaning and suggestion which, standing alone, they do not have. Thus, though the words here do not of themselves impute wrong, they might be published in such a place or under such circumstances as to make them capable of naturally conveying the impression that plaintiff had been guilty of dishonest practices, either in contracting the debt or withholding payment of it. And so they come under the second class mentioned in the cases referred to, of words reasonably susceptible of a defamatory as well as of an innocent meaning. What meaning they would naturally convey was for the jury to determine, in view of the circumstances of their publication."

See also *Woodling v. Knickerbocker*, 31 Minn., 268, and the *Hatter's case*, 22 Q. B. D., 134.

As the language of the publication, taken in connection with all the circumstances under which it was made, made it susceptible of a construction "that the plaintiff had dishonestly and dishonorably evaded and refused to pay said claim, and that he was not entitled to the confidence and respect of the community," we are of the opinion that the question of whether or not it was to be so constructed should have been submitted to the jury, and that the court erred in instructing the jury to return a verdict for the defendant.

The judgment of the court below will therefore be reversed, and the cause remanded for a new trial.

MOORE, J. and HUNT, J., concurred.

Bateman & Harper, for plaintiff in error.

Kittredge & Wilby, for defendant in error.

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## TRUSTS.

[Franklin Common Pleas, 1891.]

\*MARY R. ENGLISH ET AL. V. WILLIAM MONYPENY ET AL.

One who is a trustee with power to manage, control, lease, collect the rents of, and in a certain contingency, to sell real estate, the beneficial ownership of which was then in his *cestuis que trustent*, purchased said real estate, at a sale made by the sheriff pursuant to a decree rendered in a partition suit which was brought by the trustee himself, the *cestuis que trustent* then not being *sui juris*. *Held:*

1. The beneficiaries may avoid the sale at their election; because the trustee did not have their consent, or the permission of the court, to buy; and because the court did not confirm his purchase, "after a full disclosure of all the facts;" and the facts, (1.) that the trustee was then the owner of one-half of the property, (2.) that the legal title was not vested in him, (3.) that the sale was not made by him, and (4.) that the contingency upon whose happening he could sell the trust property, had not occurred, do not, nor does either of them, affect this conclusion.
2. The beneficiaries may show cause against the decree of sale by an original suit in the nature of an original bill in equity, such as this action is.

PUGH, J.

On the nineteenth day of July, 1881, John C. English, of this city, died. He left a widow, Mary R. English, and the following children: John R., Mary A., Louise R., Bertha R., Agnes R., and Jessie R. English. He also left a last will and testament. The items of the will pertinent to this case read as follows:

"Item 1. My property, real, personal and mixed, choses in action, shall go into the possession and control of my executor, to be by him managed and cared for, except so far as special disposition is otherwise herein made. He shall see to all matters relating to real estate, collecting rents, making leases, and having the property kept in proper repair and insured."

"Item 2. The real estate which I own jointly with William Monypeny, I desire shall be left in said Monypeny's control, to be managed by him, with power, so far as my interest therein is concerned, to make such repairs and improvements thereon as he may think best, and to lease the same and collect the rents, accounting therefor to my executor,

\* For decision of circuit court see 3 Circ. Dec. 582.

and in case he sees proper to sell his interest therein, then he may sell my interest therein, and for these purposes I hereby appoint him trustee in that behalf. In case of such sale thereof, my executor may, if the means of the estate will justify, purchase the said property; that is, said Monypeny's interest therein, for my estate. This trust shall terminate on the division of my estate."

"Item 10. I hereby nominate and appoint J. G. Gilmore to be executor of this will, and authorize and empower him to make, execute and deliver all needful and proper deeds, and other conveyances on all sales he is herein authorized to make, and also to compromise and adjust all claims in favor of or against my estate as he shall deem best; and also to take in his own name, as executor, title to any real estate purchased by him under the powers of investment herein conferred on him, and on the division of the estate he shall, and he is hereby authorized and empowered to make to the devisees, deeds for their respective shares of the real estate, as well that which I leave, and which shall not before have been sold, as that which he purchases as aforesaid. And in order that he may make these deeds and the others above mentioned, and also that he may insure the real estate in his own name as executor, I hereby devise to him all my real estate, wherever situate, as executor. He is also authorized to keep insured in his own name, as executor, all personal property belonging to my estate that in his opinion should be insured."

"Item 6. All my real estate in Franklin county, Ohio, except those parcels above spoken of herein, shall be held till the division of my estate, and at that time all the real estate then held for my estate shall be divided among my children, one full third thereof being assigned to my wife for and during her natural life, which third subject to such life estate, shall be also divided among my children as aforesaid."

"Item 9. My estate shall be divided whenever my youngest child, surviving, reaches the age of twenty years." The rest of that item is not germane to this case.

The meaning of these provisions, touching some of the questions discussed, is not clear and unambiguous.

It is obvious that the defendant was made a trustee of the interest of English in the joint property for the purpose of renting it, making repairs and improvements, collecting and accounting for its rents, and selling it whenever he saw proper to sell his own undivided interest therein.

It is probable that the testator only contemplated a private sale, and not a public sale, such as might be made in a partition suit. Ordinarily a power to sell would imply a power to convey. It was claimed, however, that the legal title to that property was not, by the will, vested in the defendant; but that it was vested in the executor by the tenth item of the will. For the purpose of deciding this case, it is not necessary to determine that question. Still these observations will be made.—The first provision of item ten certainly does not imply that the legal title to the English share of the joint property is vested in the executor; for that only authorized him to make "deeds on all sales he was authorized to make" by the will, but he was not authorized by the will to sell the interest of English in the joint property. Another provision of that item is that the testator devises all his real estate to the executor. Standing alone, that would mean just what it says. But the provision is explicit that all the real estate is devised to him for two purposes, to wit: (1) To enable him to make the deeds required to be made on the division of

the estate, and (2) "To make the other deeds above mentioned," which, evidently, refers to the deeds on sales made by the executor.

The proposition is not without plausibility that he did not mean by this to divest the trustee of the implied power to convey his interest in the joint property, in the contingency that he should sell. This item also requires the executor to take the title in his own name "to any real estate purchased by him under the power of investment herein conferred on him." Under one of the powers, he could buy Monypeny's interest in the joint property in case it should be sold by the latter. But does this provision, in item ten, necessarily import that because he was to take the title to Monypeny's share when he bought it, that the title to the other share was vested in him for all purposes? On this subject, therefore, the will has not the virtue of clearness.

The evidence proved that the defendant accepted the trust.

The joint property of Monypeny and English is described in the petition fully. On the twenty-fifth day of February, 1882, the defendant filed a petition in partition in this court. At the April term, 1882, an order of partition was made. Some of the property was divided by the commissioners the rest of it, including the most valuable portions, was reported to be indivisible, and the first day of July, 1882, it was sold and purchased at the aggregate price of \$53,644, by the defendant. Subsequently the sale was confirmed by this court.

For several reasons, on several grounds, the validity of the sale or sales is assailed by the plaintiffs in this action. One is, that inasmuch as Monypeny was trustee, his purchase was void, or voidable. This is the only ground that will be considered by the court.

At the time of John C. English's death, all of his children were minors. When the suit in partition was brought, and the property was sold to William Monypeny, all the daughters were absent, attending school in Indiana, and they charge that they knew nothing of, and were in darkness as to those proceedings. The widow makes substantially the same charge. Two of these children were not of age at the time this action was brought. One is still a minor.

The principle is firmly imbedded in our American jurisprudence, that trustees, agents, and all persons acting in a confidential character, are disqualified from purchasing the subject committed to them. It was borrowed from the civil law. The principle has been expressed in varying language by different authors and courts. It is difficult to give an exact a priori definition of the principle, and more difficult to mark its limits by such a definition. Indeed, courts of equity have refused to fetter their jurisdiction, under the operation of this principle, by giving such a definition, or defining its boundaries. The principle is distinguished for its universality; for its breadth.

In *Billage v. Southee*, 9 Hare, 534, the court, through the delivering judge, observed:

"The jurisdiction is founded on the principle of confidence, and I shall have no hesitation in saying it ought to be applied, whatever be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised—those of trustee and cestui que trust, guardian and ward, attorney and client, surgeon and patient—to be merely instances of the application of the principle."



The existence of the fiduciary relation as a fact, involving "confidence, reposed on the one side, and the resulting superiority and influence on the other side," is the central fact upon which the principle rests. And Pomeroy said: "The relation and the duties involved in it, need not be legal; they may be moral, social, domestic or merely personal." 2 Pomeroy's Eq. Juris., sec. 956.

It is, therefore, fallacious to say that at the very beginning, the relation between the alleged trustee and beneficiaries must be proved to have been legal in character.

He also makes this clear statement of the principle as to the trustee and beneficiaries:

"The rule is inflexibly established that where, in the management and performance of the trust, trust property of any description, real or personal property, or merchantile assets, is sold, the trustee cannot without the knowledge and consent of the cestui que trust, directly or indirectly become the purchaser. Such a purchase is always voidable and will be set aside on behalf of the beneficiary, unless he has affirmed it, being sui juris, after obtaining full knowledge of all the facts. It is immaterial to the existence and operation of this rule that the sale is intrinsically a fair one, that no undue advantage is obtained, or that a full consideration is paid, or even that the price is the highest which could be obtained. The policy of equity is to remove every possible temptation from the trustee. The rule also applies alike when the sale is private or at auction, \* \* \*."

I will quote briefly from some other authors and from some of the numerous authorities.

"If the trustee purchases the trust property, either directly, at his own, or any other sale of the property, the sale may be set aside at the election of the cestui que trust." 4 Lawson's Rights, Remedies and Practice, sec. 2030, (note 4).

"One who holds property in trust cannot be the purchaser thereof at a sale, by operation of law." Freeman v. Howard, 49 Mo., 195.

"Trustees are incapable of purchasing trust property for themselves." Grumley v. Webb, 44 Mo., 44; s. c., 100 Am. Dec., 309.

Lord St. Leonards said the rule was "that trustees who have accepted the trust (unless they are nominally such to preserve contingent remainders), agents, commissioners of bankrupts, assignees of bankrupts, or their partners in business, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, counsel, or any persons who, being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves except under restrictions which will be shortly mentioned." Sugden's Vendors and Purchasers (13 ed.), 566.

Our Supreme Court, in the case of Dunlap v. Mitchell, 10 Ohio, 117, 120, said:

"No principle is better established than that the person entrusted with the authority to sell the land of another can not himself become the purchaser. This principle of exclusion is familiar with the profession, and has been pushed to a rigorous extent in our courts. In all such cases the owner may annul the sale on the repayment of the money advanced."

"A trustee can not purchase for himself, nor deal with the cestui que trust in reference to the estate," said the Supreme Court of South Carolina, in *McCants v. Bee*, 1 *McCord's Ch.*, 383; s. c., 16 *Am. Dec.*, 610.

"Trustees are never permitted, without the aid of the court, to buy the property which they hold as such." *Carson v. Marshall*, 37 *N. J. Eq.*, 214.

In that case, the will empowered the executors to rent the real estate, and to sell so much thereof as should be necessary to pay the testator's debts. They accepted the trust. Judgments had been rendered against the testator in his lifetime. After his death executions were issued at the instance of the judgment creditors; the sheriff, in obedience to the writs of execution, sold the property at public sale, the executors becoming the purchasers. It will be perceived that this was a case where the sale was not made, or procured to be made by the executors.

"A trustee can, in no case, and under no circumstances, become the purchaser of the property he is entrusted to sell, so as to acquire a title which he can maintain against his cestui que trust." This was the decision of the court in *Creveling v. Fritts*, 34 *N. J. Eq.*, 134.

"A trustee can never be a purchaser upon a sale of the trust estate." This was a decision of the Supreme Court of Maryland, in *Dorsey v. Dorsey*, 3 *Harris & J.*, 410, s. c., 6 *Am. Dec.*, 506.

The principle, or rule, is fortified by reason and authority. If the trustee is invested with the power to sell the trust property, and makes the sale to himself, directly or indirectly, he unites in himself the functions of seller and buyer, functions that are incompatible.

But it is not necessary that he should either make the sale, or procure it to be made.

In *Chapin v. Weed*, 1 *Clark's Chy.*, 325, that was the contention of counsel for the trustee, but the court overruled it.

The same argument was made in *Staats v. Bergen*, 17 *N. J. Eq.*, 297. The court observed upon it:

"But it may be said that where a sale (as in the present case) was not made by a trustee himself, but by a sheriff, or master, or other officer, under a judgment, decree or execution, the rule does not apply, and that the trustee may in such case, purchase and hold the property for his own benefit. But it is held that the rule applies to such sales, as well as to those made by the trustee himself, as will be seen by the following cases." One English, four Maryland, and two New York authorities—all respectable—are cited to sustain the proposition.

In *Carson v. Marshall*, cited before, the court said this on the subject:

"The question is not, under such circumstances, who makes the sale, whether the trustee himself or other persons, but whether the property sold is held in trust or not."

It would be impossible to discover any reason why the rule should not control, whether the sale was made by the trustee himself, or by his procurement, or by an order of court.

Whether the question is viewed by reason or under the illumination of authority, it is not important that the sale was made in the partition case in virtue of a decree of court, and not by *Monypeny*.

The rule is not confined to trustees so-called, to technical trustees, to persons who are trustees in the more limited signification of the term; nor is it confined to any particular class of fiduciaries. It extends to all classes of persons who stand in a situation of trust or confidence in re-

lation to the property which was purchased. If the buyer had a duty to perform in reference to the property which was not consistent with the interest and character of a purchaser on his own account, the purchase may be avoided by the owner." *Van Epps v. Van Epps*, 9 Paige, 237.

The fact that there was, or may have been, a struggle for the mastery, between self-interest and integrity; that there was a temptation to abuse; that there was danger of imposition, which may not have been discoverable "by the eye of the court"—these facts would invalidate a sale like this.

In *Imboden v. Hunter*, 23 Arkansas, 622; S. C., 76 Am. Dec., page 221, the court used this unqualified language, which was quoted from the Vice Chancellor in *Dobson v. Racey*, 3 Sandf. Ch., 60: "And it is now a settled rule, both there and here" (that is, England and this country) "that no party can be permitted to purchase an interest where he has a duty to perform which is inconsistent with the character of purchaser."

In *re Hallman*, 13 Philadelphia Reps., page 553, it was said:

"The rule embraces all who being employed or concerned in the affairs of another have thus enjoyed a means of information that might be employed in the destruction of interests they are bound to promote, were the agent at liberty to convert himself into an owner against the consent of the principal."

If the purchaser sustains the relation of trust or confidence touching the subject of the purchase, it is not material what he is called, whether a trustee, executor, administrator or guardian. "What's in a name?" *Creveling v. Fitts*, supra; *Saltmarsh v. Beene*, 4 Porter (Ala.), 283; S. C., 30 Am. Dec., page 528.

"The jurisdiction which courts of equity employ to protect infants is not confined to cases of a strictly fiduciary nature." *Long et al. v. Mulford*, 17 Ohio St., page 485, 505.

This rule or principle was adopted in equity, not to remedy a wrong, but to prevent a wrong. The conception is, that it is better that the cause of evil should be inhibited; that it should be nipped while it is in the bud, rather than wait till it has blossomed and ripened; that even "courts of equity should not be relied upon to apply the remedy in particular cases by inquiring into all the circumstances of a case whether there has not been fraud in fact." "Equity administers the ounce of prevention; law, the pound of cure."

The position of the trustee gives him the means of knowing the situation and value of the trust property, and the wants and needs of the beneficiaries. His first duty is to employ that information to promote, and not to injure the interests of the beneficiaries. At the sale, it is his duty to make the property produce the best price, and he is bound by all principles of honesty to use every reasonable effort to that end. But if he should be permitted to buy, he would be tempted to use the information to benefit himself, and to buy the property at the lowest possible price.

There are just as good men, and just as many of them now as there ever was. but equity will not assume that the best of them will "carefully consider" and "sedulously protect" the interest of fiduciaries in a sale of their property, when he is permitted to bring to the discharge of that duty the selfish interests and bias of a purchaser. He will not be trusted to act for another and for himself in the same matter, when they are in conflict. He may not be loyal to both. How can he be so?

The policy of equity, of the rule under consideration, is to lead him away from that temptation and to deliver him from the evil of wronging the beneficiaries. Even if he owns an interest in the property sold, that fact does not exempt him from temptation; in fact it increases the temptation.

That there may have been no moral turpitude in the conduct of the trustee, no moral fraud; that the property may have been sold at the best possible price, are no reasons for relaxing the rigor of the rule and for withdrawing from the beneficiary the right to avoid the sale. In *ex parte Bennet*, 10 Vesey, 385, it was pertinently said that if a trustee should be allowed to buy the property in an honest, a fair case, then he should be allowed, and have the liberty to buy in a case having the verisimilitude of an honest and fair case. Human nature is so weak and imperfect that such a case may be in fact grossly fraudulent. The power of a court is not always equal to distinguishing an apparently fair sale from a flagrantly fraudulent one. The trustee may have been a paragon of innocence, but that would not legitimize the sale to him.

It was insisted in the argument of this case, that this was not a case for the domination of the rule or principle in equity mentioned.

One contention was that William Monypeny was not vested with the legal title. It may be true, as the court has intimated, that the legal title to the property was vested in the executor, but that does not withdraw the case outside of the principle. Why should it?

In *Staats v. Bergen*, *supra*, it was held: "A trustee is not relieved from his incapacity to become a purchaser at the sale of the real estate of his cestui que trust by the fact that the legal estate is not in him." The cases cited to sustain and exemplify the resolution of the court are found on page 307 of the report.

In *Van Epps v. Van Epps*, 9 Paige, *supra*, this was the decision of the question under consideration: "The rule of equity which prohibits purchases by parties placed in a situation of trust and confidence with reference to the subject of the purchase is not, as the defendant supposes, confined to trustees or others who hold the legal title to the property to be sold \* \* \* \*"

In *White and Tudor's Leading Cases*, sec. 242, the law is thus stated: "The person who effects the sale need not be clothed with the legal title; it is enough that he expressly or impliedly agrees to act for others, and ought not to bring his duty in conflict with his interests."

Nor does the court conceive that it is indispensable that the trustee should be empowered to sell the property, although in most of the decided cases such a power was bestowed upon the trustee. It is sufficient to make the principle applicable, in all its strictness and force, that the defendant had, in some respects, in the language of Ch. Kent, "a concern in the disposition and sale of the property of others." Or, it is sufficient, in the language of Lord St. Leonards, that the defendant, "being employed or concerned in the affairs of another, has acquired a knowledge of his property," which he might be induced to conceal for his own benefit, and not use it for the benefit of the person relying upon his integrity. It is sufficient that he has a duty to discharge which is inconsistent with the character of a purchaser, that duty having arisen from his relation of trust or confidence touching the property. See also, in *Micoud v. Girod*, 4 Howard; S. C. Curtis, Dec., page 189, a statement by Judge Wayne, which supports this view.

Again, it was vigorously and ably contended that the rule did not apply to this case because the defendant, Monypeny, having no interest in the property independent of that which he represented for five of the plaintiffs, was entitled to buy to protect his interest. To this it was replied that, if he desired to buy the property he should either have had the consent of the beneficiaries, or the permission of the court.

This makes the difficult question in the case. It cannot be decided, however, it must be remembered, by the square and compass of technical law. It is an equity question, and must be decided by the rules and reasons of equity.

The decree of sale in the partition case did not authorize the trustee to buy; nor did the evidence show that the court confirmed the sale with full knowledge of all the facts." If these facts, or either of them, were essential, the defendant was obliged to prove them. "Whenever there is any fiduciary relation between the parties, the court throws the burden of proof on the party who sets up the transaction against the person whom he was bound to protect." *Harrison v. Guest*, 6 De G., M. & Gr., 452. If there is a rule in equity jurisprudence, or, in equity practice, which required the defendant to obtain the permission of the court to buy the property, the plaintiffs must prevail in this cause; that conclusion is irresistible.

The counsel for plaintiffs cited two cases to support their contention that there was such a rule. They were a New York and a North Carolina case. But the counsel for the defendant insisted that it was a local rule limited to New York.

A careful examination of the authorities convinces the court that the rule obtains wherever the borrowed English chancery jurisprudence and practice have been adopted.

In *Davoue v. Fanning*, 2 Johnson Chancery, on page 261, Chancellor Kent said: "The only way for a trustee to purchase safely, if he is willing to give as much as any one else, is by filing a bill and saying, so much is bid, and I will give more, and the court will then examine into the case and judge whether it be advisable to let the trustee bid. In that way the court will divest him of his character of trustee, and prevent all of the consequences of his acting both for himself and for the cestui que trust. In no other way could the trustee become the purchaser, without being called upon to give up his purchase."

In that case (page 225) it was contended that the trustee purchased "for the benefit of his wife, who was one of the cestui que trust, having an interest in the sold land." Yet Ch. Kent held that, "if he could become a purchaser on her account, \* \* \* \* the temptation to the abuse of the trust would be great and dangerous."

Here in this case at bar, it was argued that as Monypeny had an interest in the property, he had the right in equity to buy it. In principle there is no difference between the two cases. Borrowing the phraseology of Ch. Kent, the fact that Monypeny bought the property for his own benefit, "was peculiarly calculated to touch and awaken the suggestions of self-interest." That self-interest could not be harmonized with his duty as trustee of the beneficiaries.

The law of this New York case has, I believe, been adopted as good law in Ohio; for in *Welsh et al. v. Perkins et al.*, 8 Ohio, on page 57, Judge Wood said: "The opinion in that case is believed to be law by us; and it is sustained by a very learned and elaborate analysis of all the ancient and modern decisions to the time it was made."

The Supreme Court of the United States was not reserved in its praise of the decision in the Davoue-Fanning case. For in *Michoud v. Girod*, 4 Howard, 503, Judge Wayne said: "It is a critical and able review of the doctrine as it had been applied by the English courts of Chancery, from an early date, and has been received, with very few exceptions, by our state chancery courts, as altogether putting the rule upon its proper footing." He awards the same praise to Ch. Kent for resisting and conquering those who were endeavoring to introduce qualifications and relaxations of the rule in this country as he does to Lord Eldon for doing the same work in England.

The United States Supreme Court also held in that case thus: "The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, or in which he represents another whether he has an interest in it or not—per interpositam personam—carries fraud on the face of it." The argument in the cause at bar was that a trustee who had an interest of his own in the trust property, was entitled to purchase it at a sale; that such a sale was not, therefore, presumptively fraudulent; that it was not voidable at the election of the cestui que trust. But the Supreme Court of the United States evidently does not countenance that argument; for, if the sale "carries fraud on the face of it," "whether the trustee has an interest in the property or not," the argument is surely unsound. There is more evidence in the opinion of that court showing what the rule of equity is in such a case, upon the proposition that a trustee cannot purchase. For in that case the trustees, the executors, who bought the land, were themselves heirs or legatees, having an interest in the land bought, and it was claimed by their counsel that that fact exempted them from the rule. To that contention the court declared that no well considered decision had been found to sustain the "right of an executor to become the purchaser of the property which he represents, or any portion of it, though he has done so for a fair price, without fraud at a public sale." "Why," said the court, "should the rule be relaxed in the case of persons most frequently exposed to the temptation of self-interest, who may yield to it more readily than any others, with a larger impunity, if the day of equitable retribution shall ever come for those who have been defrauded? \* \* \* \*"

"Then other remedies must be devised to protect their interests than which experience has shown to be alone efficacious. It is, that when a trustee for one not sui juris, sees that it is absolutely necessary that the estate must be sold, and he is ready to give more for it than any one else, that a bill should be filed, and he should apply to the court by motion, to let him be a purchaser. This is the only way he can protect himself." This, be it remembered, was a case in which the trustees had a personal interest in the property sold which might require protection, but that did not exclude them from the operation of the rule.

Both of these cases, *Devoue v. Fanning* and *Michoud v. Girod*, were cited with approbation by our Supreme Court in *Piatt et al v. Longworth*. 27 Ohio S., page 196. That was a case in which Nicholas Longworth, who was an administrator, bought property belonging to the estate of his intestate, at his own sale. In effect, the court declared that two of the objects of the rule, two of the reasons for its institution, were to elevate the trustee above the region of temptation, and to "guard against the uncertainty and hazard of abuse;" and that for these reasons the cestui que trust could elect to have the experiment of another sale

"without showing actual injury." And the court, notwithstanding Longworth's standing, his prominence, adjudged that the sale was voidable under the same equitable principle which has been invoked and considered in this case.

There are other authorities which refute the claim that the rule is local to New York.

In *Colgate's Executors v. Colgate*, 23 N. J. Eq., 372, the will directed that until the estate should be sold, the executors should receive the rents and apply them as ordered by other provisions in the will. It was also devised in trust to the executors to be sold at such times as they should think proper. The plaintiff was one of the executors of the will. He and his co-partners had a part interest in the land, and he asked for leave to buy it. Thereupon the court observed: "And when it is necessary that lands held in trust should be sold, and the trustee is in a situation that induces him to give more than any other purchaser would give, the court may authorize a sale by him at a full, fair price, to be approved by the court, to himself, or to some one for his benefit." The same rule, therefore, seems to be prevalent in New Jersey.

So in the case of *Dorsey v. Dorsey*, supra, the plaintiff, who was a cestui que trust, had an interest in the land sold, as an heir of Samuel Dorsey, who was a son and one of the devisees of Caleb Dorsey, deceased. The defendant's testator, Edward Dorsey, was his guardian and trustee. He (Edward) was also a son and devisee of Caleb Dorsey, and as such, as I understand the case, though the report is not clear in its statement, had an interest in the land. If I am right in my construction of the report, then this authority sustains the rule, and shows that it is not limited to New York, and that it has been adopted in Maryland.

In *Creveling v. Fritts*, supra, three executors purchased the trust property. They were sons of the testator, and had an interest in the property and its proceeds. They might have insisted that they should be allowed to bid on it, to protect their interests. The report expressly states that they were "agents to sell the testator's lands for the benefit of others besides themselves." The decision of the case, by which the sales were nullified, is a sharp, stern, severe disapproval of the contention that a trustee, who has an interest of his own in the trust property, has the right to buy it without the consent of the cestui que trust, or the permission of the court, after notice.

The New York case, before mentioned, is *Scholle v. Scholle et al.*, 4 N. E., 334. Abraham, William and Jacob Scholle, as tenants in common, were seized of real estate. Abraham died, leaving a will, by which he appointed William and Jacob executors and trustees. They were empowered to sell the land and re-invest the proceeds. There were four children. William Scholle brought suit to partition the land. It was sold by a decree rendered in that suit. William and Jacob Scholle bought it.

After making a statement of the rule of equity, it was held:

"But where the trustee has an interest to protect, by bidding at a sale of the trust property, and he makes a special application to the court for permission to bid, which, upon the hearing of all the parties interested, is granted by the court, then he can make a purchase which is valid and binding upon all parties interested, and under which he can obtain a perfect title."

I believe this is simply a statement of a rule which is applicable wherever the English Chancery principles and practice obtain. There

is no disclosure in the report that the decision was based on a rule that no party to a suit shall have the right to buy property sold therein.

In *re Hallman*—a Pennsylvania case—before cited, this forcible statement was made:

“No man in whom another has confided; no man who is in the confidence of another and has advised a sale, can safely buy without the consent of the owner, or beneficiary, or without the permission of the court, having jurisdiction of the trust.”

And it was said that the rules, which have been considered in the case at bar, “apply with peculiar force to every case of executors, trustees, administrators, appointees of the several courts, and guardians.”

No exception was made in favor of the trustee who had an interest to protect; and the case is another witness to the universality of the rule.

It has been stated by an able text book author that a mortgagee, who has power to sell, cannot, without the aid of a statute, buy the property sold by him. The reason is, that he is, not in the technical, but in the broad, equitable, sense of the term, a trustee. But he has an interest to protect, and there would be just as much plausibility in his claim that he should be allowed to buy, as in that of a trustee who owns part of the property. The authority of two states is against this rule, but the preponderance of authority is on the other side. And I am now speaking of the rule independently of statute. See for a review of the authorities in *Imboden v. Hunter*, *supra*.

The case of *Caldwell v. Caldwell*, 45 Ohio St., 512, was appealed to on the argument, and it was criticised. By analogy it does sustain the contention of the plaintiffs. The criticism was that the decision was not based upon any definite principle or ground. If that is an impeachment of the decision, the decisions in *Davoue v. Fanning*, *Michoud v. Girod*, and *Piatt et al. v. Longworth et al.*, *supra*, are abnoxious to the same attack. They are almost like the case made in *Caldwell v. Caldwell*. The praise for the ability manifested in *Ch. Kent's* opinion, in the New York case, was unwarranted, if this criticism was sound. But an examination of the opinions in both the *Devoue-Fanning* and *Michoud-Girod* case, will, I believe, make it plain that there is a definite ground, a definite principle, for their basis. It may not be the definiteness as fixed by the square and compass of technical law, but it is the definiteness of equity, which “moderates and reforms the rigor, harshness and edge of the law,” and “defends the law from crafty evasions,” and “protects it from shifts and contrivances against its justice.”

The case of *Lee v. Howell*, 69 N. C., 200, and *Simons v. Hassell*, 68 N. C., 213, were relied upon by defendant's counsel. But in a subsequent case in the same court, *Froneberger v. Lewis*, 79 N. C., 426, it was said that the statement in the second case mentioned, that the husband of the widow and guardian of the children, could purchase at the sale, and that he had a right to see that the land brought a fair price, was *obiter dictum*. Besides it was said that the other case was at law, and it was doubtless correct to say that, at law, the purchase was invulnerable, but that was not true in equity. “Observe that this was an action at law, where of course the legal title only could be looked to, and that was clearly in *Hassell*.” *Hassell* was the trustee and purchaser. This decision, therefore, does not instruct any court how to decide the question in equity. The same comment was made by the court on the case of *Lee v. Howell*—above mentioned—“The same may be said of *Lee v.*



Howell." And the court in 79 N. C., affirmed that in cases where the trustee had an interest, it was "proper, if not indispensable, that his bidding should be sanctioned by the previous permission, or subsequent confirmation of the court upon a full disclosure of all the facts."

The court, therefore, regards the North Carolina authorities as adverse to the defendant in the case at bar.

I am aware that in a few courts the rule of equity, discussed, has been relaxed, and qualified, notably in the State of Pennsylvania, in the case of *Fisk v. Sarber*, 6 Watts and Sargent, 18, Judge Sharswood, an excellent judge, having delivered the opinion. But that decision has been adversely criticised and expressly disapproved by a number of the highest courts of the country.

Independent of authority, when we look "down into the law itself, to the very bottom, reading in its crystal evolutions its own reasons for its own being and flowing," as Bishop felicitously expressed it, should not the conclusion be against the defendant? The fact that he had an interest in the property did not absolve him from sedulously protecting the interests of the beneficiaries. It was his duty to see that the property sold for the highest possible price. They reposed implicit confidence in him. It was his duty to subordinate his interests to their interests. He had peculiar knowledge of the character and value of the property and the wants and needs of the plaintiffs. He could "form a better judgment as to the value of the property than any other person." He could use his knowledge for his own advantage. He was exposed to the temptation to so use that knowledge. At his instance the place and time of sale were fixed; he moved the court to make the order of sale, and to confirm the sale. At the sale, he bore the triple character of trustee for plaintiffs, owner of part of the property, and purchaser of all of it. Acting for himself, he could not act for the others. His interests being opposed to that of the plaintiff, he might have acted under a "bias in his own favor." The court does not find that he did so act; indeed, no moral, actual fraud is found; but the court does find, and cannot help but find, that he was exposed to the temptation of doing that. His ownership of part of the property, does not affect any of the high considerations upon which the rule is based. That was only a reason why he should have had permission to buy, after notice served upon the other parties. The rule is clear and unequivocal. This court cannot set it aside. The old way must be followed. It is the more equitable way too.

It was argued that as the defendant was only a "dry trustee," he had the right to buy, *Perry on Trusts*, secs. 198 and 199 having been cited. The fallacy is in the assumption that the defendant was a "dry trustee." One of the cases cited by *Perry—Jones v. Sutton—Sutton v. Jones*, 15 Vesey Jr., 583, is instructive on this proposition. The holding was that a trustee could not be a receiver of the trust property "with emoluments." A Mr. Boodle was one of the trustees and the nominated receiver. It was found that he was invested and charged with the duty of a trustee; that the will conferred upon him and his co-trustee the power of leasing the property; and that they were "entrusted by the testator" with the "management" of it. The actual ground of the decision, the ratio decidendi, was, that if the trustee should be appointed receiver, there would be a collision between his duty as trustee and his duty and interest as receiver. It was observed that the circumstance that the trustee had the power to sell and exchange did not disqualify him, but that was because it was a power which "which could not at present be called into existence."

One of the essentials of an express private trust of the passive class—called frequently “a dry trust”—is that the legal title is vested in the trustee. His duties are few. The cestui que trust has the equitable estate and the beneficial ownership which entitle him to the possession of the property, to rent it, to receive the rents and profits, and to control and manage the property.

By an express active trust, the trustee is charged “with the performance of active and substantial duties with respect to the control, management and disposition of the property for the benefit of the cestue que trustent.” The trustee may or may not hold the legal title. For in one of the subdivisions of this class of trusts, the object of the trust may be for the trustee “to hold the property, receive its rents, profits and income and apply them to some prescribed uses.” Neither the commission to sell the corpus of the property, nor clothing the trustee with the legal title, seems to be indispensable to the constitution of such a trust. 2 Pomeroy's Eq. Juris., secs. 988, 991 and 992.

Manifestly, Monypeny was not a “dry trustee.” Some of his duties were, to lease the property, to collect the rents, and to control and manage the property. These were “active and substantial” duties. If, in addition to these, he had the power and duty to sell the property, which, in one contingency, he certainly had, and also the power to convey it when sold, can there be the slightest doubt that he was an active trustee, and not a “dry” one?

It was further contended that the plaintiffs have misconceived their remedy, their only remedy being by a proceeding in error to the decree in the partition case. If I do not misinterpret the decision in Long et al. v. Mulford et al., 17 Ohio St., 484, it furnishes a conclusive answer to this contention. The kinship of that to this case is obvious. There, as here, in the first suit in partition, no live defense was made by the guardian ad litem, who was appointed by the court upon the application of the plaintiff. Assuming that the plaintiffs here were constructively served in the partition suit, as the statute required, still they relied upon their trustee to guard their rights, as they had a right to do. They were infants. They were absent in Indiana; and they, also, all affirm, under oath, that they had no knowledge of the proceedings in partition till some years afterwards.

Practically, the partition suit brought by the defendant was amicable in its character. The plaintiffs had no technical guardian. Fraud, not actual, but constructive, is the gravamen of this action.

Unless they had made an objection to the purchase of the property by their trustee, by a motion to set aside the sale, and obtained an adverse ruling from the court, how could they have acquired a standing in a reviewing court in a proceeding in error?

The trustee could have adopted another course by which his purchase would have been valid. The language of Judge White in the case just mentioned, is pertinent. “If the party intends to take the position and stand on the rights of a stranger, or of an adversary, he ought first to surrender the advantage arising from the trust, confidence and control which pertain to his fiduciary or quasi fiduciary character.” If Mr. Monypeny wanted to buy, the safest course would have been for him to have laid down, surrendered, his commission as trustee.

The question is, how can one who was an infant when a judgment was rendered against him, show cause against that judgment? There are at least four remedies.

(1.) He may, within one year after he arrives at age, proceed under sec. 5330 of the Rev. Stat.

(2.) He may institute a proceeding against it, in the nature of a bill of review, as authorized by the eighth paragraph of sec. 5354 of the Rev. Stat.

(3.) He may, within the time prescribed by law, proceed against it in an appellate court on error.

(4.) He may proceed against it by an original suit—the substitute for the original bill in equity.

Neither remedy is exclusive of the other. He is not confined to any particular remedy or remedies.

The jurisdiction of a court of equity to interfere and grant relief "in any particular case, or under any condition of facts and circumstances, is not lost, or abridged, or affected," by a statute afterwards enacted, which gives a remedy at law, unless the statute expressly negatives or takes away the equitable remedy. 1 Pomeroy Eq. Juris., 181, 276 et seq.

In *Carey v. Kemper*, 45 Ohio St., on page 97, Judge Minshall, discussing the right of an infant to show cause against a judgment, which ordered his property sold, and which was rendered during his infancy, said:

"And it is equally clear that he is not confined to this remedy," (the second one mentioned) "for as held in *Long v. Mulford*, 17 O. S., 484, and in *Rammelsberg v. Mitchell*, 29 Ohio St., 22 he may do so by an original suit, in a court of competent jurisdiction, the substitute under our reformed procedure for an original bill."

The defense that the plaintiffs acquiesced in, and ratified, the sale was unsupported by the evidence. The fact that the proceeds of the sale were applied to the payment of debts is of no significance under the decision in *Caldwell v. Caldwell*, supra. This fact, and the fact that a settlement, which disclosed that the proceeds were so applied, was made, approved and recorded in the probate court, and the presumption that the plaintiffs had knowledge, or constructive notice, of these facts, are relied upon to form ratification. But they are utterly inadequate.

A resale at a proper upset price will have to be made. The upset price will have to be ascertained by taking an account before a master; the account to be ascertained by debiting the plaintiffs with the price at which the property was sold, together with the lawful interest and the value of substantial improvements made by the defendant; and crediting the plaintiffs with the rents and profits of the property since the purchase. The difference between these sums, ascertained in this way, will be the price at which the property should be set up the sale to be on usual terms. If the property should not sell for more than the upset price, then the former sales shall, in all respects, stand confirmed. If the property should sell for more than the upset price, then the former sales should be vacated. It is true that this question of what the remedy should be, was not discussed by counsel, and the court may be in error as to the remedy, and argument will be heard if it shall be deemed necessary.

Decree for plaintiffs.

Powell, Owen, Ricketts & Black; Fairbanks, Smith & Steele, for Plaintiffs.

Harrison, Olds and Henderson, Booth & Keating and Nash & Lentz, for Defendant.

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## DOW LAW TAXES.

[Superior Court of Cincinnati, 1891.]

## H. W. VOSS &amp; CO. v. JOHN HAGERTY, AUDITOR, ET AL.

1. A whisky broker who negotiates sales of liquors between different parties, but who neither buys or procures the liquor so sold, is not subject to the tax provided in the act of May 14, 1886, and the amendments thereto, "providing against the evils resulting from the traffic in intoxicating liquors," and commonly known as the Dow Law.
2. The tax provided in such law is, upon the business of trafficking in intoxicating liquors, and not upon a single sale not a part of a business of trafficking in intoxicating liquors.
3. The sale of liquors not located in Ohio is not within the purview of such law.

SMITH, J.

The plaintiff in this case represents that his business is that of a "whisky broker" in the city of Cincinnati; that he is not engaged in the business of "trafficking in intoxicating liquors," as described in the act of May 14, 1886, and the amendments thereto, "providing against the evils resulting from the traffic in intoxicating liquors," and commonly known as the Dow Law; but that notwithstanding these facts the county auditor has placed his name upon the Dow tax duplicate for the year 1891 as a dealer in intoxicating liquors who is subject to that law.

Upon the filing of his petition a temporary restraining order was issued restraining the county treasurer from the collection of the tax, and the case has been presented to me upon a motion to dissolve such temporary restraining order.

It appears from the evidence that the plaintiff has an office only in the second story of a building devoted to other business than that which he carries on; that he advertises himself as a "whisky broker," and that his business consists in bringing together parties who desire to buy and sell whisky in large quantities, the vendor being either a distiller or a wholesale house, located, often, although not always, in Kentucky, or some other state than Ohio; that he never owns or has in his possession or under his control any of the liquor sold; and that he merely acts as the agent of the vendor or vendee, or both. It also appears that transfers of the liquors sold are made by indorsing bonded or other warehouse certificates; that occasionally such transfers may be made and the sale completed in the broker's office, but more frequently this transfer takes place at the place of business of either the vendor or vendee.

It also appears that frequently for the purpose of concealing the identity of the vendor and vendee from each other (a fact which both vendor and vendee frequently desire to have concealed) the certificates may be transferred by the vendor into the broker's name and by him in turn re-transferred to the vendee. Also that in many cases, before the transfer to him by the vendor, the broker receives the money from the vendee; but that in other cases he pays the vendor with his own check, and upon his transfer to the vendee is repaid by that party.

But I am satisfied from the evidence before me that whatever form the transaction is made to assume, for the purpose of concealing the identity of the parties for facilitating the transfer, it remains substantially always a transaction in which the broker is a mere agent or trustee for one or both of the parties to the sale. It is never his sale, but is

always a sale between the parties, effected through the broker as an agent.

Is a broker engaged in such business liable to the Dow tax, is the question raised in this case. Section 1 of the Dow law provides:

"That upon the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, there shall be assessed yearly, and paid into the county treasury as hereinafter provided, by every person, corporation or co-partnership engaged therein, for each place where such business is carried on by or for such person, corporation or co-partnership, the sum of two hundred and fifty dollars."

Bearing in mind the fact that the Dow law was enacted as a police regulation (Adler v. Whitbeck, 44 O. S. 539, 563) "to provide against the evils resulting from the traffic in intoxicating liquors," it is very evident from the language of this section that the law is not satisfied by one tax upon a business of trafficking in intoxicating liquors, unless that business is confined to a single place, but as each separate place in contemplation of law is a center from which arises the evils which the law designs to restrain, a tax is imposed upon the business carried on in each place, although these different places are owned and controlled by the same person. If the law were otherwise, a saloon keeper, by paying one Dow tax, could establish through agencies, a number of saloons which would be exempt from taxation—hence appears the language of sec. 1, "by every person, corporation or co-partnership engaged therein, for each place where such business is carried on by or for such person, corporation or co-partnership."

But while the tax must be paid by every person, corporation or co-partnership for each place where the traffic in intoxicating liquors is carried on, the law does not require a separate tax to be paid for every place where a sale is made, unless the sale in such place is in pursuance of a "business" carried on in that place. The tax is not upon a single sale, but upon the "business" of "buying and selling," or "procuring and selling." An occasional sale at a place by an agent who does not transport the liquor to the place, but solicits the sale of the liquor located in another place, does not of itself necessarily subject his principal to an additional tax in that place.

The proposition that a single sale, or several isolated sales in a place, do not necessarily constitute a carrying on of business in such a place, is laid down in the case of University Club of Cincinnati v. F. Ratterman et al., 2 Cir. Dec., 11, where it is said:

"It was hardly the intention of the legislature to make a person or corporation liable to assessment for a single sale of liquor, or it may be two or three isolated sales, but to require those who do it habitually to pay a tax therefor."

There is no evidence before me to show that Voss acted regularly for any particular vendor or vendee, so that such vendor or vendee could be said to carry on through his agency a business at his place; therefore there is no evidence before me that would warrant me in holding that any particular vendor or vendee was liable to a tax for carrying on a business there; and *a fortiori* there is no evidence to hold the agent of such vendors or vendees liable to pay a tax as such agent.

But it may be urged in criticism of this argument, that it does not follow that because no vendor or vendee carries on the business at that place, that the business of acting as agent for any and everybody is not in itself a business which should render the agent liable for the tax.

But the definition of the phrase "trafficking in intoxicating liquors" as found in sec. 8 of the Dow law, is as applied to the facts of this case an answer to that objection. That section reads as follows :

"The phrase 'trafficking in intoxicating liquors' as used in this act, means the buying or procuring, and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes; and said phrase does not include the manufacture of intoxicating liquors from raw material and the sale thereof at the manufactory by the manufacturer of the same in quantities of one gallon or more at any one time."

In order to subject to liability under this section there must therefore be a "buying and selling," or "procuring and selling." That the broker here does not "buy," is of course beyond dispute. The only question is, does he, within the meaning of the law, "procure" the liquor whose sale he has negotiated. Webster gives the derivation of "procure" from *pro* for, and *curo* to take care and defines the word as meaning "to bring into possession; to cause to accrue or come into possession of; to acquire or provide for one's self or for another; to gain; to get; to obtain." As thus defined there can be little doubt that the broker never procures the liquor that is sold through his agency. He never either has it in his possession or under his control; it never comes to his office, and the ownership and possession of it are at all times either in the vendor or vendee, and never in him.

When we take into consideration too, the object which it appears the framers of the act intended to effect by the use of the word "procure," it becomes manifest that it does not apply to such a case as this. The intention of the framers was to tax every business in sight with the exception stated in sec. 8, and if they had confined the tax to those only who bought and sold, there would be an opportunity for evasion of the tax, by the assertion upon the part of the liquor dealer that he had not bought the liquor and did not own it, and that only the owner could be subjected to the tax. In order to avoid such evasions the word "procure" was inserted in the act, so that whoever is found carrying on the business with the liquor in his possession has, in the sense of the statute, procured it, and is liable for the tax. The law will not go into a search for the owner.

The conclusion I reach, therefore is, that a whisky broker engaged in carrying on the business of an agent such as the plaintiff in this case carries on, cannot be held subject to liability for the Dow tax. If it is desirable that such class of persons shall be subject to a tax, additional legislation will be required.

But it is contended, that, although the plaintiff may not by reason of his business as a whisky broker be subject to the Dow tax, yet the evidence shows in the year 1890 an actual purchase and sale of whisky by him; and that by reason of such sale he has made himself liable under the law.

The evidence as to this purchase and sale of whisky is that during the year 1890, plaintiff negotiated a sale between two persons, of two hundred and seventy-five barrels of whisky located in another state, and that the warehouse certificates were assigned to plaintiff for the purpose of having him in turn assign them to the purchaser.

That afterwards the vendee refused to take the whisky and to accept the assignment of the certificates, and that not desiring to disappoint the

vendor, who had relied upon the statement of plaintiff that the sale would go through, the broker, upon failure of the vendee to purchase the whisky, became himself the owner and purchaser of the same, and afterwards disposed of it by sale to parties in Ohio. The sales and transfers, although made in Ohio, were evidenced by transfers of warehouse certificates. The whisky was all outside of the state of Ohio, and none of it was at any time during the ownership of the plaintiff, or his vendor, in the state of Ohio.

There were three reasons why this transaction would not justify the imposition of a tax upon the plaintiff for the year 1891: First, there is no evidence to show that such transaction will occur during the year 1891. Second, it was an isolated sale, and not part of the business in which plaintiff was engaged. Third, if the Dow law applied to such a sale it would be in violation of the Constitution of the United States, as being an interference with the freedom of inter-state commerce, and the presumption, therefore, is that such a sale is not within the purview of the law.

The first ground, viz.: that there is no evidence that any such transaction will take place in 1891, needs no comment. It is self-evident.

The second ground does not require, I think, any extended consideration. We have seen that the Dow tax is upon the business of trafficking in intoxicating liquors, and not upon a single sale not a part of and not characteristic of the business engaged in. If the plaintiff in this case could be made liable for the Dow tax because of this transaction, then any person who made a single sale not part of a business would be liable; and any person, for instance, loaning money, upon whisky certificates and afterward receiving whisky in payment for the loan, or purchasing the same when offered for sale to satisfy the loan, would afterwards upon a sale of the whisky by himself, be subject to liability under the Dow law. The law clearly did not have in mind such cases.

In considering the third ground, it is well to recall to mind the salient facts which I have already referred to of the transaction of the purchase and sale of the two hundred and seventy-five barrels. These facts are that the whisky was manufactured and stored outside of the state of Ohio; that it was purchased by the plaintiff by a transfer of the warehouse certificates; that it never came into the state of Ohio during his ownership of it; and that it was sold by him to parties in Ohio merely by the transfer of the certificates.

The Dow law as has been before stated, is a tax levied under the police power of the state to restrain the evils arising from the traffic in intoxicating liquors. It necessarily contemplates, I think, that the liquor is in Ohio, because the sale of liquor outside of the state would not result in any injury to the citizens of Ohio.

I feel bound to presume, also, that the sale of liquor located outside of the state does not fall within the purview of the law, because otherwise the law would be clearly an interference with inter-state commerce. It is not until the liquor comes into the state and is sold that the law becomes operative.

This case hardly calls for extended discussion of this question, but the authorities leave no doubt as to the position the United States Supreme Court has taken upon it.

In *Welton v. The State of Missouri*, 91 U. S., 275, it was held that: "a license tax required for the sale of goods is in effect a tax upon the goods themselves."

"That power" (to regulate commerce) "was vested in Congress to insure uniformity of commercial regulation against discriminating state legislation. It covers property which is transported as an article of commerce from foreign countries, or among the states from hostile and interfering state legislation until it has mingled with and become part of the general property of the country, and protects it even after it has entered a state free from any burden imposed by reason of its foreign origin."

In *Bowman v. Chicago, etc. Railway Company*, 125 U. S., 498-9, it is stated :

"It may be said, however, that the right of the state to restrict or prohibit sales of intoxicating liquors within their limits, conceded to exist as a part of its police power, implies the right to prohibit its importation because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the state is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the state, arises only after the act of transportation has terminated, because the sales which the state may forbid, are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful in the execution of the policy of prohibition within the state to extend the power of the state beyond its territorial limits, but such extra territorial powers cannot be assumed upon such an implication. On the contrary, the language of the case contradicts their existence, for if they belong to one state they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the constitution by its delegations of national power to prevent."

And in *Robins v. Shelby Taxing District*, 120 U. S., 493, it was *held*:-

"It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimately affected by state laws, is when by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property. \* \* \* But in making such internal regulations, a state cannot impose taxes upon persons passing through the state or coming into it merely for a temporary purpose, especially if connected with inter-state commerce or foreign commerce. Nor can it impose such tax upon property imported into the state from abroad, or from another state, and not yet become a part of the common mass of property therein."

And upon page 497 in the same case is found this conclusive language :

"It is very true that if the goods when sold were in the state and part of its general mass of property, they would be liable to taxation. But when brought into the state in consequence of the sale, they will be equally liable, so that in the end the state will derive just as much revenue from them as if they were there before the sale. As soon as the goods are in the state and become part of its general mass of property, they will become liable to become taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown v. Houston*, 114 U. S., 642. When goods are sent from one state to another for a sale, or in consequence of a sale they become part of its gen-



eral property and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed as goods brought from another state. *Brown v. Houston, supra*; *Machine Co. v. Gage*, 100 U. S. 676.

"But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on inter-state commerce itself."

See also *Leisy v. Hardin*, 135 U. S., 100; *In re Rahrer*, 140 U. S., 545.

For the reasons indicated in the foregoing opinion, my conclusion is that upon the facts as presented to me, the motion to dissolve the temporary restraining order heretofore issued should be overruled; and that the plaintiff is entitled to a perpetual injunction against the treasurer, restraining him from collecting said tax.

Wilby & Wald, for plaintiff.

F. S. Spiegel, County Solicitor, for defendant.

## MARRIAGE—CONFLICT OF LAWS.

309

[Franklin Common Pleas.]

### ALBERT COURTRIGHT V. FLEETWOOD COURTRIGHT ET AL.

1. Where parties living in Ohio, go into another state to be married, to avoid our laws, the marriage, if valid where made, is valid here, if not expressly prohibited by our laws, nor contrary to the laws of nature.
2. Marriage by a female over twelve years of age, but under sixteen, is voidable only, and is made irrevocable by cohabitation after arriving at sixteen.
3. If such wife dies before she arrives at the age of sixteen, the validity of the marriage cannot be questioned.

EVANS, J.

I. The statutes neither confer nor abridge the right to enter into marriage relation.

The right to marry is a natural one, recognized and regulated by the laws of all Christian countries.

In the absence therefore of a statute expressly prohibiting, and declaring a marriage contrary to such prohibition void, a marriage entered into in this state that would be good at common law, will not be declared void because not entered into in accordance with the statute of this state regulating that subject.

II. The statutes of this state provide, that a female may enter into the marriage relation upon arriving at the age of sixteen years, but do not declare that a marriage by her under that age is void. Hence, where a female over the common law age of twelve years, though under the statutory age of sixteen years, enters into the marriage relation in this state, while such marriage would be voidable at the election of the infant, it is by no means void; and if she should continue to live and cohabit in such relation until after arriving at this statutory age, the marriage would become perfect and irrevocable without any further ceremony.

III. Such a marriage, *i. e.*, one contracted by a female over the common law, but under the statutory age, though voidable at her election

up to arriving at the statutory age, is so far a valid marriage, (that is, unless abandoned or avoided by her while an infant becomes irrevocable), that if she should die before abandoning or avoiding it (such marriage), its validity may never afterward be drawn in question.

IV. The validity of a marriage depends upon the question, whether it was valid where celebrated. If valid there, it is valid everywhere. The only exceptions to this general rule being marriages which are incestuous, or contrary to the laws of nature, as understood and generally recognized in Christian countries, and marriages which the legislature or commonwealth has prohibited, and expressly declared shall have no validity.

Hence, a marriage entered into in Kentucky, valid and binding by the laws of that state, will be held and recognized as valid in this state.

V. Where a man of full age and a girl over the common law but under the statutory age, both residents of Ohio, go out of this state for the purpose of becoming married in another state, and in accordance with its laws, intending to immediately return and continue their residence in this state, and such purpose and intention is carried out, the marriage thus consummated, can not be set aside, either because it was not contracted in accordance with the law of this state, or because the parties went out of the state for the purpose of evading the laws of this state upon that subject.

Our statutes do not attempt, nor profess to give any extra territorial operation to their own provisions or principles, with respect to the citizens of this state. Nor do they profess or attempt to prevent or prohibit our citizens from going elsewhere to celebrate their marriages; much less is there any provision declaring any such marriage thus entered into void.

Our statutes simply profess to regulate marriages celebrated in Ohio. The question at issue in this case, so far as the validity of this marriage was sought to be drawn in question, was made by the cross-petition of Clarence W. Scrimger and the reply thereto. This action was for partition by the brothers of the half blood of their deceased sister Oma's lands, alleging that she died seized of the lands described, part coming by inheritance from her deceased father, and part by purchase in her life time.

Clarence W. Scrimger is made a party upon the allegation that he asserted or claimed some interest in and to said lands, which claim is denied. Scrimger answered setting up a freehold in the one tract that came to the deceased Oma by inheritance from her deceased father John Courtright, by reason of being the husband relict of said Oma.

As to the other tracts, he claimed in fee simple, they coming to the said Oma by purchase, and upon her death without child or children living, descended to him as her husband relict.

To this answer and cross-petition, plaintiff replied denying that said Scrimger was the husband relict of the deceased Oma, and averring that the said Oma was born in April, 1875, and resided all her life in Franklin county, Ohio, and died on November 23rd, aged not to exceed fifteen years and eight months.

The facts shown in evidence, so far as they relate to the validity of the marriage of the deceased Oma and the defendant Scrimger, and upon which the above rulings were made, are as follows:

Oma Courtright was born in Clinton township, Franklin county, Ohio, May 9, 1875, the daughter of John Courtright; the plaintiff and

defendant, other than Scrimger, being children of the same John Courtright by a former marriage. The father died July 20, 1886, and her mother, some three years thereafter, inter-married with John S. Friesner.

Her step-father was the guardian of Oma's estate at the time of the marriage, and she remained in the custody of her mother, making her home with her, from the time of her father's death to the time of the marriage. On the eleventh day of September, A. D. 1890, she left her home in Columbus, Ohio, without the knowledge or consent of her mother or guardian, and in company with the defendant Scrimger, also a resident of Ohio, went directly to Covington, Kentucky, procured a license to marry, in which license the age of Oma is recited as seventeen years. The probate court of Kenton county, Kentucky, Judge Shine presiding, issued the license after appointing a guardian for her, a minor, who gave his consent, as required by the statutes of Kentucky. Thereupon the marriage ceremony was performed by the judge, who is authorized by the laws of Kentucky to celebrate marriages, and the two pronounced husband and wife. They immediately returned to Columbus, and cohabited together as man and wife until her death, which occurred November 23, 1890. A copy of the license and record of the Kenton county court were introduced in evidence, also the deposition of Judge Shine, who performed the ceremony, and who testified as a lawyer, familiar with the laws of Kentucky, that the marriage was, in all respects, a good and valid one in accordance with the laws of that state.

The statutes of Kentucky upon the subject of marriage, and several decisions of the court of last resort in that state were introduced to the same effect upon these facts.

The plaintiff and co-defendants of Scrimger claim that the marriage was void for the reasons following: *First*—That the capacity of Oma must be determined by the laws of the state in which she resided and not by the laws of Kentucky, and that, according to the laws of Ohio, the marriage of a female person under the age of sixteen is void, unless ratified and affirmed by her after she reaches that age, and that as she died before she reached that age, her marriage is void and incapable of being ratified. *Second*—That Oma's residence and property being in Ohio, the Kentucky court had no jurisdiction to appoint a guardian of her person. The court held that the question of the validity of the marriage must be determined by the law of the place where the marriage was celebrated. If valid there, it must be held to be valid in this state.

The court held by Evans, J., that the marriage was valid by the laws of Kentucky where it was celebrated, and therefore a valid marriage here. The court furthermore held, that if the marriage had been celebrated in this state, or if its validity was to be determined by the laws of this state, it would not be a void marriage, but voidable merely at the election of the minor, and if not abandoned or avoided by her in her life-time, it could not afterwards be annulled.

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## SIDEWALK ASSESSMENTS.

[Hamilton Common Pleas.]

**\*EDWARD MILLS ET AL. V. NORWOOD (VILLAGE) ET AL.**

An ordinance of a village providing for the construction of a sidewalk upon one side only of a street under section 2332 Rev. Stat., and assessing the charge for such construction on the owners of the lots or lands abutting on both sides of such street, and which makes no provision or allotment for space for a sidewalk on the other side, is unreasonable and in conflict with the manifest intent and meaning of this section of the statutes, and is therefore void.

OUTCALT, J.

This is an action upon the part of plaintiffs, Edward Mills and others, to restrain, by order of this court, the letting of a contract for the proposed improvement of a part of what has originally been known as the Carthage road, within the corporate limits of the village of Norwood.

Several grounds of action are set out in the amended petition, allowed to be filed, and which I have severally and separately considered.

The first ground of action alleged in the petition of the plaintiffs is "that the said Carthage avenue is and long has been a county road or public highway; that the same has been in public use since pioneer days in Hamilton county, long prior to the incorporation of the village of Norwood, which incorporation was had in the year 188-; that on the twenty-eighth day of April, 1890, the general assembly of Ohio enacted a law, entitled "an act to authorize the county commissioners of Hamilton county, Ohio, to levy tax for grading, macadamizing and improving the county road, commencing at Paddock road at the east end of Second street, in the village of Carthage, and running thence eastwardly through section 6, Millcreek township, and southwardly over sections 36, 35 and 34 of Columbia township, to the Montgomery pike." That by virtue of the said act the legislature of Ohio, in the exercise of its sovereign power, has provided for the suitable improvement of said highway in a manner adapted to the public convenience, both upon that part of the said highway which lies within the incorporated limits of Norwood, as for that which lies without said limits, thus removing the said highway out of the jurisdiction of the municipal authorities of the village of Norwood; and that by virtue of the said act, the village authorities have no further power or jurisdiction to assess the lands of these plaintiffs for the expense of any further or additional improvements thereon.

This act was passed and is found in the 87th volume of the Ohio Laws, at page 619, and it is contended on behalf of the plaintiffs in this behalf that the sovereign power of the state, namely the legislature has by the passage of this act found a necessity for the improvement of this road, and that the power thus to improve under this finding of the necessity and of the character of the improvement is thereby exhausted, and hence that there remains in the village of Norwood, through its council, no authority or power or jurisdiction to otherwise improve that portion of the avenue or highway within the corporate limits of the village.

It is sufficient to say that upon a fair and candid consideration of the argument and the point that is made, I am unable to agree with counsel

\*For decision of the circuit court, on appeal of this case, see 3 Circ. Dec., 465

in that behalf. In other words, I can see no reason for saying that because of the passage of this act by the legislature for the improvement of the county road, which necessarily by its terms does not contemplate the improvement of any portion of it as a street within the corporate limits of the village, shall for all time, or until some further act of the legislature, restrict or prohibit the trustees or council of the village through which this turnpike may pass, to further improve said avenue. That will dispose of the first cause of action set out in plaintiff's petition.

For a second cause of action the plaintiffs say "that the lands of these plaintiffs, for the most part abutting on said avenue, are ordinary farm lands, and are used altogether for dairy or farm purposes; that there are but few houses built upon said avenue, and but few inhabitants residing there, who have occasion to use said road as a means of access to their homes, and that except the house of the plaintiff, Edward Mills, and a tenant house, and one building on the lands of the plaintiff, Lewis C. Flack, at the extreme south end of said avenue where the same joins Main avenue, there is not a single residence on the west side of said Carthage avenue, and but six residences on the east side of said avenue, as shown by the said plat. But notwithstanding the premises the defendants threaten to, and are, about to enter into a contract for the guttering, curbing and paving of said avenue at an expense of \$2.10 per front foot, which expense the defendants are about to charge, or attempt to charge, upon these plaintiffs which abut upon said avenue." And then proceeding, the allegation is that the legislation, namely, the passage of the resolution finding it necessary to improve, and the adoption of the ordinance making the improvement, "was a gross abuse of the discretion entrusted to said council; and that said resolution and proceedings were not taken in good faith, in this, to-wit: that the defendants voted in council for said resolution and took said proceedings, not because of the public needs, but at the request of and under the threats to hinder other needed improvements, of one member of council who resides and owns property on the line of said avenue; and plaintiffs say that the said improvement is so little warranted by the public necessity, that their acts in that behalf constitute a gross abuse of corporate power."

This allegation is made, or at least attempted to be made, to cover what is known to be the law in this state, namely: that under the provisions of the statutes of the state, giving municipal corporations power to open up and to improve and to repair public highways and streets within their corporate limits, they must observe a certain form of legislation, first finding by the adoption of a resolution that such an improvement is necessary, and then, proceeding to follow the several forms which are provided for the giving of notice, and thereafter the offering of protest etc., and then finally the adoption of an ordinance. The law in this state as announced in several authorities, and notably perhaps in 23 Ohio St., 510, in the case of the Railroad Company v. Dayton, is that "the exercise by a municipal corporation in respect to the laying off and location of streets, so long as such corporation acts in good faith, and within the limits of its authority, is not subject to judicial revision." So long as it acts in good faith and within the limits of its authority. Hence it must be apparent, it is at least to the court, that for the purpose of restraining a proposed improvement upon the part of the corporation council, allegations must be made in the petition sufficient to indicate to the court that there is either an excess or an attempted excess of powers

by the council of the village, or that the proceedings taken by the corporation to effect this improvement are had in bad faith. The allegation here made is not sufficient, namely, "that the defendants voted in council for said resolution and took said proceedings not because of the public needs, but at the request of and under the threats to hinder other needed improvements of one member of council who resides and owns property on the line of said avenue." In other words, the court from that allegation must assume that there is one man so autocratic in his power in that village, as by threats, to absolutely intimidate five other members. In such a community it is hardly within the bounds of reason to suppose that such a state of affairs does exist. If it is intended to indicate that by threats or favor one individual councilman is able to induce others to vote for measures which are beneficial to him, upon his promise to vote for others, I do not see that it is a matter into which this court can inquire. Such is not evidence of fraud or lack of intelligence or bad faith in finding a necessity for this improvement. So much therefore as to the second cause of action.

For a third ground of action the plaintiffs say "that for the most part their lands are ordinary farm lands of no great value, and that the cost of said improvement is largely in excess of 25 per cent. of the value of the lands which abut upon said avenue to the depth of ordinary lands in said village; and that a large part of the costs of said improvement cannot, under the provisions of law now existing, be charged upon said property and collected therefrom, but that the same must be borne by the village of Norwood; and that by reason of the premises the proceedings of the defendants are irregular and void, in this to-wit: that the clerk of said village has not certified to the said council that the money which will be required on the part of the village to pay its share of the said improvement, is now in the treasury thereof; and plaintiffs further say that by reason thereof that the proposed contract of said improvement is illegal, and that if the defendants are permitted to proceed and enter into said contract and charge the same, or attempt to charge the same, upon the lands of these plaintiffs they will cast a cloud upon the title to their lands."

It is sufficient to say that such is not the law. The contract to be entered into would not be invalid under sec. 2702, Rev. Stat.—Burns Law—because it does not contemplate any expenditure of money by the village. So much for that part.

"For a fourth ground of action the plaintiffs say that they hold, as owners of the abutting property, as, hereinbefore set out, the fee, subject to an easement for a public way, to the middle line of said Carthage avenue; that the same was dedicated by them and their ancestors, or grantors of their abutting lands, as aforesaid, to the width of forty feet; that from the earliest times the said public road, which was originally known as Columbia road, was used in the center thereof as a wagon way, and along the sides thereof in the ordinary manner for a pavement or foot way; that ever since the opening of the said Columbia road to the present time, plaintiffs and their ancestors and grantors have had access to their said lands over said public road, both by foot travel and by vehicle, in the manner which is usual and necessary in such cases, and that by such use, the plaintiffs, as abutting property owners, have acquired a right to a suitable pavement along said avenue on the west side thereof, in order to have access to their property, which right has, at all times, been acquiesced in by the general

public, and has been respected by the public authorities of Hamilton county; and that the plaintiff, Edward Mills, and the plaintiff, L. C. Black, for many years last past, have constructed and maintained a pavement or sidewalk along the side of the said road, in front of the premises, which have houses upon them as aforesaid, to a width of six or more feet, by means of which they have obtained access to their premises thereon, as above specified, and that such sidewalk is absolutely necessary to the use and enjoyment of their said premises; and that the commissioners of Hamilton county, in making the improvement of said Carthage avenue as in the first ground of action herein set out, respected the said sidewalk and right thereto, and left the same undisturbed, for the sidewalk was a proper, necessary and reasonable use of said highway, and that the need, both to the public and to the plaintiffs, as abutting owners, is as great on the west side as the like need is to the east side of said avenue; and that the village of Norwood has formally adopted a general ordinance, providing that in all public streets or roads, within said village, the sidewalks upon each side of the street thereof shall constitute one-fifth of the entire roadway, and that a pavement shall be upon each side of the roadway, and that the remainder of said street shall constitute the roadway thereof for vehicles.

" Plaintiffs say that notwithstanding the premises, and without warrant or authority of law, and disregarding the ancient rights of these plaintiffs, they have provided in the ordinance or resolution, authorizing the alleged improvement of said avenue, that the roadway of said avenue shall be graded to a width of thirty feet, and that the curb line of said roadway shall be the west line of said Carthage avenue, and that there shall be but one sidewalk along said avenue, and that said sidewalk shall be upon the east side, thus depriving the plaintiffs entirely of said sidewalk privileges so far as their property abuts upon the west side of said avenue."

That sufficiently states the fourth ground of action set out by the plaintiffs, and which involves necessarily the interpretation of the sections of the statute under which the village of Norwood is proceeding to make this improvement with reference to the sidewalk. The statutes in numerous chapters and divisions provide for the improvement by municipal corporations of public highways within their limits. They likewise provide for the improvement of such public high ways, streets or avenues by the making of sidewalks. The statute under which the village of Norwood is proceeding to adapt this ordinance and to make this improvement is sec. 2332 of the Rev. Stat. It is as follows:

" If the board of public works, board of improvements, council, or trustees, of any municipal corporation, deem it necessary to construct a sidewalk on one side only of any street, alley, turnpike or plank-road, with proper crossings from one side to the other, it shall be lawful to assess and collect the charge for constructing or repairing such sidewalk and crossings on the owners of the lots or lands abutting on both sides of such street, alley, or road, in like manner as if such sidewalk had been constructed on both sides; but after a sidewalk is so constructed, and the charge therefor assessed, if it is deemed necessary to construct a sidewalk on the other or corresponding side of such street, alley, or road, the charge therefor shall also be assessed on the owners of the lots and lands on both sides.

The contention made by the plaintiffs in this case is that the construction which the village of Norwood has sought to place upon this

particular section in making the improvement in the manner provided by this ordinance, is not a proper, or legitimate, or reasonable construction of this statute, in which view of the case the court is disposed to concur. In other words, the ordinary interpretation and acceptance of the term "street," as understood now in municipal corporations, whether they be villages or cities, is that the term street not only means a roadway for the convenience of public traffic by vehicles, etc., but likewise includes everything which is incident thereto, namely, proper and sufficient accommodation for pedestrian travel; and the fair, legitimate and reasonable interpretation of this section of the statute, and upon which this improvement is sought to be made, by constructing simply one sidewalk, upon one side of the street, leaves out of mind and out of view altogether what is reasonably and fairly contemplated by this statute, namely, that in making one sidewalk and imposing an assessment upon the abutting property upon both sides of the street improved, for the purpose of paying for it, likewise contemplates that there shall be some provision made, some space or allotment, for a sidewalk upon the other side of the street. It does not mean that they may so distribute that strip of ground which is about to be improved as a street in a village as that the sidewalk shall be upon one side and constitute one-fifth of the strip of ground to be improved, and let the gutter and curb line come flush with the property line of the other side of the street, thus, hindering the proper and reasonable access, ingress and egress to and from the lands and houses or improvements, as the case may be, upon that side of the street. To hold otherwise would be to say that the legislature, in the adoption of this statute, meant just what is contended for by the village of Norwood, namely, that they may so distribute the strip of ground as that one-fifth of it may be for the sidewalk, and the balance entirely for vehicle travel, and that if it become necessary thereafter to make another sidewalk, that the village may have recourse to that power which is vested in them under the statutes of condemning and paying for a strip of ground sufficient to make a sidewalk for the other side. This section of the statute, nor any other statute that I have been referred to, leaves me reason to adopt any such conclusion. If the village, under this section of the statute, or any municipal corporation, sees fit to construct but one sidewalk upon one side of the street, my conclusion from the consideration of the language of this statute is that whenever that course is pursued, that there shall be reasonable provision made out of the ground included within the strip of ground known as the street, for a sufficient strip of ground to be thereafter used as a sidewalk; and simply to exclude that, and to run the curb line up to the line of the property on the other side, and compel the village thereafter for the purpose of making a sidewalk to condemn and appropriate and pay for a strip of ground, which might entail needless expense, does not, within the opinion of this court, appear to be intended by this section of the statute.

Hence it follows from the allegations made in the petition that the ordinance which seeks to make this improvement in the manner in which it does is unreasonable, and hence void, and the demurrer upon this ground will be overruled, and judgment for the plaintiff.

Counsel for plaintiffs, Foraker, Black & Bosworth, and Ben B. Dale.

For Village of Norwood, W. E. Bundy.



## DIVORCE.

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[Franklin Common Pleas, 1891.]

## KREDEL v. KREDEL.

Where there has been a decree in the absence of defendant, he not knowing that the case was set for trial, it having been irregularly assigned, the trial court may set aside the decree, during the same term at which it was entered.

DUNCAN, J.

The court decided that for fraud as irregularity shown, a divorce decree could be opened at any time during the term in which the decree was taken, and accordingly he set aside a divorce granted a few days before, in the same term of the court, to Charles Kredel from Clara Kredel on the ground of adultery. The facts leading up to this order are as follows: Kredel filed suit by Mr. Samuel Black, his attorney, charging his wife with unfaithfulness to her marriage vows. She came in with an answer denying the charge. The case was assigned for trial. Neither Mrs. Kredel nor her attorney, Mr. James Allen, appeared on the day set for the trial, and Kredel was granted a divorce. Next morning Mr. Allen, attorney for Mrs. Kredel, appeared in court and demanded that the decree be set aside. He claimed that neither he nor his client knew the case was set for trial, and they wanted a hearing. The application, which was fought by Kredel, gave the court considerable trouble because of the fact that it had no precedent in the local courts. A search of the Supreme Court decisions developed a case decided in 1859, (Parrish v. Parrish, 9 Ohio St., 534), but none since that time. That case, however, differed from the Kredel case in this that the application for a setting aside of the decree was made at a term following the one in which the decree had been made, while in this case the application was made in the same term of court. The Supreme Court had refused the application. Judge Duncan said the Supreme Court thus seemed to have made an exception of divorce cases, because other actions at law can be opened up on charges of fraud at subsequent terms. Commencing on the position which this decree had put Mrs. Kredel in, the court said: "The wife is charged with a grave offense, and if it is a groundless charge, she ought to have a chance to establish the fact. Her counsel has given a good excuse for not being here. The decree will be opened up because it was irregularly assigned." Incidentally the court remarked that in all other states but Ohio the rule was that a divorce case can be opened up on the ground of fraud in subsequent terms, and cited an instance where this was done though one of the parties had remarried.

Under Judge Duncan's holding, divorce decrees can be opened up during the term in which the decree was taken, for fraud or irregularity in assignment.—[Editorial.]

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## ASSESSMENT INSURANCE.

[Hamilton Common Pleas, April Term, 1891.]

ROSE M. TUDOR v. W. B. TUDOR.

If a member of a mutual benefit order whose children are named as beneficiaries of his death certificate, stops paying dues and assessments, separates from his family and is finally divorced, and the wife for years and until his death keeps up the dues and assessments for the children's sake, the member has thereby lost all right to change the beneficiaries, and the children are entitled to the fund at his death.

Mr. Tudor became a member of a mutual benefit association taking out a beneficial certificate payable at his death to his children. Some years ago he stopped paying his dues and assessments to the association, and afterwards separated from his wife and was divorced from her. The wife has had the sole charge, care and support of the children. Before the divorce and ever since for about four years, in order to keep the policy alive for the children, the wife has paid all the dues and assessments to the association out of her own earnings, the husband ignoring its existence, and that of his wife and children, the wife having possession of the certificate.

About a year ago, the husband on his death bed at his mother's house, in order to compensate his mother for her care and trouble, duly notified the association that he changed the beneficiary so as to give half the amount to his mother, and went through the requisite forms to perfect the change and tendered the single assessment thereafter maturing, and died. The society does not know whether to pay his mother or his children.

BATES, J.

The right of a member of a mutual order to change the beneficiary of his death certificate without the beneficiary's consent is well settled. See *Thesing v. Supreme Lodge*, ante 88, where all the authorities are collected. A member of a mutual order has no property in the fund, but merely a power to designate a beneficiary. Bacon on Benefit Societies, sec. 237; yet this right is not strictly a power, for it is not exhausted by one exercise, but the appointment may be changed over and over again. It is rather of a testamentary nature revocable and alterable as a will is.

There seems to be but one decision in the United States on the subject, and that sustains the right to change, viz.: *Fisk v. Equitable Aid Ass'n*, Pennsylvania Supreme Court, 1887, 11 Atl. Rep., 84. There Mrs. Fisk became a member, and had her husband named as beneficiary of the death certificate, and gave him possession of it, and he paid all the assessments; a few days before her death she got possession of the certificate, and had a new one made payable part to her husband and part to her mother and children. The court held that the husband knew or ought to have known that he held it and paid assessments subject to her right to change the beneficiary, and that there was no evidence of her ever having waived or estopped herself from exercising that right, and hence the second certificate governed the distribution.

It will be conceded as settled law that a person may bind himself by contract on adequate consideration to make a devise in favor of a partic-

ular person, or to compensate by will, or discharge an obligation by will. See *Phipps v. Hope*, 16 Ohio St., 586, 595; *Morris v. Clark*, 7 Ohio Dec. Re., 564; *Howard v. Brower*, 37 Ohio St., 402; *Shahan v. Swan*, 48 Ohio St., 25; *Hopple v. Hopple*, 2 Circ. Dec., 59. And it seems to me that the same principle will apply to enable a member of a mutual order for a proper consideration to part absolutely with his right to change the beneficiary by surrendering that right to the one named if within the necessary degree of relationship. And if this case belongs to that category, there was no right to change.

There is a clear distinction between the above case and this one. In that case the husband and wife living together as one family, he supporting her, justifies the presumption that payments for her, or on her property, were gifts to her and gave him no right of inheritance, or of property, nor any equity. Such a theory is so foreign to the facts of this case as not to admit of argument. The motive of the husband's payments in that case may have been the prospective benefit to himself, but if that were so, which is pure assumption, there is a difference between mere motive and a declared consideration. The interest of an intended donee under an unexecuted gift may supply a motive, but is not a consideration. Compare *Sabin v. Grand Lodge A. O. U. W.*, 8 N. Y. Supp. 185, 187.

Suppose a mother (and I have known of such a case) puts her boy, on arriving at the age of eligibility, into such a society, at her own expense, she paying all the assessments, telling him that it is to be hers if she survives him, and that if he ever marries and desires insurance, he must not touch hers: Can he, under his apparent powers as a member, take from her that which exists only by her act and self-denial, and give it to another? Take the more frequently occurring case of a wife supporting the family, including a worthless husband, by her own efforts, and keeping up his membership in a mutual order out of her earnings, for the benefit of herself and children. Can he, at the last moment, take it from them at caprice? The statement of such a case negatives all presumption of gift. It is much stronger than building upon another's land in reliance on his promise to sell and convey to the improver, and is more like depositing monies in a bank in another's name, with his consent; for the entire existence of the product is due to the person paying, the member being a figure-head, contributing less than does the scare crow to the farmer who plows and waters the crop.

There is no accumulation of funds in the mutual orders. Each assessment or due paid is but the consideration for the continued currency of the certificate until the next call, giving no retrospective rights, but rather as a renewing contract, and lays no foundation for a claim to divide the fund in favor of one who has ceased paying.

Hence the fund in this case is wholly the wife's creation. Had she not kept up the dues and assessments, the policy would have been non-existent years ago. Her fidelity to those unable to protect themselves, has saved it, and it cannot be diverted from them or appropriated. True, as between the lodge and the member, his wishes control, but as between him and others, he may part with his rights by estoppel or contract, and then the designation of a beneficiary is not a mere unexecuted gift, but a vested interest. The entire fund must go to the children.

Howard Douglass, for plaintiff.

Porter & Rendigs, for defendant.

**MECHANIC'S LIEN LAW.**

[Portage Common Pleas, 1881.]

**SECOND NAT. BANK V. ENTERPRISE EGG CO.**

The act of 1889 providing that cognovit judgments have no priority over certain claims of operatives, although it affects debts in existence before its passage, does not impair the obligation of contracts, and is not invalid for want of constitutionality. It affects merely the remedies of different classes of creditors.

On July 4, 1889, the Enterprise Egg Case Co., of Ravenna, Ohio, made an assignment for the benefit of creditors, to Bradford Howland, Esq., who failing to qualify as assignee, H. B. Dickinson was appointed trustee in his stead by the court.

On July 3d the Second National Bank of Ravenna, being the largest creditor, took judgment against the Company upon cognovit notes, for \$2,018, and the same day levied upon all the personal property of the Company, both in Ravenna and in Cleveland, thus leaving nothing to come into the hands of the trustee. The Bank realized about \$1,400 from the sale of this property.

At the time of the assignment the Company was indebted to thirty-nine of its employees for labor, in amounts ranging from \$1.50 to \$20, the aggregate being \$535.25, and they brought suit for their claims.

By the act of April 5, 1889, judgments on cognovit notes have no priority as against claims of operatives for labor performed within twelve months of the assignment to the amount of \$300 each.

It was claimed by the Bank that inasmuch as the debt owing by the Company to it was in existence before the passage of the act, referred to above, the act was therefore retroactive in its nature, and in violation of art. 2, sec. 28 of the constitution of Ohio, which says: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts." Also, in violation of art. 1, sec. 10 of the federal constitution, which says, "no state shall pass any *ex post facto* law, or law impairing the obligation of contracts."

The case was tried to the court upon an agreed statement of facts. The plaintiffs claim that the act referred to was not in violation of either the state or federal constitution, because it does not affect the obligation of the contract between the Bank and the Company, but affects merely the remedy, the controversy being simply one between preferred and unpreferred creditors, and the contract remaining in *statu quo*.

This view of the plaintiffs was sustained by the court, who rendered a decision in their favor.

H. B. Dickinson and M. Stuart appeared for the plaintiffs,  
Bradford Howland, for the defendants.

## LEASEHOLD—RENT LIEN.

2

[Superior Court of Cincinnati, General Term.]

F. A. SCHMIDT, EX'R, v. ELIAS EHLER ET AL.

In 1882 Schmidt executed a lease to Ehler for a period of ten years, by the terms of which lease a lien was reserved upon the leasehold for unpaid rent. In 1887, at which time a large amount was due from Ehler for unpaid rent, Schmidt, by a general warranty deed, conveyed the property to Brown, who had knowledge of the existence of the claim of Schmidt, against Ehler. No reservation was made in the granting clause of the deed which in any way qualified the grant, but the warranty clause provided that the grantee would "warrant and defend against all claim or claims of all persons whomsoever, as fully as he, as such executor, is authorized to do, subject, however, to a lease to Elias Ehler." *Held:* That the lien of Schmidt, upon the leasehold for the unpaid rent was extinguished by his deed to Brown.

SMITH, J.

This is an action for the sale of a leasehold estate for unpaid rent due from Elias Ehler to the estate of D. K. Este from September 1, 1882, to September 13, 1887, being sixty months and thirteen days, at \$30 per month, and amounting in all to the sum of \$1,813.

The court below entered a judgment for the amount claimed, and ordered a sale of the leasehold estate to pay for the same; and the proceeding here is to reverse the decree for error in ordering a sale of the leasehold.

The bill of exceptions shows the following state of facts:

The plaintiff offered in evidence a lease made by F. A. Schmidt, executor and trustee of the estate of D. K. Este, deceased, to Elias Ehler, of the property described in the petition, with a rental of \$360 a year in equal monthly payments of thirty (\$30) dollars. The lease purports to have been executed on the first of March, 1882, by F. A. Schmidt, executor and trustee of the estate of D. K. Este, deceased, and to have been acknowledged on the third day of November, 1887.

It also appears that said Schmidt, executor, on the first day of December, 1887, by a general warranty deed, for a consideration of \$12,500, transferred this property to Samuel S. Brown, conveying to him in the ordinary and well accepted language of such deeds, "all the estate, title and interest of the said grantor and of the said David K. Este, either in law or equity, of, in and to the said premises, together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof, to have and to hold the same to the only proper use of the said grantee, his heirs and assigns forever."

In the deed from Schmidt, executor, to Brown, no reservation is made in the granting clause which in any way qualifies the grant as aforesaid, but the warranty clause provides that he "will warrant and defend against all claim or claims of all persons whomsoever, as fully as he, as such executor, is authorized to do so. Subject, however, to a lease to Elias Ehler for the east three-fifths, and to McMahon, Porter & Co. for the west two-fifths of said premises, both of which leases expire March 1, 1892, subject also to all taxes and assessments now a lien on said premises.

The lease also contains the usual covenant that "for the said rents, taxes and assessments to be paid by said lessee, his heirs and assigns, a

lien is hereby reserved upon the premises hereby leased, and the interest of said lessee and assigns in and to the same, in favor of said lessee, his heirs and assigns, and preferable to all other liens thereupon whatsoever."

It also appears from the bill of exceptions that after this suit had been brought Elias Ehler, in consideration of one dollar, transferred all his interest in his lease to Samuel S. Brown

There are two principal questions presented by this record:

First—Was the lease from Schmidt, executor, to Ehler sufficient to create a lien on Ehler's leasehold for the rent due from September 1, 1882, to September 13, 1887?

Second—If such lease was sufficient to create such lien, was it extinguished by the deed from Schmidt, executor, to Brown?

The first question was not argued at the bar, and for that reason we are unwilling at this time to express an opinion in regard to it. The question arises from the following facts: Schmidt was not appointed executor until the twenty-fourth day of September, 1886, and did not probably execute this lease until the third day of November, 1887, at which time it was acknowledged, yet the lease is dated as of the first day of March, 1882, a period of more than four years before the appointment of Schmidt as executor. Now, while ordinarily it may be presumed that an official acts in the line of his duty, and that what Schmidt would undertake to do in the execution of a lease for the Este estate, he would have a right to do, yet it is a serious question whether such a power can be presumed as is exercised here, viz.: that of entering into a contract which dated back prior to his appointment, and to a period of time when Este himself was alive. But if such presumption cannot be made, another question would still remain, viz., can Brown take advantage of such a defense?

But these questions not having been argued at the bar, we prefer to pass them with a statement merely as to what they are, but without expressing any opinion upon them.

But, assuming such lease to be sufficient to create such a lien, was the lien extinguished by the deed from Schmidt, executor, to Brown?

It is contended by the defendant in error that the language in the warranty clause that Schmidt, executor, warrants and defends against all claims "subject, however, to a lease to Elias Ehler," is in effect a reservation by Schmidt of all his right, title and interest in such lease, including any lien he may have upon it for unpaid rent. But we are clearly of the opinion that this contention is unsound. The meaning of this language cannot, we think, be in doubt. As the title had been in a previous part of the deed conveyed as clear, free and unincumbered, and as the general warranty was that the grantor would warrant and defend the title against all claim or claims of all persons whomsoever, and as Elias Ehler had a lease upon said property, it was, of course, necessary for the grantor to except such lease in another part of the warranty clause; otherwise, he would have been liable in an action against him by his grantee for an interference with his title by reason of this lease. This is the plain meaning, we think, of this limitation in the warranty clause, and such construction of it makes the warranty clause harmonize with the granting clause. If, however, the construction is put upon it that defendant in error claims is the true one, it conflicts with the granting clause. The rule is well settled that an instrument must be so construed as to give effect, if possible, to all its parts.

It is insisted by the defendant, however, that aside from the language of the warranty clause, the circumstances surrounding the transfer are such that necessarily Schmidt still retains a lien upon this leasehold.

These circumstances, as they appear from the bill of exceptions are, that when Brown purchased of the plaintiff the premises described in the deed above; that he was aware that there were rents, taxes and assessments then unpaid under said lease to said Elias Ehler; that it also appears by an agreement in open court that said lease was on record; that the said claim for back rents was not assigned to said S. S. Brown, but was reserved to the plaintiff; and that the defendant S. S. Brown was informed at the time of the purchase, on December 1, 1887, that a suit was contemplated by said plaintiff for the sale of said leasehold estate in satisfaction of said rents.

Now the fact that Schmidt contemplated a suit against Ehler for the sale of the leasehold at the time Schmidt sold it to Brown, is unimportant, whether Brown knew of such intention or not. The deed which Schmidt executed is the contract, and it cannot be varied by parol evidence.

Of the other circumstances only one can have any bearing on this case. That is the circumstance that the lease from Schmidt to Ehler was on record and that Brown is therefore chargeable with knowledge of it. But did Brown's knowledge of the existence of such lease from Schmidt, executor, to Ehler have the effect of restricting in any manner or to any degree, the absolute conveyance by Schmidt, executor, to Brown, of all the right, title and interest in law and equity which Schmidt had in the property? We cannot see how it can have such an effect. The contention that it does arises from a misapplication of the principle that where one person conveys real estate to another, against which real estate a third person has a claim of which the purchaser had notice, that the property is taken by the purchaser subject to said third person's claim.

But this case is not a proper one for the application of this principle. For in this case it is not a third person who asserts a claim against the vendee, but the vendor himself, who, notwithstanding he has conveyed all his right, title and interest in law and equity in the property to the purchaser, nevertheless asserts that he may now claim, in opposition to the language of such grant, that he retains an interest in the property in the form of a lien for unpaid rent upon a leasehold of such property. We think the assertion of such an interest is in direct conflict with the grant under the deed.

But it is argued by the defendant in error that the effect of this deed is to convey the fee to Brown, but not the leasehold, and that Brown can have no possible interest in the fee which conflicts with the plaintiff's lien for the rent. But this position is unsound, even if it be assumed that the fee is conveyed and not the lease, because the existence of such a lien interferes with the free exercise by Brown of his estate in fee. Thus one of Brown's rights as the owner in fee is to sell said leasehold to pay for rent which comes due to him, but if a prior lien is allowed to be asserted, and upon a sale of the leasehold to be paid before Brown's claim, this right of Brown is seriously impaired, and it might be rendered entirely valueless. But we do not understand that an absolute conveyance, such as was here made, does not convey all the grantor's interest in the property—an estate for years as well as the fee. Any other construction of an absolute deed, such as this is, would, we are

confident, perplex titles to a point beyond endurance, and come with the very greatest surprise to the legal profession.

As we are of the opinion, therefore, that the lien of Schmidt, executor, upon this leasehold, if he had one, prior to the conveyance to Brown, was extinguished by that conveyance, we are of the opinion that there was error in entering a decree for the sale of the leasehold to pay such lien, and that the judgment of the lower court should therefore be reversed and the cause remanded for a new trial.

MOORE and HUNT, JJ., concur.

Follett & Kelly and Thornton M. Hinkle, for plaintiff in error.

Drausin Wulsin and Frank O. Suire, for defendant in error.

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### MECHANIC'S LIEN—PLEADING.

[Superior Court of Cincinnati, Special Term, December 1, 1891.]

EDWARD KEATING v. ELLEN WORTHINGTON.

In an action solely between the owner and the claimant to enforce a mechanic's lien, and the pleadings do not disclose any other sub-contractors or lien claimants, it is immaterial whether a copy of the attested account be filed in the recorder's office.

HUNT, J.

This is a general demurrer to the petition.

The petition discloses that the plaintiff is a sub-contractor and material man, and avers the performance of all the conditions of a contract set forth by him to be performed for certain work set out in the petition.

The petition does not show that there were any other sub-contractors or lien-claimants.

It is averred that on the twenty-seventh day of November, 1890, the plaintiff filed with the defendant, Ellen Worthington, a proper and verified statement and account of the amount and value of his labor performed, in pursuance of the statute. The amount was not disputed in any way, but although a subsequent payment became due to the principal contractor, sufficient in amount to pay claimant the full amount of his claim, yet the defendant did not pay the same.

The plaintiff on the twenty-ninth day of December, 1890, duly filed with the recorder an affidavit and an itemized statement, as required by law, notifying the defendant that such lien was in existence, and thereby obtained a lien.

These proceedings evidently were had under secs. 3193, 3196 and 3202 of the Rev. Stat.

The liability of the defendant and the remedy of the plaintiff will be found under secs. 3201 and 3202 of the Rev. Stat.

It is true that under sec. 3195 the sub-contractor is required, after filing notice with the owner, to file a copy of the same with the recorder in order to notify his fellow sub-contractors; but in this action, as disclosed by the petition, there is no question that can arise between the plaintiff sub-contractor and the other lienholders, since no others are alleged to exist.



The object, evidently, of filing with the recorder, under sec. 3202, Rev. Stat., is to notify such lienholders, because as between the claimant and the owner it is not material whether a copy of the attested account be filed in the recorder's office or not. Rockel and White, Ohio Mechanics Lien Law, p. 117.

The litigation in this action is solely between the claimant and the owner, and the right of no other fellow lienholder has yet intervened.

All that was required to be done to obtain a lien against the owner under sec. 3201 and 3202 was in filing a verified account with the recorder when the defendant failed out of subsequent payments which became due under the contract to pay the sub-contractors, which was done.

Demurrer overruled.

F. W. Brown, for demurrer.

Burch & Johnson, *contra*.

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### INSURANCE—PLEADING.

15

[Superior Court of Cincinnati, Special Term, November 23, 1891.]

GEORGE H. BENNETT ET AL V. CONNECTICUT FIRE INS. CO.

1. If the contract or agreement to insure be settled upon between the contracting parties, the formal execution and delivery of the policy of insurance may be subsequent; and if done as of the date of the principal act, it will relate back as having taken effect on that date.
2. Where the petition declares on a policy of insurance, and the reply admits that the policy was written after the destruction of the property, but alleges that it was issued in pursuance of an agreement to insure made prior to the destruction of the property, there is not such a variance in the pleadings as that a demurrer will lie to the reply.

HUNT, J.

This cause comes on before the court on a demurrer of the reply to the plaintiffs.

The petition, filed April 18, 1891, alleges that the plaintiffs are partners under the firm name of George H. Bennett and Brother. The defendant is a corporation under the laws of Connecticut. The plaintiffs on and prior to September the 27th, 1890, were owners of two hundred barrels of Susquehanna pure rye whiskey contained in the stone, metal roof, bonded warehouse "A.", registered, distillery No. 63 near Milton, Kentucky.

It is alleged that in consideration of a premium of twelve and 75-100 dollars, to-wit: paid by the plaintiffs, the defendant issued to plaintiffs its policy of insurance dated September 27, 1890, No. 117, whereby it insured George H. Bennett & Brother against loss or damage by fire to said whiskey including cooperage, in the sum of fifteen hundred dollars, from the twenty-seventh day of September, 1890, at noon, to the twenty-seventh day of September, 1891, at noon. The cash value of said two hundred barrels of whiskey, exclusive of government tax, was \$4,196.84.

The plaintiffs owned the same, when, on September 28, 1890, it was destroyed by fire. In the case of loss or damage by fire, to said property, by the terms of the policy, during the said term for which the same was issued, loss was to be paid to said George H. Bennett & Brother, within sixty days after the notice, ascertainment, estimate and satisfactory proof of loss made to and received by defendant at its office in Chicago.

Plaintiffs effected other insurance on the property to the amount of twenty-seven hundred dollars, which was permitted by the policy which provided that defendant should not be liable under the policy for a greater proportion of any loss on the described property than the amount thereby insured should bear to the whole insurance covering said property.

Upon the destruction of the property by fire, the plaintiffs, as required by the policy, gave notice immediately in writing, to the defendant, of the total loss within sixty days after the fire, to-wit: on November 3, 1890, and rendered to the company, at its office in Chicago, where the same was received by the defendant, a particular account of the loss, under oath, stating the time, origin and circumstances of the fire, the occupancy of the building containing the property insured, the other insurance and copies of all the policies, the whole value and ownership of the property and the amount of loss or damage, and produced a certificate under seal of a magistrate or notary nearest to the place of fire and not concerned in the loss, or related to the assured, stating that he had examined the circumstances attending the loss, knew the character and circumstances of the assured, and verily believed that the assured had, without fraud, sustained loss to the property insured to the amount claimed by the assured, and all other matters required to be stated by the provisions of the policy, which statement was accepted by the defendant without objection.

The plaintiffs claim to have fully performed all conditions by them to be done and performed in the premises. There was a condition of the policy that the ascertainment or estimate of the loss or damage payable by defendant, should be made by the defendant and the assured, but it is averred that the defendant has utterly refused to join plaintiffs in making such ascertainment or estimate, and has repudiated all liability by reason of the policy, and refused to pay anything on account thereof.

The prayer seeks a recovery against the defendant in the sum of \$1,498.90, with interest from January 29, 1891.

The answer, filed June 1, 1891, says that the property described in the petition, which the plaintiffs claim to have owned on September 27, 1890, was wholly destroyed by fire as alleged in the petition, on Sunday, the twenty-eighth day of September, 1890, at which date, and until after the total destruction of the property, the defendant had received no application for any such insurance, nor any premium therefor, and the policy referred to in the plaintiffs' petition was delivered on the day after the property was destroyed by fire, by a local agent, and dated back to the day before the destruction of the property without any authority to do so, and without consideration therefor, neither the plaintiffs nor the defendant having any knowledge of any such policy or insurance during the existence of the property.

The reply of the plaintiffs, filed June 15, 1891, denies that the policy in the petition and answer mentioned was written without authority on the part of the agent writing the same, and denies that it was without

consideration. There is an admission that the policy was written after the destruction of the property, but it is alleged that it was issued in pursuance of an agreement made prior to the destruction of the property to insure the same, and issue a policy, which agreement the agent of the defendant was authorized to make, and his act in making the same and similar agreements and policies had been ratified by the defendant.

It is necessary, in order to make a valid contract of insurance, that several things should exist.

First—The subject-matter to which the policy is to attach must exist.

Second—The risk insured against.

Third—The amount of indemnity must be definitely fixed.

Fourth—The duration of the risk.

Fifth—The consideration to be paid therefor must be agreed upon, and be paid, or exist as a valid legal charge against the party insured, while the payment in advance is not a part of the consideration upon which the policy is to attach. \* \* \* If anything is left open or undetermined, so that the minds of the parties have not met, no contract exists, and consequently no liability for a loss occurring.

It has been held (May on Insurance, sec. 43 G.), that, a contract not completed until after a loss, and when the insured knew of the loss, is bad, although the policy is antedated. *Wales v. Bowery Ins. Co.*, 37 Minn., 106.

In discussing the nature of a contract for insurance (Porter on Insurance, p. 7) says:

"In fact, unless the property insured is for a time subjected to the risk insured against, the contract of insurance, even if made, never operates, and the premium, though paid, is unpayable; which illustrates yet further the principle that the person seeking insurance must, for the contract to be effectual, have had some prospect of needing indemnity against losing the thing insured within the period of insurance. From this it may be seen that effecting a contract of insurance does not oblige the insured to run the risk named in the contract; for the contract being, as already said, contingent on the actual attaching of the risk, is not enforceable by either party till the risk is run; and premium paid before risk is begun is paid subject to such contingency. (Citing *Tyrie v. Fletcher*, Cowper 666.) It may be said, too, that while a policy does not attach till the risk begins, it can equally not attach after the risk is determined one way or the other, except in these special instances when both parties are equally ignorant of the position of the thing insured, and contract to insure it lost or not lost."

Thus May on Insurance, sec. 4, in expressing this doctrine, adopts the language of *Tyrie v. Fletcher*, Cowper, 666.

"When the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned. \* \* \* It would seem, therefore, says Alauzet, that the engagement of assured is not absolute, but conditional, like that of the insurer; that of the latter, depending upon the condition that an accident happen, and that of the former upon the condition that the subject-matter of the insurance be part of the risk."

So, also, when the insured took out a policy on certain goods he expected to be shipped to him, and instead other goods were shipped and lost, the insured could recover his premium for the risk that never

attached, but could not apply his policy to the new goods. *May on Insurance*, sec. 420 B.

Even when the terms are decided upon by the agent and the insured, but no company designated, and no company agrees to take the risk on the terms, there is no contract.

If, too, the agent acts for several companies, and no particular company is named in the negotiations, or fixed by prior dealings, the contract is not complete. The contract is not complete until the property to be covered has been specifically designated. When anything remains to be done before the insurance takes effect, for example, approval, it is absolutely void if that precedent condition is not performed. *May*, sec. 48. F.

These principles of law are well settled as contended for by defendant, but yet the contract or agreement to insure is the principal act, and, if this be settled upon, it is immaterial whether the premium be then paid or waived. The formal execution and delivery of the policy may be subsequent, and, if done as of the date of the principal act, it will relate back as having taken effect on that date. *Brownfield v. Phoenix Ins. Co.*, 35 Mo. Appeals, 54.

Whether the contract was complete and unconditional, and the premium paid or promised to be paid on a day prior to the loss, so that nothing remained to be done except the delivery of the policy, or whether the completeness of the contract so made depended on a subsequent ratification, which had not been effected when the loss occurred, were questions for the jury in that case under the instructions of the court.

The suit was on a contract of insurance as evidenced by the policy. A judgment was sought and secured on the policy alone. The policy being delivered after the negotiations were completed related back to the time of such completion, and was proper evidence of the contract. *May on Insurance*, sec. 43 and 44; *Lightbody v. Insurance Co.*, 23 Wend. 18; *Baldwin v. Insurance Co.*, 56 Mo., 151.

In the city of *Davenport v. Insurance Co.*, (17 Iowa, 288, 289), the court said:

"The contract or agreement to insure is the principal act, and, whether the premium is paid or waived, is an immaterial circumstance, and the formal execution of the policy may be a concurrent or subsequent act, and if subsequent and made as of the date of the principal act, it will have relation back to the doing of the principal act."

It is contended, however, by the defendant, that the demurrer admits facts which invalidate the policy set out in the petition, to-wit: that it was obtained from a local agent without authority, and was written and delivered on the day after the property had been wholly destroyed by fire.

It is true that the petition sets out a cause of action on the policy, but the reply, which it is claimed is demurrable, denies that the policy in the petition and answer mentioned was written without authority on the part of the agent writing the same, and denies that it was without consideration.

It is admitted by the plaintiffs that the policy was obtained after the destruction of the property, but it is alleged that it was done in pursuance of an agreement made prior to the destruction of the property in question to insure the same and issue a policy which the agent of the

company was authorized to make, and his act in making the same was ratified by the defendant.

Section 5079 of the Rev. Stat. provides that the plaintiff may reply to any new matter contained in the answer by denying generally or specifically each allegation controverted, and the pleader may also allege in ordinary and concise language any new matter not inconsistent with the petition, constituting an answer to such new matter in the answer.

In the case of *Durbin v. Fisk*, 16 Ohio St., 533, cited by defendant, the plaintiffs asserted the mere legal rights of the holder of a promissory note, and if the replication could be regarded as seeking equitable relief under the facts thus stated, it was a total departure from the petition. It can not be doubted that it is not the province of the reply to introduce new causes of action. This can be done by amendment of the petition, and the plaintiffs can recover only on the causes of action stated in the petition. This, however, is not the case as presented by the pleadings in the case at bar.

Nor will the claim hold that the plaintiffs are attempting to sue on the policy and support it by asserting that there was a precedent contract, without giving an opportunity to the defendant to take issue as to the terms of that contract. Under the Code (sec. 5081, Rev. Stat.) the allegation of new matter in the reply shall be deemed controverted by the adverse party, as upon a direct denial or avoidance as the case may require. The antecedent contract pleaded in the reply is taken as denied by the defendant, who, therefore, has taken issue as to its terms.

The cases of *Trainer v. Worman*, 34 Minn., 237, and *Miller v. The Hillsboro Mutual Association*, 47, N. J. Law, 393, to which the attention of the court is directed, do not disturb this view adopted by the court. In the former case the complainant alleges and relies on a complete performance of the contract according to its terms, while the reply admits a failure to perform as to time, and relies on the new matter therein alleged as an excuse for such failure.

There is, of course, a departure when a party quits or departs from the case or defense which he first made and has recourse to another.

In *Mills v. The Hillsboro Mutual Assurance Association*, 47 N. J. L., 393, the declaration was based on a contract of insurance made "according to the terms of the constitution by-laws and conditions," of the defendant association. The plea set up a defense under, a by-law of the association. The replication was that the only by-laws and conditions embraced in the contract were those annexed to the policy, and that the by-law set forth in the plea was not so annexed. On demurrer to the rejoinder it was held that the replication constituted a departure from the declaration. In that replication an inconsistent claim was presented. In it plaintiff contended that the covenant of the defendant was, to be bound according to the by-laws and conditions of insurance annexed to the policy, and no others, and that therefore the by-law of the association set up in the plea could not avail the defendant, because it was not annexed to the policy. It can readily be conceived that this is a substantially different contract from that exhibited in the declaration. Such a departure would be bad on general demurrer.

It is the opinion of the court that the pleadings present issuable facts which are not inconsistent, and that the demurrer to the reply should be overruled. It is ordered accordingly.

C. D. Robertson, for the demurrer; Wilby & Wald, *contra*.

## PLEADING—INCONSISTENT DEFENSES.

[Green Common Pleas, 1891.]

\*HOOVEN AND ALLISON CO. V. NATIONAL CORDAGE CO.

FIELD CORDAGE CO. V. NATIONAL CORDAGE CO.

1. In an action to recover rent, defendant for a first defense alleged that there was no legal or valid consideration for the lease.
2. For a second defense he alleged that he was entitled to an accounting under the terms of said lease, by reason of plaintiff having resumed the possession and use of the machinery leased, and in case the judgment of the court should be against him on the first defense prayed, that plaintiff be compelled to account for said use and possession.
3. By way of cross-petition he alleged that under the lease plaintiff was to pay certain liquidated damages in case of his violation of the stipulations of said lease; that plaintiff had been guilty of such violation, and prayed in case the judgment of the court should be against defendant on the first defense for judgment in the sum as agreed in liquidated damages. *Held*, not inconsistent, and defendant not compelled to elect.

MOTIONS to compel defendant to elect as between inconsistent defenses, etc.

SMITH, J.

The actions are brought to recover rental alleged to be due plaintiffs under the terms of certain leases between plaintiffs and defendant, the amounts claimed being \$1,291.65 and \$1,125.00, respectively.

Defendant for a first defense alleges that the object and purpose of the so-called leases was to diminish the amount of binder twine manufactured, and control the price; that plaintiffs were only to manufacture a certain quantity, but did in fact manufacture more, and otherwise violated their agreement by selling twine which they manufactured at a less price than agreed upon, and that by reason thereof the sole consideration of the contract had failed, and there was no valid or legal consideration therefor.

For a second defense the defendant alleges that there were certain other stipulations in the leases whereby plaintiffs, in case of defendant's failure to pay said rental, might, at the option of plaintiffs, resume the possession and use of the machinery mentioned in the contracts, for all purposes, without impairing the obligation of defendant to pay said installments of rent, but that in such case plaintiffs should account for their net earnings from such use down to the time of bringing suit for any such installments, and the same should be credited on the installments sued for. Defendant alleges that plaintiffs, having retained possession, did resume the use of all said machinery long prior to the commencement of these actions, and have since continued such use, and that in case the judgment of the court shall be against defendant on the first defense, an account be taken of the net earnings of the plaintiffs to be credited on the amounts sued for.

By way of cross-petition, defendant alleges that said leases contained a further stipulation that in case plaintiffs should engage in the manufacture of twine in violation thereof, then, in such case, plaintiffs agreed to pay defendant upon demand, the sums of \$40,000 and \$100,000 respectively as agreed, in liquidated damages, for such violation.

The cross-petition repeats the allegations of the first defense concerning such violation of the agreements by plaintiffs, and in case the judgment of the court should be in favor of plaintiffs on the first defense prays judgment for said sums agreed in liquidated damages as aforesaid.

The motions are to require defendant to elect as between the inconsistent defenses set forth in said answer, and to strike out the parts of said pleading not relied on; or as stated in one of the motions, if defendant elects to rely upon the first defense, that said contract is against public policy, without consideration, and void, that said cross-petition may be stricken from said pleading.

\* This judgment was affirmed by the circuit court; opinion 3 Circ. Dec., 613.

Section 5071 provides that "the defendant may set forth in his answer as many grounds of defense, counter-claim and set-off, as he has."

There is no limitation on this right except what is implied in the provision that pleadings shall be verified by oath. The several grounds of defense need not be technically consistent with each other. Therefore the defendant may set forth as many grounds of defense, counter-claim and set-off, as he has, provided they can be verified without swearing falsely.

When the verification of one is not the falsification of another; or where the facts stated are not so inconsistent that if the truth of one be admitted it will necessarily disprove the other, the defendant cannot be required to elect. *Bank v. Closson*, 29 Ohio St., 78; *Pavey v. Pavey*, 30 Ohio St., 600.

Tested by the foregoing, can it be claimed that the first defense and the second defense are inconsistent, or that the first defense and the cross-petition are inconsistent?

Admit the truth of the allegations of the first defense—that the object and purpose of the lease was unlawful, against public policy; that plaintiff by its breach of the stipulations of said lease, prevented the carrying out of said unlawful object and purpose—it does not disprove the allegations either of the second defense, or of the cross-petition. The first may be true, and yet the stipulations of the lease—though founded upon an unlawful consideration—may be as set forth in the second defense and cross-petition.

There is nothing in the pleading to prevent its verification. All of the allegations may be verified without swearing falsely. The counter-claim set up in the cross-petition is founded upon the breach of the stipulations of the lease set up in the first defense. The section of the code providing for the joinder of defenses in one answer applies equally to a counter-claim. The defendant may set forth as many grounds of defense counter-claim and set-off as he has. The limitations upon the counter-claim which defendant may set forth in his answer are prescribed in section 5072.

For the purpose of making his defense a defendant is permitted to set forth in his answer as many grounds of defense as he has, as many counter-claims as he has, and as many matters of set-off as he has, provided such answer can be verified by oath without swearing falsely, and provided further, that the counter-claim shall be included in the provisions of sec 5072, and the set-off within the provision of sec. 5075.

But it is claimed that defendant in this answer is attempting to defend against its stipulations in the lease by reason of illegality of consideration, and by the cross-petition to enforce the provisions of the lease in its favor. The pleadings do not sustain this construction. The defendant is seeking to avoid the lease. Defendant does not deny the allegations of the breach on its part set forth in the petition. That it has not paid the installments of rent sued for is admitted, but it claims the payments of rental provided for in the lease cannot be enforced for want of legal consideration. If true, this would be a complete defense, but defendant has another defense, and it has a counter-claim, both may be set forth in the same pleading, if the pleading can be verified without swearing falsely. Defendant then sets forth what may constitute a partial defense, and by way of cross-petition its claims for liquidated damages. Defendant does not pray that the lease be cancelled and a judgment for liquidated damages. The first defense is pleaded in bar of plaintiff's action, but if it shall be determined that there was a valid and legal consideration for the lease which it denies, defendant claims the benefit of the other provisions by way of partial defense, and for liquidated damages. The facts are not pleaded in the alternative. Defendant alleges that the sole consideration of the lease was to diminish the manufacture of binder twine and control the price, that there was no legal consideration, and that this same lease for which there was no legal consideration, provided that in a certain contingency plaintiff should account for its net earnings to be deducted from the rental sued for, and in case of a breach by plaintiff of its agreement contained in this lease without a legal consideration, plaintiff should pay certain liquidated damages. Defendant admits, as it must admit, that it cannot recover liquidated damages, or compel an accounting if there was no legal consideration for the lease, because the law would not enforce it for either party.

But the lease may, as defendant alleges, have been founded upon an illegal consideration, and have also contained the stipulations set forth in the second defense and cross-petition.

Therefore, defendant may set forth as his first defense the illegal consideration, in the second, another defense which may, diminish the amount of plaintiff's recovery, and in the cross-petition his claim for liquidated damages.

If defendant succeed in the first defense, plaintiffs cause of action fails, and with it defendant's claim for an accounting and for liquidated damages. If defendant fail in the first defense, it is entitled to the benefit of its claim for an accounting and for liquidated damages.

Defendant cannot be compelled at its peril to elect in advance on which it will rely to the exclusion of the others. It may be unable to establish the fact of illegal consideration. Though claiming to have produced full proof of an illegal consideration, it may nevertheless fail. It therefore becomes uncertain which is its true and proper defense, and it may set them all up in one pleading, provided the pleading can be verified by oath without swearing falsely, 29 Ohio St., 81.

I have examined the case of *Bell v. Brown*, 22 Cal., 671, (cited and approved in *Pavey v. Pavey*, 30 Ohio St., 602), where this question of the joinder of inconsistent defenses is fully discussed. It is in harmony with the Ohio cases above cited, and on principle applicable to this case.

I have examined all the cases cited by counsel for the motions. They are not in conflict with the cases above cited, several of them being the same on principle as the case of *Morriss v. Rexfeld*, 18 N. Y., 552, where it was held, that a vendor having taken from his vendee by writ of replevin, goods sold for cash on the failure of the vendee to make payment, that such action of replevin amounted to a disaffirmance of the sale by the vendor, and he could not maintain a subsequent action for the purchase money.

Having elected to pursue one remedy, his right to the other was extinguished.

But defendant in this case has simply declined to pay the rental; it has come into court because summoned to appear and defend against plaintiffs enforcing payment of the rental it has declined to pay. It is simply defending against the demand of plaintiffs, and by way of defense and counter-claim it has set up in the answer the grounds of defense and counter-claim it has, as it is entitled to do under sec. 5071. The cases in 16 Ohio St., 118; 7 How. Pr., 236; 12 How. 340, are on the same principle as 24 N. Y., above cited.

In 21 Minn., 163, it was held that a complaint so framed as to admit proof of an implied contract to pay what services were worth, and of an express contract to pay a particular sum therefor, was objectionable, and might be corrected on motion.

In 22 Minn., 15, the complaint set up a special contract as to price, and also alleged value. Held, in sound discretion of court to require plaintiff to elect.

In addition to 29 Ohio St., 78; 30 Ohio St., 600, and 22 Cal., 671, above referred to, the following authorities are cited: *Pomeroy, Rem & Remedial Rights*, sec. 722; 1 *Bates*, Pl., 138, 140, 195; 2 *Bates*, 799; 1 *Cir. Ct. Rep.*, 203; *Bliss on Code Pleading*, sec. 343, 344; 9 *How. Pr.*, 289, 282; 20 *How. Pr.*, 503; 10 *Ib.*, 44; 12 *Ib.*, 313; 12 *Minn.*, 4:6.

The motions to compel defendant to elect are therefore overruled.

*Charles Darlington and Little & Spencer*, attorneys for plaintiffs.

*Harmon, Colston, Goldsmith & Hoadly*, attorneys for defendant.

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## CHURCH PEW—REAL ESTATE.

[Cuyahoga Common Pleas, October 23, 1891.]

ADOLPH S. DEUTSCH V. MAURICE C. STONE ET AL.

*Stone Bros.*, a partnership, brought a suit on an account before a justice of the peace, against *L., F. and L.*, partners as *The Prospect Rolling Mill*, and attached a certain pew owned by *L.*, on the statutory grounds. Pending this case *L.* sold his pew to *Deutsch*. The justice found in favor of *Stone Bros.* and ordered a sale of the pew by a constable. Thereupon *Deutsch* applied to the common pleas court for a restraining order, which the court allowed on the grounds set forth in the opinion. The court, Held:

1. That a pew is real estate.
2. That the nature of property cannot be changed by agreement of parties.
3. That a court of equity will enjoin a sale of real estate which would confer no title on anybody purchasing.



SHERWOOD, J. (orally).

This is an action brought for an injunction to restrain the constable from proceeding to sell, under an attachment issued in a justice of the peace court, a pew in the Jewish Synagogue. Plaintiff claims and sets out in his petition "that he is a member of the church and congregation in this synagogue, and that in April, 1890, he purchased from Lazare Levy the pew in controversy; that at the time of the purchase there was an action pending; that an attachment was levied upon this pew in an action in the justice of the peace court, and the attachment was issued out of that court; that he paid the consideration of five hundred dollars for that pew; that since he has become the owner of it there has been an effort made by the constable to sell the pew, and he is likely to be disturbed in the peaceable possession and occupancy of the same, and seeks to enjoin the constable from further proceeding, on the ground that the pew is real estate; that no attachment, or levy, or proceedings in a justice's court would be authorized to sell that property, it being real estate; that he has complied with all the requirements of the rules and regulations of the church, and that having so complied, the title passed to the plaintiff, and he is entitled to the free and unobstructed use and occupancy of that pew, as against the defendant and the constable who seeks to sell it."

The question arises on a motion for a temporary injunction. The defendants interpose first, that the pew is chattel property, first in its nature, and second by reason of the deed from the synagogue or trustees to Lazare Levy, under and by reason of which the plaintiff took only the interest of Lazare Levy; that it is personal property, though real estate in its essential nature, and third, that even if all these proceedings are invalid and void, it is not such a case as an injunction might issue in, no harm being done to the plaintiff if an attempt be made to sell the real estate by process of law.

The questions have been very exhaustively argued, and very numerous authorities have been cited, especially in behalf of the plaintiff, sustaining the several positions for which they contend. And the first question that arises is as to whether the pew in question in this church is or is not real estate. I presume forty or fifty books have been cited and read to the court to sustain the position that this pew is real estate in its essential nature. There was not one authority cited to the contrary. There are, however, I believe in Pennsylvania, cases in which it is held that it is personal property. Without reviewing the authorities or taking as long as it did the counsel to cite them, a day and a half upon that proposition, I am content to state simply the conclusion to which I have arrived, and that is that the pew is in its essential nature real estate, holding as the courts certainly have done in different states. Of course, under the statutes of this state, an execution issued out of a court of a justice of the peace, or an attachment of any kind, does not affect real estate, he having no jurisdiction over it.

But it is said that in the deed from the church to Lazare Levy, the original owner, it is specially provided that this shall be chattel property, and the document itself does not state in a peculiar manner. It recites that for the consideration of four hundred and ten dollars received to its "full satisfaction of Lazare Levy of Cleveland, the grantee, the grantor has bargained, granted, sold, delivered and by these presents does bargain, sell and deliver the following described chattels and effects, to-wit: One family pew No. C.

12, located in the temple situated on the corner of Scoville avenue and Henry street, in said city. It being understood that said pew is to be treated as a chattel as far as the rights of the grantee are concerned, and as realty as far as the grantor is concerned, especially in its immovability. It being further understood that said pew is to be held by grantee and heirs and assigns, subject to the rules, by-laws and constitution of the grantor. To have and to hold the same unto the said grantee, his heirs and assigns, to his and their own proper use and behoof forever. And the said grantor does hereby covenant and agree, to and with said grantee, his heirs and assigns, that said bargained pew is free and clear from any and all encumbrances whatsoever, and that it is the true and lawful owner thereof, and has good right and lawful authority to bargain and sell the same in manner and form as aforesaid, and that it will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

"In witness whereof, the president and secretary of grantor have hereunto set their hands, at Cleveland, this first day of June, A. D. 1888."

Signed by the president and secretary, and witnessed by S. M. Goldsmith and F. Sery.

It is signed and sealed, but not acknowledged. Under this contract the grantee took possession and occupied it for some time—from 1888 until 1890, at which time he sold it, as is contended, to the plaintiff in this action—Mr. Deutsch, and the question arises as to whether persons can in an instrument of this kind, or by agreement, make that personal property which is real estate.

There are some circumstances under which by agreement, property which otherwise would be real estate, may be considered and held as personal property; but is this one of them?

The Supreme Court of our state, 14 Ohio St. courts, 558, page 564, has defined, as did other (adopting the language of those courts), that species of property which may be held as real estate or personal property, or rather which is in its nature or would otherwise by its connection with real estate, be real estate. It says, on page 564:

"There is undoubtedly a limitation upon the rights of parties to change by their agreements, the status of property from that which the law would assign to it in the absence of a special agreement.

"Whether an agreement shall preserve the character of personalty, in things so affixed to the freehold, as that, but for such agreement, they would become part of the realty, depends upon their essential character and the mode in which they are annexed, e. g., whether they can be removed without serious damage to the freehold, or without substantially destroying their own qualities and value.

"It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and can not, in general, be changed by the convention of the parties. Thus it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams or materials of which the walls of a house are composed. Rights by way of license might be created in such a subject, but it could not be made alienable as chattels, or subjected to the general rules by which the succession of that species of property is regulated. But it is otherwise with things which being originally personal in their nature, are attached to the realty in such manner that they may be detached without being destroyed or materially injured, and without

the destruction of or material injury to the things real with which they are connected; though their connection with the land or other real estate is such that in the absence of an agreement or of any special relation between the parties in interest, they would be part of the real estate."

I think that expresses substantially the holding of courts so far as I have been referred to authorities or been able to find authority on the question of changing the character of property. It depends upon the essential nature or character of the property itself. It would seem, in the nature of things, that persons could not, as between themselves, say that a piece of land should be personal property, thus giving jurisdiction to a justice of the peace to levy and sell a piece of land, or to prevent the statutes from operating where they differ with reference to land and chattels, except where in their original character they were personalty, and only became real estate by reason of their connection with that property. It may be conceded, as it is held, that parties may by agreement between them give or retain the character of personalty where it may be detached from the real estate without injury to the latter. Thus a pew is, as we have seen, in its essential nature real estate. It cannot be detached without injury to the real estate with which it is connected, it is in its nature as much realty, and it is called an incorporeal hereditament. It is as essentially real estate as the land itself, and by the convention of the parties cannot be made personalty.

Another question that is raised is that this property did not pass, for the reason that the rules and regulations of the church were not complied with, from the fact that it is specified among those rules that no pew can be offered for sale until the grantor has received an option of sale. It appears that on the date that this pew was purchased, Mr. Levy had offered or tendered to the grantor the right to purchase this pew, and they declared they would not purchase for the reason that there was an attachment on the property and they would not take it in its then condition. They say now that there was a refusal; that a little after the refusal in the manner indicated, Lazare Levy sold the pew, Deutsch paying over the money in the presence of the trustees, and without any evidence of protest or objection on the part of the trustees. It is now claimed that this provision of the rules would not apply to it though title passed. It nowhere provides that the church shall have an option of purchase upon the pew, which shall be free and clear from any claims or any liens or attachments. It is not disputed that they declined. The only question is whether, having declined by reason of the attachment on it, they reserved to themselves an option until that pew was free and clear from any controversy whatsoever. I am disposed to hold that when the offer was made, whatever the condition of the pew, whatever controversy might have arisen with respect to this, that that option was all that the provisions of the by-laws would contemplate, and if they refused to take possession as appears by the records, that condition of the by-laws is complied with, and that the sale after the refusal to purchase by the then owner of the pew, to another who is a member of the church and has authority to become a pew owner and holder, would be a good transfer, a good sale. It is said again that Mr. Deutsch and Mr. Levy being members of this congregation, subject to its rules and regulations, are bound by the action of the trustees, and that the trustees having declined to purchase this pew by reason of the fact that there was a controversy over it, that Mr. Deutsch in the face of an action

by the trustees, had no right to make a purchase of the pew, until after the trustees had passed upon the question as to whether they would purchase it or not, the pew being free from controversy—that there is some superiority attaching to the trustees over the members of the congregation which would prevent their attempting any action by way of purchase of the pew until they had permission from the trustees. I am unable to see any such relation existing between the members and the trustees as would subordinate the purchaser in any such manner. This being real estate which cannot by the intervention of the parties be made personalty, and the requirements, rules and regulations having been complied with on the part of Lazare Levy and Mr. Deutsch, the only question that arises is as to whether a court of equity will intervene by injunction and restrain the constable from doing that which would, in its effect, be void and of no effect as a transfer of title, if he did attempt to sell to any one, or divest the plaintiff Deutsch of his title to the pew. The general principle that has been universally adopted under such circumstances is, that a court of equity will not intervene to prevent a sale on a void judgment, or to prevent proceeding where a sale would have no effect to divest the title of the owners, as there was an adequate remedy at law. I think our courts, however, have invested courts of equity with a little additional power in a matter of that kind, and have varied the general principle which heretofore obtained, and have held that a court of equity will prevent a sale under a void judgment or under circumstances such as I have referred to, where the effect of the pretended sale would be to pass no title or cast a cloud on the title of the owner. In several early cases, the 2nd, 3rd, 4th and 5th Ohio Reports this has been held to be the law, and I nowhere find those cases overruled, or a different principle announced.

On the other hand, it is said here that if this injunction is not granted, "plaintiff will suffer irreparable injury and damage, for which he has no complete or adequate remedy at law. The peaceful worship in said temple will be interrupted, scandal created, and the feelings of plaintiff and his family and of said congregation will be outraged by unseemly controversies in a sacred place, as to who has the right to use said pew, for all which no action at law and no award of damages by a jury can make adequate recompense."

Those are the reasons assigned why no adequate remedy can be had at law. Now, the question arises whether those allegations are sufficient in themselves to invest a court of equity with authority to grant an injunction. Several cases have been cited in which under substantially such allegations as those with reference both to churches and graveyards, where there has been an effort to seize upon property held as graveyards or places of worship, that courts of equity will intervene, although by the process on which it is sought to obtain possession of these places no title would pass, and the owners would not be divested of their rights or title to the property, because it is said they were in their peculiar nature such that no adequate damages could be given by reason of their possession being taken, no adequate damage could be given for the outraging of religious feelings and the violating the sacredness of the place, either of a grave-yard or a church, and on principle, it would seem that in a case of this kind, if this pew were sold to some one else who should claim title to its use and occupation, the controversy between Deutsch and the pretended purchaser would be such, because of the place and its surroundings, that no jury would be able to determine or fix any dam-

ages adequate under the circumstances, and a court of equity ought to interpose to prevent any such unseemly controversy with reference to a property of that kind. The justice of the peace, then, having no jurisdiction over the property, and the attachment and levy being totally without authority, the motion for a temporary injunction will be granted to prevent the officer from selling this property.

W. G. Guenther & P. Zucker, represented Stone Bros.

J. G. White & Emil Joseph, represented A. S. Deutsch.

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### TAXATION.

23

[Hamilton Common Pleas, 1892.]

An illegal tax paid under protest may be recovered back. *Whitbeck v. Minch*, 48 O. S., 210, explained.

The County Treasurer sued White for \$67 taxes and \$6.70 penalty. White admitted indebtedness for \$40.20, and claimed that the amount in excess of the \$40.20 was upon an addition illegally made by the board of equalization. White also claimed judgment against the Treasurer for taxes illegally charged and paid by him under written protest, and an interesting question as to the application of a holding of the Supreme Court as to payments under protest was passed upon.

The county solicitor insisted that no payment under protest could avail to save the right of a tax-payer under the decision of the Supreme Court in *Whitbeck v. Minch*, 48 O. S., 210. It was argued on the other hand for White that the Supreme Court in an unreported case, and without giving extended reasons therefor, would not reverse its former decisions where protests were held good, as in *Catoir v. Watterson*, 38 Ohio St., 319; 28 Ohio St., 521; 27 Ohio St., 527, and 11 Ohio St., 536; and that the Supreme Court opinion in *Whitbeck v. Minch*, though sweeping in its language, must be interpreted in the light of the special facts of the case, and it was urged that if the Supreme Court meant to hold that no protest could in any way be available, there would have been a final decision terminating the *Minch* case summarily, whereas it was remanded to the lower courts for further proceedings.

Judge Maxwell in rendering his decision last week noted that in *Whitbeck v. Minch*, *Minch*, as assignee, sued to recover sewer assessments paid under protest by eight different persons. One of the payers paid protesting against his personal tax, and not the sewer tax, and another did not enter his protest until the day after his payment. And he held, interpreting the ruling of the Supreme Court in the light of these facts, and in remanding the case for further proceedings instead of finally dismissing it, that the Supreme Court by its holding in the *Minch* case did not intend to reverse its former decisions on this question. To hold so would be a change of the well known rule, which forbids proceedings in equity if the law provides remedies that are adequate, so as to forbid a party from resorting to law where, as in cases of taxation, a remedy is provided in equity.

The court therefore held a payment under protest sufficient to justify recovery of an illegal tax so paid; and rendered judgment for \$40.20, admitted by White to be due, excluding all penalty charged.—[Editorial.]

## CONSOLIDATED DITCH APPEAL.

[Clark Probate Court, 1892.]

\*JASPER N. MARSH ET AL. V. CLARK CO. (COM'RS.) ET AL.

## 1. SETTING ASIDE VERDICT AS AGAINST WEIGHT OF EVIDENCE.

The verdict of the jury in locating a ditch, etc., under sec. 4467, Rev. Stat., will not be set aside as being against the "weight of the evidence" even though not supported by the evidence produced in the case in the presence of the judge and jury.

## 2. MISCONDUCT OF PARTY BY TREATING, ETC.

Where the principal petitioner for a ditch, on solicitation from the jury while on their view, gave them something to eat, and one of them being unwell, also some intoxicating liquor, there being no public house near, but held no other conversation with them, there being no intent to influence the jury, the verdict will not be set aside.

## 3. MISCONDUCT OF JUROR, EXPRESSION OF OPINION.

A juror will be presumed to have obeyed the injunction of the court until positive evidence is produced to the contrary, and the mere fact that during the view, in a casual way, he expresses himself as having made up his mind, not saying what that opinion is, will not be such misconduct of the jury as will justify the setting aside of the verdict in a ditch proceeding, where the verdict is unanimous, and a verdict of eight would have been sufficient.

ROCKEL, J.

The plaintiffs in this case have filed a motion to set aside the verdict rendered by the jury for the following reasons:

First—The verdict is against the weight of the evidence and the law of the case.

Second—The court erred in submitting to the jury the question of the right to establish a ditch upon the petition filed before the commissioners in this case, over the line of an already established township ditch.

Third—The court erred in refusing to charge the jury as requested by plaintiffs.

Fourth—For misconduct of the defendant, Andrew Phelan, during the time the jury was engaged in the viewing of the line of the proposed ditch, in this: that he sought to influence the jury by inviting them to his house and by taking them there, and by treating them, or a number of them, to intoxicating liquor, and by also feeding them all, at his own expense.

Fifth—For misconduct of the jury in accepting from defendant, Andrew Phelan, while they were upon duty and in charge of an officer, and after they had been sworn and during the time they were engaged in viewing the line of the proposed ditch, an invitation to the house of the defendant, Andrew Phelan, and then accepting and eating the food of the said Andrew Phelan, and also, because a number of the jury, not less than six in number, accepted and drank, at the time they were at the house of the said Phelan, intoxicating liquors, and all this at the expense of the said Phelan, and in the absence of the plaintiffs, or either of them.

<sup>3</sup>This judgment was reversed by the common pleas, but the circuit court reversed the common pleas, and affirmed the judgment of the probate. The circuit court was affirmed by the Supreme Court; unreported, 52 O. S., 657. For decision of the probate on hearing of the case, see ante 290.

Sixth—Because it having been made to appear to the court and jury that the principal part of the line upon which the proposed ditch would be established is upon the line of an already legally and properly established ditch, established by the township trustees of Pleasant township.

Seventh—Because the proposed ditch as ordered by the county commissioners, does not conform to the line petitioned for by the defendant, Andrew Phelan, and because it extends to a considerable distance further south and beyond the line petitioned for.

Eighth—The said jury or a majority of them, formed an opinion, and made up their minds as to the issue in this case, and expressed said opinion before the conclusion of the trial and before the hearing of the testimony, contrary to the orders of the court and the law, and for other misconduct of the jury and of the prevailing party.

The questions sought to be made by the second, third, sixth and seventh, ante 290, of the above reasons have received the consideration of the court in a former hearing of this case and will not be further considered herein. The others will be considered in their order.

First—In considering the first, the court not having all the evidence before it which was properly considered by the jury, labors under a very great difficulty in determining whether the verdict is against the weight of the evidence.

The statute provides that:

(Section 4467) "The probate judge shall administer to the jurors an oath faithfully, impartially, and to the best of their ability, and from actual view of the premises along the whole route of the improvement, to examine and determine the particular matter appealed from, and to render a true verdict according to the facts appearing to them from actual view of the premises, and the evidence, under the charge of the court."

And the Supreme Court in considering this section, *Williams v. Lockman*, 46 Ohio St., 417, says: "The provisions of sec. 4467 manifestly contemplate, that by an actual view of the premises the jury shall be enabled not only the better to apply the testimony disclosed at the trial, but also be aided by their own personal knowledge of the facts as derived from an actual view of the premises, in examining and determining the particular matter appealed from."

What the jury saw in this actual view the court does not know. Oral testimony might disclose many of the things viewed by them, but it is safe to say that in no case would all be disclosed. And even if it were possible to disclose all by oral testimony it is extremely doubtful if the judgment formed from such testimony would be as good—as near correct—as that formed from the actual sight. The lay of the land, the fall of the water, its present drainage, the surrounding country, the usefulness or practicability of the proposed ditch, are matters which cannot, and evidently this was the intention of the legislature, be as well determined by hearing them described as by actually viewing them. It is extremely questionable whether any other evidence than that acquired from the view is absolutely necessary to be produced to the jury in order to enable them to render a verdict. "After the jury has fully examined the premises either party may be heard, in person or by counsel and may offer evidence to the jury." (Sec. 4468.)

If neither party is compelled to produce any testimony, he may rely solely upon the view. If this be true, how is the judge able to say that a verdict rendered by a jury in locating the ditch is against the

weight of the evidence? It may be, as perhaps it was in this case, that considering only the testimony adduced in court, and before the judge, the verdict is not strongly supported by the evidence.

Where the jury is to view the premises and form their verdict from their own knowledge as well as from the testimony, the difficulty of setting aside a verdict because not supported by, or being contrary to the evidence, has been fully recognized by the courts.

In *Parks v. Boston*, 15 Pick. (Mass.), 198, 199 and 200, it is said:

"The whole city being within an easy walk of the court, it was manifestly a wise and convenient provision that after having taken a view of the place, they should return into court and have the cause there conducted before the judge, and in conformity with the usual forms, rather than elsewhere before the sheriff. But the object of the inquiry is still the same: it is to estimate the plaintiff's damages, and upon view, if either party desires it. The jury must therefore, I think, exercise their own knowledge and experience fully; and perhaps in most instances, with a competent and intelligent jury, such judgment could not be much aided by the estimate of others, though under oath, in the form of testimony. It may follow as a consequence, as suggested by the learned counsel for the complainant, that it would be difficult, if not impossible, to set aside a verdict in such a case on the ground of being contrary to the weight of the evidence given on the trial."

In a condemnation proceeding in Michigan (*Toledo R. R. v. Dunlap*, 47 Mich., 466) it was said:

"Their conclusions are not based entirely on testimony. They are expected to use their own judgment and knowledge, from a view of the premises, and their experience as free-holders, quite as much as the testimony of witnesses as to matter of opinion. And while an appellate court is bound in such cases to set aside proceedings which appear based upon false principles, it cannot properly deal with rulings as if they were excepted to on a common law trial, or dispose of the controversy on a mere technical motion."

In a like proceeding in Nebraska (*Omaha R. R. Co. v. Walker*, 17 Neb., 432), it was said:

"It is difficult to review the judgment as being against the weight of the evidence, because all the evidence before the court cannot, from the nature of the case, be incorporated in the record; and in these cases there is no such discrepancy between the evidence in the records and the verdicts as to justify the court in setting them aside, which the court would not do unless it was clear that the jury had erred."

In the case at bar the testimony adduced on the hearing in court was conflicting, and if considered alone would hardly justify the verdict, but the court is unwilling to say that the verdict is contrary to the weight of the evidence, when the court has not had all the evidence before it that was properly before the jury. And it is not improbable, but that the legislature may have intended when this power to view was given the jury, that they were to be the sole judges on this question—under proper instructions of the court, and unless the verdict could be impeached for fraud, or that it was manifestly wrong and irreconcilable with well known facts and principles, it could not be set aside. Although the law relating to ditches nowhere expressly authorizes probate courts to set aside the verdict of the jury, yet there is no doubt but that the probate court has such power, and will do so for sufficient cause, and in determining the matter the same rules will be applied as are applied



to juries in the common pleas courts generally. *Trimble v. Koch*, 26 Ohio St., 438.

It is not complained in this case, that upon the third and fourth propositions submitted to the jury, *i. e.*, "The compensation for land appropriated," and "damages claimed to property affected," that the verdict is not supported by the evidence.

It is upon the first and second propositions, *i. e.*, "whether such ditch will be conducive to the public health, convenience or welfare," and "whether the route thereof is practicable," that argument has been made to show that the verdict of the jury was against the weight of the evidence.

In determining these two questions submitted to them, it was not intended by the legislature, that the jury should perform the functions of a common law jury, or in other words, that they constituted a jury as recognized in the constitution. If this be not true, the statute is unconstitutional when it provides that less than an unanimous verdict will support a finding in favor of the ditch. It is rather to be presumed that the duty intended by the law to be placed upon the jury, in this respect, was that which ordinarily and generally devolves upon viewers, etc.

If the law is constitutional in its provision that an affirmative verdict of eight will support the finding in favor of the ditch, in this case where the verdict is the affirmative finding of the entire twelve, one-half more than is necessary, even if the court could set the verdict aside, because against the weight of the evidence, it is questionable whether it would be justified in so doing. Either these men's opinions, formed from actual view under the instructions of the court, as provided by the statute, regardless of the evidence produced in court, are of some value, or it was an absurdity to require them to at all view the premises, and yet they could not have performed their duties as required by the law without such "actual view."

Besides, the county commissioners, as appears from the record before us, also unanimously decided in harmony with the verdict of the jury. Thus we have the opinion of fifteen men outside of the engineer, and the defendant and his witnesses, that the ditch is necessary, and in harmony with the verdict. The evidence produced in court presents but little, if anything, more than what could have been, and it is fair to presume was, learned and taken into consideration by the jury in their actual view of the proposed improvement. The court is unwilling to say that all these men are wrong, by reason of the evidence produced in court by the plaintiff and his witnesses in this case. And, if I had the power in such a case as this, I would not set aside the verdict of the jury as being against the weight of the evidence.

4 and 5. The evidence adduced to show misconduct of the defendant or of the jury showed the following facts:

The jury in charge of the sheriff and the engineer drove out sixteen miles to view the ditch. The engineer having been there before, and somewhat familiar with the premises, suggested that they drive to the defendant's house, which was near the line of the ditch. When they arrived, Phelan was not at home, but they put up their horses and started to view the ditch. When about half way on the line they met Phelan. The sheriff immediately went and informed him that he must have no conversation with the jury upon any matter concerning the proposed ditch. Phelan followed along with the jury a short distance, and then

returned to his home or his work; after the jury had finished their view, it then being about three o'clock in the afternoon, and many of the jury having had nothing to eat since morning, the engineer went to Phelan and asked him if he could not set them out a lunch of bread and butter, as it was a long drive to Springfield, there being no hotel or public house in the community. Phelan at first demurred, and said that he did not like to do it, as the court had directed that he should have nothing to do with the jury. The engineer said to him that the view was now over, and that nothing that he might do would have any difference with the jury. Phelan said that he would go in and see if his wife had anything, and after a while he came out and invited the jurors in. It was a very warm, dry, dusty day, and some of the jurors, not being used to outdoor exercise, complained to the engineer that they were not used to that kind of work, and they were fatigued, and did not feel well, and said they would like to have a drink, and inquired if Phelan kept any whiskey. The engineer replied that he knew Phelan kept it, and then went to Phelan and asked him if he had any whiskey, saying that some of the jury were not feeling very well. Phelan brought out a jug containing a pint, or half pint of liquor, poured some in a glass and left the room. The sheriff and some four or five of the jury drank liquor. They finished their lunch, hitched up their horses and returned to Springfield. During all the time they were at Phelan's he had no communication with any one of the jury upon any subject whatever. He was not present in the room when the liquor was drunk, nor at any time with the jury, or any member of it, in the absence of the engineer or sheriff.

Is there sufficient reason here shown to set aside the verdict on account of misconduct on the part of either Phelan or the jury? It is very evident that no juror became intoxicated, or that he drank enough to prevent him from properly considering the case. The view of the premises had been made, and the jury were to meet the second day thereafter to hear evidence, and the charge of the court, and then give their verdict. If set aside then, it must be upon the ground that the courtesies extended them and the favors received by them were such as to influence their decision in his favor. The conduct of an interested party towards jurors is always closely scrutinized by the courts, but not always with the same degree of vigor. In *Pittsburg, etc., R. R. Co. v. Porter*, 32 Ohio St., 328, it was held that "where it appears during the progress of the trial, that a prevailing party or his attorney has furnished intoxicating liquors to a juror, it is a good ground for a new trial, unless it is clearly shown that it was not intended to influence his action in the case, and that it had no influence on his mind as a juror." The mere fact that a juror in a civil case drank intoxicating liquor during an adjournment of court, while the trial was in progress, is not a sufficient reason for granting a new trial, unless there be reason to suspect that it may have had some influence on the final result of the case."

In this case it was shown that after an adjournment, about ten o'clock at night, during the progress of the trial and before the case was finally submitted to the jury, one of the jurors and one of the counsel for the plaintiff, on the way to their respective lodgings casually met, and while passing a saloon, the attorney remarked that he was tired and thought he would like a glass of ale, and asked the juror if he drank ale. On receiving an affirmative reply he invited him to go in and join him in taking a glass of ale, which they did, remaining there about five min-

utes, and drinking but a single glass each, during which time, nor at any time while they were together, was any allusion made to the case.

In the opinion it is said, "More especially the least attempt on the part of the prevailing party or his attorney, to influence or corrupt a juror, though it be unsuccessful, is held to have the effect to vitiate a verdict rendered in his favor, as a just punishment for his misconduct. The rule is founded in public policy, the better to preserve the purity of trial by jury. Hilliard on New Trials, 202 ch., 10 and 6. But if the act done was mere accident or inadvertance, without any improper design, and if it can safely be assumed that it had no improper influence on the mind of the jurors, in such case there can be no just or reasonable ground to disturb the verdict. *Vaugh v. Dolson*, 2 Swan, 348. Accordingly, it has been held, that the casual treating of a juror by the prevailing party or one in his employ, without any design to bias or influence him, where there is no cause to believe that the juror was influenced by the occurrence, is not a ground for a new trial. Hilliard on New Trials, ch. 10, 88."

This is the only case in Ohio on the subject. *John v. Griem*, 17 Neb., 447, is somewhat similar to the case at bar. There it was held that "where a jury was sent in charge of a bailiff of the district court, with the sheriff and county surveyor, a distance of eight miles to view and examine real estate alleged to be damaged by the overflow of water, and while examining the land, it being noon, the bailiff, by order of the sheriff, procured and caused to be served dinner at the house of the defendant in error, without his solicitation or the solicitation of the jury, there being no other convenient place to procure it, the dinner being obtained by the bailiff and paid for by him, and where it is affirmatively shown that the defendant in error had no conversation with the jury upon the subject of the case on trial, that no misconduct on the part of the defendant in error, or of the jury, was shown which would require a new trial.

In *Bennett v. Gladfelt*, 11 N. E. R., 253, (Ill. Sup. Ct., 1887), it appears that pending the trial, and in the evening after the adjournment of the court, one of the jurymen was seen near the courthouse alone with the plaintiff, riding in the direction of the home of both. The explanation shown by the affidavits of both that they both lived in the same place, and the juror having to go home in the same general direction of as the plaintiff asked permission of the latter to ride with him in his wagon, and the plaintiff consented, after being informed by counsel that there would be no harm in it if they did not talk about the case, and nothing was said about the case. "There was a clear impropriety in the association of the party with the juror. \* \* \* While what took place meets with our strong disapproval, we hardly feel that we should go so far as to visit it with the penalty of reversal of the judgment."

In *Gurney v. Minn. R. R. Co.*, 43 N. W. R., 2 (Minn. Sup. Ct., '89), "On the morning that the jury went out to view the premises and before they started some of the jurors made inquiry as to who was going to 'set up the cigars'; that the bailiff replied, 'Well, I will go and get a box, and I will run the risk of getting it from the railroad company.' That he went and got a box and distributed them among all who wished to smoke. That five or six weeks afterwards, when he sent in his bill to the railroad for the carriages he included the cigars, and it was paid. The only thing that connected the railroad with it was that they paid

the bill. 'We do not think' say the court, 'enough was shown to justify setting the verdict aside on this ground,' and they reversed the lower court for doing so."

In Thompson on Trials, sec. 907, it is said, "On principles heretofore stated any tampering with the jury, by extending undue favors to them in the way of food, drink and entertainment while making the view by or in the interest of the successful party, will demand the setting aside of the verdict; but this does not extend to ordinary civilities such as the act of the deputy sheriff in charge of the jury in furnishing them with a pitcher of cider at the house of the petitioner, upon their request for refreshments."

In the case under consideration there is nothing shown to indicate that what Phelan did was done with the intention of influencing the jury. The fact that he refrained from conversing with them, that he did not volunteer to furnish them food and drink, and only did so after being informed by the engineer that nothing that he might do then would influence them, that he did not remain in the room only when it was unavoidable, clearly indicate this. I well know the hospitality of the average farmer. Their doors are always open to entertain with what they have all who may chance to call. In a case like this, not to have extended the civilities, as was done by Phelan, would generally be received by this class of people as an act of extreme inhospitality, and I might add, inhumanity. Here were fourteen men who had ridden sixteen miles, some even thirty miles, walked over a mile of ditch on a hot, dry, dusty day, without their dinners, no public house near, with the same distance to return, applying for food and drink; Phelan perhaps, felt, being an original petitioner for the ditch, that it was his fault that these men were there at all, and that he ought not to be uncivil or unkind to them. It seems to be very probable if I had been in Phelan's place, not knowing the severity with which the law looks upon any act done by a prevailing party to the jury, I should have done as he did. The fact of setting out something to drink stands upon no other or different ground than that of furnishing something to eat. Of course I do not approve of the conduct of either the jury or Phelan in this case. It ought not to have occurred. The jury were charged before they started on their view, as to their duties. Personally I know many of them to be as good citizens as are found anywhere. Upon the question of establishing the ditch, the only question in which Phelan was interested, only required the affirmative vote of eight. In this case the entire twelve agreed upon the affirmative side of the question. Besides, the county commissioners had also once unanimously found in the affirmative.

It not appearing that Phelan intended to or did influence their verdict, I do not, therefore, feel that the verdict ought to be set aside for any such alleged misconduct of either the jury or Phelan.

Eighth—Upon the last ground urged for a new trial it is alleged that the jury formed and expressed an opinion before the conclusion of the trial. This is based upon the evidence of the engineer, who testified that when they were going back over the ditch, that he volunteered to take the jury back over the entire line, but they informed him that they did not care to see any more, that they had made up their minds and were satisfied. He does not say that all the jury gave expression in that way, and it is rather to be presumed that only a very small proportion thus expressed themselves, probably one or two. The verdict only required the affirmative vote of eight. It received twelve. He says

further that no one of them expressed what that opinion was. This is not given as the exact language of any one juror, or of all of them, but evidently is only the impression that the engineer received from them, and only as a reason why they did not care to go back over the entire line. Evidence was afterward heard by them as well as arguments of counsel and the charge of the court. If it be true that they had then made up their minds, as this was before they went to Phelan's, it is an additional indication that the food and drink they there received, did not influence them.

It does not appear to me that what was said on the subject was meant by them that they had absolutely made up their minds. But rather that they had seen all of the line of the proposed improvement that they desired to see; and that they were satisfied with their actual view, and that it was unnecessary to again go over the entire line, and that upon this they had made up their minds, and not upon what their final verdict would be.

They were instructed to return and hear further evidence, and not to express or form an opinion. In the absence of positive proof to the contrary, it ought to be presumed that they obeyed the injunction of the court, and that as men of ordinary judgment, they knew that they would not be justified in making up their minds finally until all the evidence, the arguments of counsel and the charge of the court had been given them. If they had an opinion they did not express what it was to anyone.

The motion for a new trial will therefore be overruled.

Keifer & Keifer, for plaintiffs.

Pringle & Johnson, for Phelan.

Chase Stewart, for commissioners.

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## ELECTRIC CAR FRIGHTENING HORSE.

70

[Muskingum Common Pleas, 1892.]

HOWARD H. CHAPMAN V. ZANESVILLE ST. RY. CO.

Where a horse, driven on a street occupied in part by an electric railway, takes fright at an approaching car, and, because the car is not stopped, becomes unmanageable and runs away, injuring the driver, the railway company is not liable for such injury, unless the failure to stop the car is attributable only to a wanton or malicious disregard for the safety of the driver of the horse.

PHILLIPS, J.

The petition alleges, that the defendant, a corporation, operates a line of street railway in the streets of Zanesville, and that its cars are propelled by electricity; that plaintiff, while riding in a buggy drawn by a horse, and at a point where the part of the street between the railway and the bank of the Licking river is very narrow, was met by a street car that was running at a high rate of speed "and making a terrific noise so as to greatly frighten plaintiff's horse, which at once began to plunge in its efforts to get away, all of which was seen by defendant's employees who were operating said car; but said employees failed and neglected to stop said car until plaintiff could drive said horse past said

car, and continued on at a high rate of speed, and thereby caused plaintiff's horse to run off, and in its efforts so to do, said horse kicked plaintiff upon the left leg just below the knee, severing the patella ligament, and otherwise injuring plaintiff.

A demurrer to the petition presents (1) an inquiry as to the substantive law fixing the rights of these parties in their use of the street, and (2) a question of pleading—whether the facts stated show that a legal right of the plaintiff has been wrongfully invaded by the defendant.

I. What are the relative rights of this railway company, and of an individual, in the streets of Zanesville? This is a question of general interest, and of much importance. It is an inquiry that underlies this case, and whose consideration must deal with events of daily and hourly occurrence among our people. So far as this question relates to the use of electricity as a motive power, it is comparatively new. Streets are highways for public travel and transportation. They are laid out, improved and maintained at the public expense; and they are controlled by the public authority, under the direction of the law.

The ways in which streets may be lawfully used to facilitate travel and transportation have multiplied as the demands for rapid transit have increased. First came street cars, drawn by horses; then cars propelled by cable; then cars propelled by electricity; then came the bicycle upon the streets. The courts have had to decide, from time to time, whether these new uses of the streets were consistent with their original purpose as highways for public travel and transportation. The courts have held, that street cars, however propelled, and the bicycle, are all vehicles; that they are only such as the growing needs for rapid transit have demanded; and all these vehicles have been held to have "the right of the road," in common with other vehicles, and the right to use the streets, exercising due care not to injure others rightfully traveling in the streets.

It is well settled in Ohio that the occupancy of a street by a street railroad, whatever the motive power, is in furtherance of the general purpose of the street as a public highway. 14 Ohio St., 523. It has been decided by the superior court of Cincinnati, that a change from horse power to a cable does not change the nature of the use. *Mt. Adams v. Winston*, 2 Circ. Dec., 240. It has been decided by the circuit court of Hamilton county, that a change from horse power to electricity does not change the nature of the use. *Clement v. Cincinnati*, 9 Dec., Re. 688. In either case it is still a street railroad, and facilitates the use of the street by the public, and is in furtherance of the general purpose of the dedication of the street. *Taggart v. Ry. Co.*, 2 Am. Ry. and Corp. Rep., 44, 54.

In some of the earlier cases it was held that the cars had an exclusive right to the use of that part of the street occupied by its rails; and in other cases it was held that the individual had a paramount right in the street. But the modern authorities have repudiated the doctrine that the railway company may run down a private vehicle caught upon its track, or that the individual may needlessly and arbitrarily interfere with the passage of cars over the track, and have established the more just and reasonable doctrine that each occupies the street as a matter of right, and that each owes to the other the duty to exercise ordinary care to avoid interference and injury. 1 *Thomp. Neg.*, 397 et seq.

It follows, therefore, that the claim of paramount right in the street, asserted in argument, can not be maintained in favor of either plaintiff

or defendant. Neither has an exclusive right, and neither has a paramount right; yet the orbit of the right of each is limited or modified by the right of the other.

I think the rule to be drawn from the authorities is this: Those who use one authorized means of locomotion upon the public streets have no rights superior to the rights of those who use other authorized means of locomotion; and if the use of one result in injury to the user of another, a right of action will arise only if the injury is the result of negligence on the part of the one complained of. 84 Mich., 212; 22 Am. Rep. 522; 120 Ind., 46; 16 Am. St. Rep., 307.

In this case the right of the plaintiff while driving his horse in the street, was the right to such degree of personal security as the exercise of ordinary care by the defendant in its use of the same street would afford him.

II. If the petition shows that this legal right has been invaded, the petition states a cause of action; otherwise, the demurrer to it should be sustained.

It is not claimed in the petition that at the time of the injury the defendant's car was running at an improper speed, or that it was making needless noise. It is consistent with the petition that the defendant was rightfully using its track—that it had the right of the street, had its car on its track, and was operating it at a proper speed, without needless noise, and with due care in every respect so far as the use of its track and the running of its car were concerned. The only thing complained of, and the only act of negligence alleged, is, that it did not stop the car to allow plaintiff to pass. The plaintiff was not on the track, and there was no danger of collision; each was on that part of the street which made each entirely free and safe from contactual interference with the other. It must be borne in mind that the railway company can use only that part of the street occupied by its track; this, then, is the only part of the street that the company and the plaintiff could use in common. As to this part of the street, the company must exercise a high degree of care to avoid collision and accident. As to other parts of the street, any care that the company must exercise must be very different in degree, and its duty, if there be any, must rest upon entirely different ground.

In *Favor v. Railroad Co.*, the Supreme Court of Massachusetts held, that a railroad company whose road passes over a highway by a bridge is not liable to a traveler in the highway for damage caused by the fright of his horse at the noise made by a train of cars passing over the bridge in the customary manner, although the corporation know that, because of special circumstances, accidents of a similar character are peculiarly liable to happen there, and although they give no warning of the approach of the train. Judge Endicott, after referring to the statutory requirement of signals where the railroad crosses the highway at grade, says: "But where a railroad crosses a bridge, it does not in common with a traveler have any privilege in or use of the highway itself. \* \* \* It has the right to use its road-bed and bridge, as a railroad may use them, by running its trains at a common rate of speed, accompanied by the usual noise attendant upon such exercise of its rights. It is not bound by law to notify the traveler of its intention to use its bridge in the ordinary and usual manner. However objectionable the customary noise of a railroad train may be to a traveler on the highway, no question of care or legal responsibility is involved in the relation of the parties, and the railroad company, in doing that which it is authorized

by the law to do, is not guilty of a nuisance. It has the right to lawful acts upon its own premises, and is not responsible for injurious consequences that may arise from such acts, unless the acts are negligently and improperly done." 114 Mass., 350, 19 Am. Rep., 364.

In *Macomber v. Nichols*, the Supreme Court of Michigan held, that where an engine mounted on wheels and propelled by steam along a highway frightens a horse being driven along the same highway, by reason whereof the driver of the horse is injured, he has no right of action, although the engine was calculated, from its appearance and mode of locomotion, to frighten horses of ordinary gentleness, unless there is negligence on the part of him using the engine. Judge Cooley, in the opinion, says: "Injury alone will never support an action; there must be a concurrence of injury and wrong. If a man does an act that is not unlawful in itself, he cannot be held responsible for resulting injury, unless he does it at a time or in a manner or under circumstances which render him chargeable with a want of proper regard for the rights of others. In such case the negligence imputable to him constitutes the wrong, and he is accountable to persons injured, not because damage has resulted from his doing the act, but because its being done negligently or without due care has resulted in injury.

Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. \* \* \* Horses may be, and often are, frightened by locomotives, but it would be as reasonable to treat the horse as a public nuisance from his tendency to shy and be frightened by unaccustomed objects, as to regard the locomotive as a public nuisance from its tendency to frighten the horse. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential. \* \* \* If one in making use of his own means of locomotion is injured by the act, or omission of the other, the question is not one of superior privilege, but is a question whether, under all the circumstances, there is negligence imputable to some one, and if so, who should be accountable for it." 84 Mich., 212, 22 Am. Rep., 522.

In *Holland v. Bartch*, the Supreme Court of Indiana held, that riding a bicycle in the center of a highway at the rate of fifteen miles an hour, to and within twenty-five feet of the heads of horses attached to a carriage, is not actionable negligence. To make it such, it must be charged and shown to have been done at a time or in a manner or under circumstances evidencing a disregard for the rights of others.

The facts in this case were, that the plaintiff, while seated in her carriage in the middle of the highway, was met by the defendant, who was seated upon and riding a large bicycle, whose wheel was sixty inches in diameter; and the defendant rode said bicycle at a very rapid rate, to-wit, at the rate of fifteen miles an hour, toward and into the faces of the horses, along the middle of the highway, until within twenty-five feet of the horses. This act of the defendant frightened the horses and they became unmanageable and ran away. It was alleged that the bicycle was an unusual vehicle with which to travel the highway, and with the defendant seated upon it, was a frightful object for ordinary horses to meet; that the defendant well knew this, and was negligent, etc.

Judge Olds delivered the opinion; and after quoting with approval from the opinion of Judge Cooley, in *Macomber v. Nichols*, says: "In this case, the acts complained of are the riding of the bicycle in the center of



the highway, at the rate of fifteen miles per hour, to and within twenty-five feet of the faces of the plaintiff's horses. It is these acts that are charged as negligence and as a wrong; but as we have held, they are not unlawful acts, and are not a wrong; hence they constitute no cause of action. To make a person liable for the doing of such acts, they must be charged to have been done at a time or in a manner or under circumstances which render him chargeable with a want of proper regard for the rights of others. While the use of the locomotive is of infinitely more benefit than the bicycle, in affording means of travel, so the danger arising from its use is also infinitely greater; yet the horse, the locomotive, and the bicycle are all used as affording means of travel, and more or less danger attaches to each. \* \* \* The complaint in this case proceeds, and can be held good only, on the theory that the plaintiff, riding in her carriage, had rights superior to the defendant, who was riding upon his bicycle; and such is not the law." 120 Ind., 46, 16 Am. State Rep., 307.

The case of *Steiner v. Phila. Traction Co.*, where the conductor of a cable car rang his bell at a street crossing, but so near plaintiff's horses as to frighten them, stands upon the principle recognized in the other cases referred to, to-wit, that it was not negligence to ring the bell where the proper management of the car required it to be rung, even though the plaintiff's horses were restive at the approach of the car and before the ringing of the bell. 2 Am. R. R. & Corp. Rep., 435.

I conclude that it cannot be maintained that, as matter of law, one in charge of an electric car is bound to stop his car simply because a horse that is being driven on the same street has become frightened at the appearance and noise of the car; on the contrary, he may proceed, at the usual speed, and with the usual noise. In doing this he would not be negligent, and would not invade any right of the driver of the horse. But if the circumstances were such that failure to stop the car would show a wanton and willful disregard for the safety of the driver of the horse, so that the continued movement of the car could be attributed only to wantonness or malice, and not to discharge of duty under his employment, he would then be negligent, and for such negligence there would be a liability of the company. The right of the plaintiff in this case to personal security might be invaded by a needless, wanton, and malicious continuation of the action and noise of the car, but not by the mere failure to stop the car, if such failure to stop be not attributable to a wanton or malicious disregard of the plaintiff's safety.

The failure of the defendant to stop the car, under the circumstances disclosed in the petition, was not wrongful, and the demurrer is sustained.

F. S. Gates, for plaintiff.

F. A. Durban, for defendant.

## CHATTEL MORTGAGES.

[Hamilton Common Pleas, 1892.]

## M. S. ISAACS V. UNION CENTRAL LIFE INS. CO.

A valid chattel mortgage of property executed to A, without change of possession of the mortgaged property, and not filed or deposited with any public officer (mentioned in Rev. Stat., sec. 4151), on condition broken, confers upon the mortgagee A, a right of possession superior to that given by a subsequent pledge of the same property, delivered to B to secure a pre-existing indebtedness, although the pledgee B had neither knowledge nor notice of the existence of the chattel mortgage.

## SHRODER, J.

The property in question was taken by the chief of police from one Harry Stahley, whilst under arrest for embezzlement from the defendant company. With Stahley's consent the property was delivered to the company as security for its pre-existing claim against him. The plaintiff subsequently replevined it, claiming the right of possession under a prior chattel mortgage executed to him by Stahley. The mortgage was not filed, as provided by Rev. Stat., sec. 4151, nor was its existence known to defendant. Its validity as between plaintiff and Stahley was not questioned. But as against itself the defendant claimed it to be void by virtue of Rev. Stat., secs. 4150 and 4151, which declare an unfiled chattel mortgage, unaccompanied by change of possession of the goods, to be void as against creditors and *bona fide* subsequent purchasers or mortgagees.

The company is not a purchaser. Regarded in the light of a mortgagee, the security being for a pre-existing indebtedness, the company's equity is not superior to that of plaintiff's. Pomeroy, Equity, 739 *et seq.* A subsequent mortgagee is not *bona fide* under the statute, if his mortgage was taken to secure a pre-existing indebtedness. 22 Ohio St., 402; 20 Ohio St., 281; 19 Ohio St., 150; 6 O. S., 448; 27 N. Y., 568, 581; 77 N. Y., 628, and cited cases. While this qualification is not, however, required of a creditor, yet he cannot challenge the validity of the prior mortgage, unless it interferes with or affects some specific interest in the property vested in him, in his capacity solely as creditor; as, for example, his specific interest as an execution or attachment creditor, or one provided for by assignment statutes, or by the course of administration of estates. The specific interest must be one which is secured to any creditor, by operation of law, or not that which is the offspring of the debtor's consent or favor to a particular creditor. Were it otherwise, no reason could be found for conferring upon his position or character as creditor, an exemption from the *bona fides*, an essential prerequisite to the equity of a subsequent purchaser or mortgagee, 40 Ohio St., 574.

In Jones v. Graham, 77 N. Y., 628, and Stewart v. Beale, 7 Hun., 405-411, this interest was acquired by judgment and execution. In Kilbourne v. Fay, 29 Ohio St., 278, 280, the interest was attained through the administration of the estate of the deceased debtor. In Hanes v. Tiffany, 25 Ohio St., 549, it was the effect of the assignment statutes furnishing a mode for providing for creditors. In Westlake v. Westlake, 47 Ohio St., 317, the creditors' rights through the assignee was considered the same "as they could have been by judgment and execution against the property." See 1 Allen 373, 20 Ohio, 166.

The Insurance Company's specific interest was that of a pledge, by force of a contract with Stahley, and not of a creditor's acquired by operation of law. Its attitude, construing and applying to it sec. 4150, according to the spirit and intent, was like that of a subsequent mortgagee, whose mortgage was taken to secure a pre-existing indebtedness. Being in such position, and not *bona fide*, its right of possession was subordinate to plaintiff's under his unfiled mortgage. It therefore follows that judgment ought to be entered in favor of plaintiff. So ordered.

Granger & Hunt, for plaintiff.

Ramsey, Maxwell & Ramsey, for defendant.

## COUNTY ROADS—JURISDICTION.

78

[Hamilton Common Pleas, 1892.]

ADAM RIEF V. HAMILTON CO. (COMRS.)

1. Where a change in the grade of a road is made by the county under a special act which made no provision for compensation for damages done, and none having been assessed or provided for, an injured abutting owner can sue the county in the common pleas, originally, in the absence of any special provision in the statutes excluding jurisdiction.
2. The plaintiff has a right to have his compensation assessed by a jury, and there being no authority in the act for such proceeding, he is not compelled to submit it to the commissioners, and does not waive his rights by failure to do so.
3. Not being compelled to submit his claim to the commissioners, the jurisdiction of the common pleas is original, and not appellate.

The plaintiff was the owner of property abutting on the Cincinnati, Oakley and Madison avenue, which was improved by trustees under the appointment of the County Commissioners, in pursuance of the special acts of Apr. 11, 1888, and Apr. 11, 1889 (85 O. L., 528, and 86 O. L., 651.) A change of grade, injurious to the property, was made without compensation for the damages done. The act made no provision for the assessment and payment of damages, and neither the trustees nor the commissioners took any measures toward such an assessment. There was no view nor hearing for such purpose, and no notice, either actual or constructive, was served on plaintiff in this respect. The plaintiff did not present his claim to the Commissioners, but brought this action to recover the damages suffered by his property in consequence of the change of grade.

The defendant contends that the common pleas court has no original jurisdiction of the case; that if it possesses jurisdiction, it is appellate only from the decision of the County Commissioners.

SHERODER, J.

"1. That an injury as here complained of is, in Ohio, recognized as a violation of property rights. 7 Ohio St., 459; 14 Ohio St., 523; 16 Ohio St., 163.

"2. That the remedy is one founded on the common law, and does not rest upon any statute. *Cheseldine v. Cone*, (C. C. decision, not reported); 1 Disney, 316.

"3. That the court has original jurisdiction of the action (it being a civil action) in the absence of any special provision by the statutes excluding the jurisdiction in cases like that at bar.

"4. That the intention of the special acts of April 11, 1888, and April 11, 1889, under which the grade was changed, was to withdraw this improvement from the operation of the chapters and sections in the Rev. Stat., relative to county roads. This view is confirmed by the associated sections in these acts which removed these improvements and the taxation for them, from the limitations and restrictions generally placed on similar subjects by the Rev. Stat., for example, the dispensing with the concurrent action of the board of control.

"5. That under these special acts there was no authority in the commissioners to appoint viewers as jury to assess damages; nor was there such power even under the general provisions of the Rev. Stat., the latter being predicated on the petition of freeholders for the establishment of a road.

"6. The plaintiff's right under the constitution was to have his compensation assessed by a jury. He was not compelled to submit his claim to the commissioners, and in the absence of any statute, his not doing so is not a waiver, 22 Ohio St., 295, 296; 24 Ohio St., 473."

The conclusion was that there are no statutes which exclude the original jurisdiction of this court in cases under these special acts, and that the power of the court is not limited thereunder to an appellate jurisdiction.

Roelke & Jelke, for plaintiff.

J. H. Bromwell, *contra*.—[Editorial.]

## 80

## STREET ASSESSMENTS.

[Superior Court of Cincinnati, General Term, January 26, 1891.]

MARTHA GIBSON V. CINCINNATI (CITY).

1. That, for the purpose of assessment under sec. 2269, Rev. Stat., 84 O. L., 72, passed May 11, 1887, lots may exist without being a part of any numbered and recorded subdivision, and without appearing as such on any plat.
2. That a tract of land not of greater dimensions than the fair average depth of lots in the neighborhood, although not a part of any subdivision numbered and recorded as lots, is not land "not subdivided into lots," but is a lot subject to assessment under sec. 2269 of the Rev. Stat.

HUNT, J.

This cause comes into this court upon an entry of reservation from the special term. The facts are all embodied in the pleadings and agreed statements of facts, which constitute the bill of evidence.

The plaintiff seeks to have the assessment upon her property for an improvement of Considine avenue enjoined, on the ground that the assessable front has not been fixed as provided in sec. 2269, Rev. Stat., 84 O. L., 72, passed March 11, 1887.

The section provides that:

"In making special assessments according to valuation, the council shall be governed by the assessed value of the lots, if the land is subdivided and the lots are numbered and recorded; but if the lots are not assessed for taxation, or if there is land not subdivided into lots, the council shall fix the value of the lots or the value of the front of such land to the usual depth of lots by the average of two blocks, one of which shall be next adjoining on each side, and if there are no blocks so adjoin-

ing, the council shall fix the value of the lots or lands to be assessed so that it will be a fair average of assessed value of other lots in the neighborhood; and if, in making a special assessment by the foot front, there is land bounding or abutting upon the improvement not subdivided into lots, the council shall fix in like manner, the part and value of said land to the usual depth of lots, so that it will be a fair average of the depth of lots in the neighborhood which shall be subject to such assessment; and this section shall be applicable to all special assessments provided for in this chapter, excepting assessments according to benefits."

The plaintiff is the owner of a tract of land located at the northeast corner of Eighth street and Considine avenue, in the city of Cincinnati. It is described as fronting on the north side of Eighth street fifty-seven and 18-100 (57.18) feet, and lying lengthwise on the east side of Considine avenue one hundred and twenty (120) feet. It is alleged that the tract has never been platted or subdivided into lots, and has a depth as to said Considine avenue of only fifty-seven and 18-100 (57.18) feet along the entire distance of 120 feet on Considine avenue, and the average depth of lots in the neighborhood is one hundred and forty (140) feet.

The plaintiff, as the owner of said tract, together with other owners of property fronting on Considine avenue, between Price and Murdoch avenues—constituting the owners of more than three-fourths of the feet front on said street—on March 8, 1887, petitioned the proper authorities of the city to improve said street, and, on the twenty-second day of April, 1887, the common council of said city adopted a resolution in pursuance of the petition declaring it necessary to improve the said street. The common council, on the seventh day of October, 1887, duly passed an ordinance to improve said Considine avenue, and assess the cost thereof, per front foot, upon all property abutting on said street between the points named. The contract for the work was subsequently let, and the said work completed and accepted by the board of public affairs.

The board of public affairs of the city of Cincinnati, on the twenty-eighth day of September, 1888, passed an ordinance to pay the cost of said improvement, by which it levied and assessed on each front foot of plaintiff's property for said entire distance of one hundred and twenty (120) feet, which abutted on Considine avenue, the sum of \$5.08 per front foot—in all the sum of \$610.10. It is claimed by the plaintiff, that the said board refused to fix the frontage of plaintiff's land according to the average depth of lots in the community, and that, if they had so done, the assessable frontage of her said lot on Considine avenue would have been only fifty feet. The plaintiff insists that all of said assessment, in excess of said sum, is wrongful and illegal, and prays that the city may be perpetually enjoined from enforcing any part of said assessment in excess of the amount admitted to be properly chargeable against plaintiff for the improvement.

The city of Cincinnati, in its answer, admits that the plaintiff Martha Gibson, is the owner of the property described, at the corner of Eighth street and Considine avenue, and that the plaintiff petitioned for the improvement of Considine avenue, and that the same was made in pursuance with said petition and in accordance with the resolutions and ordinances duly passed, and that the cost was assessed per front foot upon all the property on said street alike. This is followed by a general denial of each and every other allegation in the petition.

The agreed statement of facts upon which this case was reserved from the general term shows:

First—That the plaintiff signed a three-fourth's petition, asking for the improvement of Considine avenue, between Price avenue and Murdoch avenue, and for the assessment of the whole cost of such improvement, except the cost of intersections, and two per cent., to be made upon the abutting property; that acting upon that petition a resolution to improve, and an ordinance to improve said street, between the termini named, were passed as alleged in the petition.

Second—That the property of plaintiff is not a part of subdivision, nor has it been platted or numbered as a lot, or otherwise, but was conveyed to the plaintiff by a deed describing it by metes and bounds, which deed was duly recorded; that said property was then improved by the erection of a dwelling house thereon prior to the improvement of Considine avenue, and that it has been and is now so used and occupied; that it fronts 57.18 feet on the north side of Eighth street, and lies lengthwise along the east side of Considine avenue 120 feet, and has a depth, as to said Considine avenue, of 57.18 feet along said entire distance of 120 feet; that the average depth of lots in the neighborhood subject to such assessment is 140 feet; that the assessable frontage of plaintiff's property, if it is to be determined by the average depth of lots in the neighborhood, is fifty feet, and that an installment has been paid upon said assessment as alleged.

Third—That the board of public affairs distributed the entire cost of said improvement of Considine avenue, between Price avenue and Murdoch avenue, less two per cent., equally upon each front foot abutting upon said Considine avenue, without reference to the depth thereof, and levied an assessment, as alleged in the petition, refusing to fix the frontage of plaintiff's property.

The case turns upon the meaning of the phrase "land not subdivided into lots," as contained in sec. 2269 of the Rev. Stat., as amended March 11, 1887. (84 O. L., 72).

It was the duty of council or the board of public affairs prior to March 11, 1887, or rather in the period between April 9, 1880, and March 11, 1887, in making assessments upon lengthwise lying lots, to ascertain the assessable frontage of the lots in proportion to other lots abutting upon the street, considering the average depth of lots in the neighborhood. The history of the legislation on this subject will show that the words "or if there be lots numbered and recorded, bounding or abutting said improvements, and lying lengthwise of said improvements," were inserted in sec. 2269 of the act of April 9, 1880. A distinction was thus made in the case of lots lying lengthwise of an improvement which did not exist before that amendment. By the act of March 11, 1887, 84 O. L., 72, these words were eliminated from this section, so that all lots, whether lying lengthwise or otherwise, were governed by the same rule of assessment by the front foot as existed prior to April 9, 1880. The only limitation left in the statutes was that the assessment should not exceed 25 per cent, of the value of the property, and that the property could not be assessed to exceed 25 per cent. of its value, within a period of five years, whether assessed once or oftener.

There are only two classes of land in this state recognized under the law for the purposes of assessment. One class is designated as lots, the other land not subdivided, or as it was formerly termed in the statutes, "land not subdivided or land in bulk." It is obvious that the legislature intended to include in these two designations all property subject to assessment. *Griswold v. Pelton*, 34 Ohio St., 482.

An examination of the legislation will show that the land in bulk and land not subdivided were originally employed as synonymous terms, and that the words "land in bulk" are no longer used because they convey the same idea as "land not subdivided."

Section 542, 66 O. L., 241, is the original of the present sec. 2269 of the Rev. Stat., and in that section the words "land which is in bulk and not subdivided into such lots" are used. The section next appears in the Rev. Stat. of 1880, as sec. 2269, and it will be seen that the revisors used only the words "land not subdivided," and evidently omitted the words "or land in bulk" as surplusage.

The amendment in reference to "lengthwise lying lots" was inserted by the act of April 9, 1880, 77 O. L., 144; there was another slight amendment by the act of March 27, 1884, 81 O. L., 86; and then by the act of March 11, 1887, 84 O. L., 72, the lengthwise lying lot part of the section was repealed.

It is urged by the plaintiff that lands "subdivided and the lots numbered and recorded" is, in the statutes of Ohio, a fixed designation, and sec. 2601 of the Rev. Stat., is cited as providing for the subdivision of land and laying out of lots, which shall be numbered by progressive numbers, a plat whereof shall be recorded.

It is very clear that the only purpose of sec. 2601 of the Rev. Stat., is to define a way by which property owners may dedicate streets, alleys, etc., and may more accurately describe their premises for the purposes of transfer.

There is a further contention that since the property of the plaintiff is not "land subdivided and the lots numbered and recorded," it necessarily follows that it is land not subdivided into lots.

The rule of construction in the second syllabus of *Rhodes v. Weldy*, 46 Ohio St., 234, is quoted as applicable to the case at bar, which states "that where the same word or phrase is used more than once in the same act in relation to the same subject-matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is otherwise doubtful or obscure, it is in the latter case to receive the same construction as in the former, unless there is something in the connection in which it is employed, plainly calling for a different construction."

The phrase "not subdivided into lots" in opposition to the phrase "land subdivided and the lots numbered and recorded," it is argued, is clear, and means all land not included in the latter designation, and, therefore, the same phrase occurring later in the section, if the meaning is in doubt, should receive the same construction, unless there is something in connection with its subsequent use plainly calling for a different construction.

The opinion in *Griswold v. Pelton*, 34 Ohio St., 482, was rendered when sec. 542 of the municipal code was in force and before the revision of the statutes, and the language used in sec. 542 defining lands subdivided and the lots numbered and recorded, and secondly, land which is in bulk or land not subdivided included all kinds of land abutting on any improvement subject to assessment.

It has been established in repeated decisions in assessment cases, that lots may exist without being a part of any numbered and recorded subdivision, and without appearing on any plat. The principle is laid down by this court in *Matthews v. The City of Cincinnati*, 9 Ohio Dec. Re., 673, that lots are to be determined by use and occupation

in preference to imaginary lines and numbers by which they may be designated in a recorded subdivision. The Supreme Court recognizes the same doctrine in the case of *Springer v. Avondale*, 35 Ohio St., 620, where on page 625 the court says: "In determining whether a particular parcel of real estate is 'land which is in bulk' within the meaning of sec. 542, regard must be had, not merely to a recorded plat of the town, but to the size of lots generally in a municipal corporation. If the lots in a particular village contain, as a general rule, three and one-half acres, a lot of that size can not be regarded, in that village, as land in bulk; but the holding should be different with respect to a lot of that size in a village where the usual size of lots is one acre. In other words, the phrase is relative in its character."

The size of lots recorded and numbered in the neighborhood of plaintiff's lot, as shown by the plat attached to the agreed statement of facts, shows lots in Hyman's subdivision and in Striker's subdivision as varying from 25 to 40 and 50 feet in frontage, and varying in depth from 114 feet to 160 feet, while in Oliver, Boyce and Stewart's subdivision the numbered and recorded subdivided lots have a frontage of 97½ and 100 feet and a depth of 135 feet. It can not well be claimed that a tract of land 57.18 feet front by 120 feet in depth is "land in bulk," while within one square of it, lots numbered and recorded on a plat of a duly recorded subdivision have a frontage of 100 feet by 135 feet in depth, especially in view of the decision of the Supreme Court that the term "land in bulk," or land not subdivided, is a relative term.

It is apparent, too, that the intent of the law with reference to "land not subdivided or land in bulk," is to limit the depth to which the authorities can go in placing a lien upon the property, and for the purpose of determining the value of that depth in view of the limitation of 25 per cent. of the value of the lot after the improvement is made. The purpose is rather to prevent municipalities from affecting the title by spreading a lien over the whole tract where lands are not subdivided and have a greater depth than ordinary lots in the neighborhood. This principle is recognized in *City v. Oliver*, 31 Ohio St., 371; *Griswold v. Pelton*, 34 Ohio St., 482; *Springer v. Avondale*, 35 Ohio St., 620; *Parmelee v. Youngstown*, 43 Ohio St., 162.

The language of the court (Gilmore, C. J.) in the case of *Griswold v. Pelton*, *supra*, is significant: "It is apparent that in an assessment by a frontage to pay for a street improvement, the assessment district, where the abutting lots are all subdivided and numbered, consists of the lots so abutting on the improvement. If unallotted lands, as well as subdivided and numbered lots, abut upon the street improvement, then such lots and the front of such unallotted lands, to the depth of lots, constituting the assessment district, and no assessment or charge can be made on lots or lands outside of or beyond the limits of the districts as thus defined; and it is by the value of the respective lots and lands within the limits of this district, after the improvement is made, that the 25 per cent. and ten per cent. limitations respectively, are to be ascertained and made effective."

The rule of average depth as to unsubdivided land can only apply to land of greater depth than the average depth of lots in the neighborhood.

We conclude, therefore, that the property of the plaintiff, Martha Gibbon, in this case is a lot within the meaning of sec. 2269 of the Rev. Stat., and although it is a lengthwise lying lot as to Considine avenue,



it is to be assessed by the front foot as all other lots abutting on the streets are assessed, since all the steps for the improvement have been taken subsequent to March 11, 1887, when the lengthwise lying lot law was repealed.

The restraining order heretofore allowed will be dissolved and the petition dismissed.

MOORE and SMITH, JJ., concur.

Bateman & Harper, for plaintiff.

Corporation Counsel, *contra*.

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SET-OFF.

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[Superior Court of Cincinnati, General Term, 1892.]

\* ARMSTRONG, REC'R. V. LAW ET AL.

1. The amount paid by a borrower at a bank on account of his subscription to a proposed increase of capital stock of the bank which had never become effective because of the insolvency of the bank was a proper set-off *pro tanto* against a note held against him by the bank for a loan.
2. The bank having become insolvent and suspended payment of all demands against it, it was not necessary for such subscriber to make a demand for payment before his claim could become available as a set-off to his note.

MOORE, J.

At special term the defendant in error obtained a judgment against the plaintiff in error upon the allegations in the petition of John H. Law and George W. Law that on the twenty-ninth day of March, 1887, they borrowed of the Fidelity National Bank the sum of \$8,500, and as evidence thereof, on the same day executed and delivered to said bank their promissory note whereby they promised to pay said sum to the order of said bank upon demand, with interest. Said petition further alleges, that on April 5, 1887, the plaintiffs, at the special instance and request of said Fidelity National Bank, subscribed for fifty shares, of the par value of one hundred dollars each, of an increase to the capital stock which said Fidelity National Bank proposed to make and issue, and thereby agreed to take said fifty shares, and to pay therefor the sum of \$135 for each share, in all the sum of \$6,750, in two equal installments, on April and May 5th, following. That the plaintiff paid the Fidelity National Bank the said two sums on the days they were due, but said bank never obtained authority to increase the capital stock, and never issued and delivered to the plaintiffs any legal or valid stock in satisfaction of said payments, and that said bank is indebted, and since the fifth days of April and May has been indebted to the plaintiffs in the sums so paid by them to it, with interest from the day the same was paid.

It is further alleged that on the fourteenth day of June, 1887, said bank being then the owner and holder of said note of plaintiffs, dated March 29, 1887, demanded payment, and the same thereby became due. But the said indebtedness of said bank to the plaintiffs was then and there and has since continued to be a good and valid off-set against said note of plaintiffs to said bank.

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\* See *Armstrong v. Warner*, 10 Ohio Dec. Re., 434.

It is further alleged that on the twenty-first day of June, 1887, the comptroller of the currency having become satisfied, as specified in the acts of congress, that said bank was insolvent, appointed the defendant Armstrong receiver, the same as provided in sec. 5234 of the Rev. Stat. of the United States; that on the twelfth day of July, 1887, by regular proceedings had in the circuit court of the United States for the southern district of Ohio, it was adjudged and ordered that the said association, The Fidelity National Bank, be dissolved.

It is also alleged that having, on the twenty-second day of April, 1890, tendered to the said receiver the difference in amount between the amount due from the plaintiffs to the receiver and the amount held by the bank on account of the alleged subscription to the increase of capital stock, and still offering to pay the said amount into court, the plaintiffs ask relief, in that the defendant, said receiver, be required to accept said sum, and deliver to the plaintiffs their said note of March 29, 1887.

The answer of the defendant practically admits the statements of fact in the petition, but denying the effect thereof, asks affirmative relief against the plaintiffs, upon the ground that the plaintiffs' note for \$8,500, and given for money borrowed by the plaintiffs of the bank and held by the receiver, is due and unpaid, and that no obligation exists on the part of the bank to return the money subscribed and paid by the plaintiffs to the proposed increase of its capital stock, and that, if such were the case, no demand had been made therefor, so as to make the debt a matured one at the time of the bank's failure, and a proper subject of set-off against the plaintiffs' note due the bank.

The court, at special term, found that the plaintiffs were entitled to set-off against the demand of the defendant, the several sums paid by the plaintiffs to the Fidelity Bank in the months of April and May, 1887, as alleged, for and on account of their subscription to the increase of the capital stock of the bank.

The evidence shows that at the date of the plaintiffs' subscription they were the owners of fifty shares of the original capital stock of the bank, and that at the adoption of the resolution by the directors of the bank, on March 27, 1887, to the effect that the capital stock of the bank be increased one million dollars, and that the same be furnished to shareholders of record in like proportions to the amount of their holdings at the rate of \$135 per share, of all the stockholders, including the plaintiffs, had notice and made their subscriptions for the purpose of carrying the proposed increase into effect.

The evidence also shows that on May 5, 1887, the stockholders of the bank, owning 9,248 shares out of the 10,000 constituting the capital stock, including the plaintiffs, signed a written agreement approving of the increase, and thereupon paid to the bank the amounts of their subscriptions, and that prior to June 21, 1887, (the day of the appointment of a receiver) all of the shareholders of the bank, with the exception of the owners of less than one hundred shares, had taken and paid for their proportion of said increase, and that the officers of the bank continued to the said June 21st, to collect the amounts due from them on said increase.

It also appears that on July 12, 1887, the corporation was dissolved by a decree in the circuit court for the southern district of Ohio.

The plaintiffs contend that notwithstanding their knowledge of and participation in the proceedings to increase, no legal steps had been taken to effectuate an increase, and, therefore, as no increase had been made,

the money paid by them to the bank was due and should be returned, and was a proper set-off against their matured note held by the bank.

The court at special term having found in accordance with plaintiffs' claim, the errors assigned in general term can readily be considered under one head.

The question to be considered is whether there was a valid increase of the capital stock of the Fidelity National Bank, so as to deny the plaintiffs' right to say that their money was paid to the bank upon a proposition to increase, and which proposition failed.

It was held by Justice Matthews, in *Delano v. Butler*, 118 U. S., 649, that under sec. 5142, of the Rev. Stat., of the United States, "three things must concur to constitute a valid increase of the capital stock of a national banking association :

"First, that the association, in the mode pointed out in its articles, and not in excess of the maximum provided for by them, shall assent to an increased amount; second, that the whole amount of the proposed increase shall be paid in as part of the capital stock of such association, and third, that the comptroller of the currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment." The court continues to say, "that all these requirements were complied with, there is but little room for question. It is quite clear that the whole amount of such increase was not paid in as part of the capital stock. The comptroller of the currency had no notice of such proposition to increase, and of course his approval was not obtained. We almost hesitate, in calling attention to the well known rule, that corporations have no power to increase or diminish their stock unless expressly authorized so to do.

We adopt the language of the court in *Winters v. Armstrong*, 37 Ill., 512, referring to subscriptions to the capital stock of National Banks, when it says: "Whatever conditions are imposed by the law upon such associations as a prerequisite or condition precedent to the acquisition of the power and authority necessary to the issuance or creation of valid stock, must be performed before the subscription contract can be enforced, either on behalf of the association, or of those claiming through or under it. The general principle is well settled that subscriptions to the capital stock of corporations are made upon the implied condition that valid stock, such as will confer upon the subscriber all the rights and privileges of a stockholder, is to be issued."

The evidence in the case at bar shows that what was done, was merely preparatory and in anticipation of becoming actual stockholders, when the whole amount of the proposed increase should be subscribed and the approval and certificate of the comptroller obtained. The bank was never in a condition to increase its capital, and its insolvency and dissolution prevented further proceeding.

The plaintiff in error contends that the Supreme Court of the United States, in *Delano v. Burton*, in a case like the one at bar, recognized a ratification of an irregular action of the corporation. An examination of that case will show it to be a case where a stockholder was sued upon his stock liability and sought to evade it by pleading the illegality of the issue of the stock held by him.

In that case A held thirty shares of stock in a National Bank whose capital was \$500,000, with a right to increase it to \$1,000,000. The directors voted to increase the capital to \$1,000,000, the persons then holding stock to have the right to take new stock at par in equal amounts

ants a large number of castings for use in their said business as elevator builders—those mentioned in the petition being a part thereof—but instead of said castings being suitable for defendant's said business, as plaintiffs had agreed they should be, many of them were so unskillfully manufactured, and the material of which they were composed was so negligently and carelessly selected, that they were not suitable for defendants' use in their said business; but defendants relying upon the agreement of plaintiffs to furnish them good castings, used said castings in their business, and by reason of the defects in said castings many of the elevators erected by defendants broke and became temporarily useless, and were hindered and stopped in their operations, by reason of which stoppage and want of capacity for continuous use of the elevators manufactured by these defendants, from the defective castings furnished by these plaintiffs, in violation of their said contract with these defendants, these defendants were, without fault on their part, injured and damaged in their business and reputation as elevator builders in a large sum, to-wit: the sum of five thousand dollars."

The plaintiffs demur to this count of defendants' amended answer and cross-petition for that it does not contain facts sufficient to constitute a cause of action.

The question submitted for the consideration of the court is, whether upon a breach of a contract for castings for use by defendants in their business as builders of elevators, damages can be recovered for an injury to the business and reputation of the defendants caused by the breakage and stoppage of elevators in the construction of which the castings were furnished.

It is admitted for the purpose of this demurrer that the breach of the contract arose from the fact that the castings were defective in their construction. The defendants claim an injury to business and reputation by reason of the breach of the contract as a proper subject for compensation. The plaintiffs deny the legality of such claim, so that the question relates to the amount of damages which may be recovered. It does not always follow for any such breach of the contract that a person is liable for all the losses which result from a breach of contract on his part; he is liable for those damages which reasonably could have been in contemplation as a result of the breach.

No case has been cited which presents precisely the case at bar, but it is accepted that the general rule would apply which governs the measure of damages in cases of the breach of warranty in the personal property.

The case of *Hadley v. Baxendale*, 9 Exch., 341, is the leading one on the subject, both in this country and in England. In that case it was held that where the parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may be fairly and reasonably considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Anderson, B., further said in that case in defining the rule: Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract,

which they would reasonably contemplate, would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For, had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

In order to ascertain, therefore, whether the claim in the case at bar falls within the limits of this rule, it will be necessary to examine the nature of the contract declared on the pleadings. The castings to be furnished under this contract were to be suitable for the use in the business of the defendant in constructing elevators. This condition, upon the execution of the contract by the delivery and acceptance of the castings; raises the implied warranty that they should be fit for the purpose for which they were furnished. *Rogers & Co. v. Niles & Co.*, 11 Ohio St., 48; *Byers v. Chapin*, 28 Ohio St., 300.

The general rule of the common law undoubtedly is, that upon an executed sale of specific goods, the vendor will not be held liable for any defects in the quality of the article sold, in the absence of fraud, or express warranty. The law presumes, where the purchaser is not deceived by any fraudulent representations, and demands no warranty, that he relies upon his own judgment in the transaction, and applies the maxim "*caveat emptor*." Scott, J., in announcing the opinion of the court in *Rodgers v. Niles*, *supra*, on page 53, says: "But to this general rule the requirements of manifest justice have introduced sundry exceptions, of which some are as well settled as the rule itself, while as to others, the authorities cannot be easily reconciled. \* \* \* The principal, if not the sole exceptions to the rule, are found in cases where it is evident that the purchaser did not rely on his own judgment of the quality of the article purchased, the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation and responsibility of ascertaining and judging of the quality was thrown upon the vendor, as where he agrees to furnish an article for a particular purpose or use."

When an examination of goods is impracticable from their nature or situation, at the time of the same, a warranty will be implied that they are merchantable. Story on Contracts, sec. 834.

It has also been held that the implication of warranty will not extend to cases where an examination, although practicable, would be fruitless on account of the latent character of the defect; but only to those cases in which there can be no examination. 1 Parsons on Contracts, 5th ed., page 584.

The court has imposed proper limitations in the doctrine of the vendor's liability on an implied warranty, in the case of articles sold for a particular purpose. In the case of *Chanter v. Hopkins*, 4 M. & W., 399, it was held that when a "known and ascertained article" is ordered and furnished, though intended for a particular use, the liability of the maker and vendor extends only to defects in the materials and workmanship, and not to such as arise from the principle or mode of construction.

If the castings were not fit for the purpose for which they were furnished, the plaintiff was guilty of the breach of the warranty implied in their sale that they should be suitable for the purpose, and such damages might be recovered as in the contemplation of the parties, would flow from the breach of an implied warranty.

The measure of damages ordinarily, upon a breach of a warranty of personal property, is the difference between the actual value of the article and the value it would have possessed had it conformed to the warranty. *Street v. Chapman*, 29 Ind., 142; *Sedgwick on Damages*, p. 344, (6th edition); *Sutherland on the Measure of Damages*, vol. II, p. 425.

At the time of making the contract for the delivery of the castings and material in question, it cannot reasonably be supposed that the parties had in contemplation the fact that a breach of warranty would result in a loss to the business and reputation as elevator builders of the party to whom the castings were furnished.

In the case of *Woodworth v. Woodburn et al.*, 20 Ill., 184, the petition declared on a promissory note for spokes and hubs sold the plaintiff by the defendant. The defense was a part failure of the consideration on account of a breach of warranty of the quality of the spokes and hubs. The defendants sought to introduce evidence of loss to their business arising from difference in value on account of the spokes being green or unsuitable for ready use. The court, in sustaining an objection to evidence of this character, held, that to entitle the party to such damages, it should be specially claimed in the declaration, with proof that the warranty was made with express reference to such damages.

In the case of *Blanchard v. Ely et al.*, 21 Wend., 342, the court held, that in an action for the recovery of the price stipulated for the building of a steamboat, the plaintiff was entitled to recover the full amount, without any deduction by way of recoupment of damages to the defendant in consequence of damages sustained by him for the loss of trips and the profits resulting therefrom occasioned by defects in the boat or its machinery. Cowen, J., says on page 348: "In short, it will be seen by the cases cited and many more, that on the subject in question, our courts are more and more falling into the track of the civil law, the rule of which is thus laid down by a learned writer: 'In general, the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation in respect to the particular thing which is the object of it; and not such as may have been accidentally occasioned thereby in respect to his own affairs.' 1 Evans' Poth. 91, Lond. ed. 1806."

In the case of *Rhodes v. Baird*, 16 Ohio St., 573, an action was brought on a contract to which the defendant agreed to execute a lease to the plaintiff for a term of years, of certain lands on which to plant and cultivate a peach orchard. The defendant failed to make the lease, and evicted the plaintiff from the premises after the peach trees had been planted and within years from the time the plaintiff went into possession. The plaintiff, on the trial, was permitted to introduce evidence of the probable profits that might, in the future, be realized from the orchard, but it was held to be error, because the evidence as to probable future profits, was incompetent as furnishing a basis for the assessment of damages. The court held that such evidence was uncertain and speculative in its nature, and in a great degree conjectural.

In the case of Gaar, Scott & Co. v. Snook, 1 Circ. Dec., 142, the plaintiff sought to recover damages for loss of profit on a contract on the sale of a steam saw-mill and attachment. The mill failed to do the work which it was warranted to perform, and the defendant was unable to fulfill his contract. In an action to recover the purchase price, the defendant claimed damages resulting from a loss occasioned by the failure of the plaintiff to furnish suitable saws according to the terms of said warranty, whereby the defendant was prevented from filling a contract made after the delivery of said mill, for the sawing of a lot of logs, and was deprived of the profits thereof. The court lays down the doctrine that the law does not hold one liable for all the consequences that may follow the breach of his contract; if it were so, his liability would be without limit, for it would continue as far as the consequences of this act could be traced. But the law wisely limits liability to direct and immediate effects of the breach of a contract. The damages claimed in this defense are not of that character. They resulted remotely from the fact that the plaintiff failed to finish the mill according to the contract, and are not the natural and proximate consequences of the breach of the contract.

The damages arising upon a breach of contract of this character to the business and reputation of the plaintiffs as elevator builders, would necessarily be uncertain and speculative in their nature, and in a great degree conjectural.

The demurrer will be sustained.

Lowrey Jackson, Meyers & Wright, for the demurrer.

Coppock & Gallagher, contra.

### BANK CHECKS—NEW TRIAL.

105

[Superior Court of Cincinnati, General Term, 1892.]

METROPOLITAN BANK V. C., H. & D. R. R. CO.

1. A finding of fact in Special Term will not be set aside in General Term unless clearly contrary to the weight of the evidence.
2. No privity of contract exists between the holder of a check and the bank upon which it is drawn; and no action can therefore be maintained against a bank by the holder of a check, unless the bank has accepted the same.

SMITH, J.

J. E. Ash was a depositor with the Metropolitan Bank of this city, and on the tenth of May, 1886, had on deposit with said bank, \$547.00.

Prior to said date, the bank had discounted for Ash a note for \$141.00, made payable to him by one —————; and falling due May 10, 1886; and Ash had indorsed the note to the bank who became the owner and holder of the same.

On the said tenth of May, Ash gave his check on said bank to the C., H. & D. R. R. Co., for \$338.31, and on the eleventh of May, the Railroad Company presented the check to the bank for payment, but the same was refused upon the ground that there were not sufficient funds on deposit to the credit of Ash to meet the check.

Upon the twelfth of May, Ash made an assignment under the insolvent laws for the benefit of his creditors.

Upon the refusal of the bank to pay the check held by the Railroad Company it began an action against the bank to recover the amount of the check, and upon a trial of the action in the court below recovered a judgment against the bank for such amount. The bank now prosecutes error to reverse said judgment.

The refusal of the bank to pay said check presented upon the eleventh as aforesaid, is based upon two grounds.

First—That at the time Ash became a depositor with the bank an agreement was entered into between him and the bank, that in case the bank discounted any paper for him and the same was not paid at maturity, it should be charged up to his account; that the note of \$141 which was discounted for Ash by the bank and upon which he was liable as indorser was within the terms of this agreement; that it was not necessary for the bank to protest the paper in order to fix the liability of Ash, and, that immediately upon the failure of the maker to pay it upon maturity the bank had the right to charge it up to his account, which it accordingly did; that upon the same day, viz., the tenth of May, said bank honored a check of Ash for \$205.00, and this amount taken with the amount of the note charged against the account as aforesaid, reduced the amount on deposit to his credit to \$201.08; and that therefore when the check of Ash for \$338.31 in favor of the C., H. & D. R. R. Co. was presented on the eleventh of May there were not sufficient funds to pay the same, and the payment therefore was refused.

It will appear from the above statement that unless the bank can establish by sufficient proof the alleged agreement between it and Ash with reference to charging into his account paper discounted for him, and upon which he might be liable as indorser without protesting the same, then there were sufficient funds in said bank on said eleventh day of May to pay the check of the Railroad Company; because in that event the only deduction which the Bank was entitled to make from the deposit of \$546.08 was \$205.00, the amount of the check which it had honored and paid as aforesaid.

The trial judge found that the Bank had failed to prove that any such agreement was entered into between it and Ash, and as such finding is not clearly contrary to the weight of the evidence we are unwilling to disturb the judgment of the court upon that ground.

Second—We are thus brought to a consideration of the second ground upon which the bank defends against this action. This ground is that no privity of contract exists between the holder of a check and the bank upon which it is drawn; and that therefore no right of action exists in the holder against the bank until the bank has accepted the check.

It is well settled in the United States courts "that a check, unless accepted by the bank, will not sustain an action at law by the drawee against the bank, as there is no privity of contract between them." *Laclede Bank v. Schuler*, 120 U. S., 514; and the reason for the rule is clearly set forth by Mr. Justice Davis in *Bank of the Republic v. Millard*, 10 Wallace, 156, where it is said: "As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important for the security of all parties concerned that there should be no mistake about the status which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also in such case sue the bank? It is conceded that



the depositor can bring assumpsit for the breach of contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons at the same time. On principle there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and the holder when the check was given, the bank would be obliged to pay the check, although the drawer before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge, is a chose in action, and his check does not transfer the debt or give a lien upon it to a third person without the assent of the depository. This is a well established principle of law, and is sustained by the English and American decisions. The few cases which assert a contrary doctrine, it would serve no useful purpose to review."

In a recent decision *Covert v. Rhodes*, 48 Ohio St., 66, our Supreme Court adopts the reasoning of the U. S. Supreme Court in the case of *Bank of Republic v. Millard*, *supra*, as to the relation which the holder of a check bears towards the bank upon whom it is drawn. Thus it says "The obligation of the bank to its general depositors is not that of bailee or trustee, but that of debtor simply. It does not agree to pay checks or bills drawn on it out of any particular fund, nor does it retain any particular funds for that purpose. As said by Mr. Justice Davis in *Bank of Republic v. Millard*, 10 Wallace, 162, 155, when deposits are received by the bank "unless there are stipulations to the contrary they belong to the bank, become part of its general fund, and can be loaned by it as other money. The banker is accountable for the deposits which he receives as debtor, and he agrees to discharge those debts by honoring the checks which the depositor shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing in the nature of a trust in it." The authorities are without exception to that effect. There is little, if any conflict of authority upon the proposition that on notice of the drawer's death, before acceptance by the bank, its right to pay the bill or check ceases, and its indebtedness to the drawer becomes assets of his estate. The reason we apprehend is, not because the bank is the agent of the drawer for the disbursement of a particular fund, and the agency is terminated by the death of the principal, but because, before acceptance, the title remains in the drawer, and devolves immediately on his death upon his personal representatives by operation of law. The authorities are also nearly uniform to the effect, that the holder of such draft or check cannot maintain an action against the drawee without the latter's acceptance. The reason given is that without acceptance there is no privity between them. It would

seem clear that if before acceptance, the check or draft operated as an equitable assignment *pro tanto*, such action might be maintained, for as has already been seen, an equitable assignment transfers the fund, and the refusal of the drawee to pay, would be a conversion by him of the payee's property, for which suit might be at once brought."

The language of our Supreme Court leaves no doubt that they have adopted the rule of the U. S. court that no privity exists between the holder of a check and the bank upon which it is drawn until the bank has accepted the same. And as the Metropolitan Bank has never accepted the check drawn upon it by Ash in favor of the C., H. & D. R. R. Co., it follows that said company cannot maintain an action against the bank to recover the amount thereof.

The principle is not confined to the U. S. courts and our state. As our Supreme Court says: "The authorities are also nearly uniform to the effect that the holder of such draft or check cannot maintain an action against the drawee without the latter's acceptance," and the following authorities are in point as bearing out this statement: Carr v. Bank, 107 Mass., 45; Bank v. Bank, 46 N. Y., 82; Rively v. Bank, 83 N. Y., 318, Sayler v. Bushong, 100 Pa., 27; Moses v. Bank, 34 M. I., 580; Pickle v. Bank, 88 Tenn., 380; Wentrick v. Bellows, 12 Bush., 139; Baitcher v. Bank, 24 Pac. Rep., 582; Podrys v. Delaware, 13 La., 98; Hopkinson v. Foester, 19 L. R. Eq., 74; Harrison v. Wright, 100 Ind., 524; Creveling v. Bank, 46 N. J. Law, 255.

As the Supreme Court did not consider it necessary in its decision in Covert v. Rhodes to refer to any previous decisions of that court, which might be apparently in conflict with the principle laid down in that case, we have not felt under any necessity to do so. We are of the opinion, however, that an examination of former decisions in that court which may appear to be in conflict with Covert v. Rhodes are not necessarily so, and that most of the expressions which might appear to announce a doctrine different from that of Covert v. Rhodes, are either *obiter dicta*, or occur in cases in which the bank was not a party.

Undoubtedly there are decisions in this state of courts lower than the Supreme Court where a different doctrine is announced, but it is not necessary in view of the decision in Covert v. Rhodes to examine them.

It is only fair to the court below to say that at the time the decision in this case was rendered Covert v. Rhodes had not been decided.

Judgment reversed and case remanded.

MOORE, J., and HUNT, J., concurred.

Pogue, Pottenger & Pogue, for plaintiff.

Ramsey, Maxwell & Ramsey, for defendant.

## TAXATION.

118

[Hamilton Common Pleas, 1892.]

**\*FRANK RATTERMANN, TREAS., v. GARDNER E. PHIPPS ET AL.**

Where a taxpayer omits to return for taxation chattels in the form of stocks known to be taxable, and chattels in the form of stocks which he believes, and has good reason to believe, are not taxable, he will not be liable for a penalty on the stocks believed not to be taxable, because of the falsity of the return as to the other.

MAXWELL, J.

The plaintiff, as treasurer of this county, brought this suit against Gardner E. Phipps and Rebecca A. Phipps, as executors and trustees under the will of Gardner Phipps, deceased, in April 1888, to recover taxes alleged to have been charged against the defendants for the year 1882, said to amount to \$7,136, as a first cause of action.

For a second cause of action to recover taxes for the year 1883, said to amount to \$6,313.08.

For a third cause of action, to recover taxes for the year 1884, said to amount to \$7,341.79.

For a fourth cause of action, to recover taxes for the year 1885, said to amount to \$7,301.76.

For a fifth cause of action, to recover taxes for the year 1886, said to amount to \$11,619.72.

For a sixth cause of action, to recover taxes for the year 1887, said to amount to \$13,273.94.

The petition was in the short form permitted by the code to be used in such cases, and simply stated that these several amounts stood charged against the defendants for the respective years named.

These taxes were placed on the tax duplicate upon a citation of the defendants in January, 1888, under secs. 2781 and 2782 of the Rev. Stat., which read as follows. Perhaps it may be necessary to read only sec. 2781, as bearing particularly upon this case:

"If any person whose duty it is to list property or make return thereof for taxation, either to the assessor or county auditor, shall, in any year or years make a false return or statement, or shall evade making a return or statement, the county auditor shall for each year, ascertain as near as practicable, the true amount of personal property, moneys, credits, and investments that such persons ought to have returned or listed for not exceeding five years next prior to the year in which the inquiries and corrections provided for in this and the connection are made; and to the amount so ascertained for each year, he shall add fifty per centum, multiply the sum or sums thus increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect the same as other taxes."

Now, by virtue of a proceeding under this section and the following one, which provides the method and manner in which the proceeding shall be had, these taxes which I have just recited were assessed against the executors and trustees of the Gardner Phipps' estate.

On the same day on which the petition was filed, an answer was filed, from which it appears that the taxes assessed were assessed upon stocks of certain railroad, telegraph and transfer companies, the lines of some of which lay entirely without the state of Ohio, and of some of which were partly without the state and partly within, and among those, (which is the subject of controversy in this case), was the stock of the Pittsburg, Fort Wayne & Chicago Railroad, lying partly without the state and partly within.

At the same time the answer admitted the liability upon all the stocks except the Pittsburg, Fort Wayne & Chicago stock, and by consent a judgment was rendered in favor of the plaintiff and against the defendants, for \$21,517.35, which was paid; the defendants claiming at the same time that the Pittsburg, Fort Wayne & Chicago stock was not taxable, and that portion of the controversy was left for future determination by the court.

\*This judgment was reversed by the circuit court; opinion, 4 Circ. Dec., 678.

After this, and while the case was pending, and before it came to trial, the Supreme Court decided the case of *Ratterman v. Ingalls*, 48 Ohio St., 468. In that case the Supreme Court gave a judicial construction to the expression "false return" used in sec. 2781, and held in brief in the syllabus of the case that:

"In order to render a return made by a taxpayer to the assessor of property for taxation, "a false return" within the meaning of original and amended sec. 2781, Rev. Stat., there must appear, if not a design to mislead or deceive on the part of the taxpayer, at least culpable negligence.

2. Where it is found that tax returns during the years 1881 to 1885, inclusive, from which certain shares of stock owned by the taxpayer were omitted, were made by him under an honest belief that the shares were not taxable, which belief was induced by reliance upon the opinions to that effect given by capable lawyers, and like opinions by the taxing officers of the county and state of his residence, and by the action of such officers refusing to correct returns of persons which they knew were holders of such stock, and it further appears that the taxpayer had given to the county auditor, in the year 1881, information as to his ownership of such stock, and had not, during any of said period, done any act indicating a purpose to conceal such ownership, the returns so made will not be treated as false returns, within the meaning of sec. 2781, Rev. Stat., although it was afterwards adjudged by the courts that such shares were, under the laws of the state, taxable during each of the years."

It is apparent on a reading of the decision in this case that the decision was made on facts peculiarly applicable to that case, but there are certain facts in that case which are pertinent to the case now under consideration.

The facts in that case, so far as they apply to this case, were those relating to Pittsburg, Fort Wayne & Chicago stock, which was one of the stocks in controversy in the case. The defendant, Ingalls, had been sued for the taxes thereon for the years 1881 to 1885, inclusive, as being the five years preceding the year 1886, for which he was also sued, a return having been made in that year, 1886, whether voluntarily, or involuntarily is perhaps immaterial, and does not very clearly appear from the statement of facts in the case.

Upon the hearing before the superior court a finding was made in favor of the defendant, Ingalls, for the years 1881 to 1885, and against him for the year 1886, including the fifty per cent. penalty for that year. And upon the findings of fact and law made by the court the case was taken to the Supreme Court, and the Supreme Court affirmed the judgment upon the principles of law set out in the case, which, so far as they may be applicable to this case, are that a "false return within the meaning of sec. 2781 means a design to mislead or deceive on the part of the taxpayer, or at least culpable negligence." What "culpable negligence" may mean does not so clearly appear, unless it be explained by the second syllabus to the effect that where a taxpayer acts under an honest belief induced by reliance upon opinions by capable lawyers, and opinions by taxing officers in his vicinity, or in the vicinity of his residence, and acting upon such belief neglects or omits to make a return of such stocks, he is not liable for making a "false return," and cannot be charged with culpable negligence, and therefore is not liable for the penalties provided by the statute, to-wit: the collection of the taxation for the five years pending, and necessarily and logically for the current year, although the Supreme Court in that case affirmed the judgment of the superior court as an entirety, permitting the penalty of fifty per cent. to stand for the current year, as well as the taxes of that year.

Now, with that state of the law before us, what is the conclusion to be arrived at in the present case?

The facts briefly are that prior to the death of Gardner Phipps, and for many years, there had undoubtedly been an opinion current in this community and vicinity, induced to some extent by the opinions of lawyers, to some extent by the action of taxing officers of this county, and others, state taxing officers, that the Pittsburg, Fort Wayne & Chicago stock was not taxable. Afterwards it was held by the Supreme Court in the case of *Insurance Co. v. Ratterman*, 46 Ohio St., 153, in 1889, that the stock was taxable. And then it became, of course, the settled law of this state from that time and thereafter that the stock was taxable, and everyone was bound to take notice of that. But prior to, and up to that time there had been undoubtedly an opinion current in the community that the stock was not taxable, and we may say it was generally prevalent.

The practical difficulty in the trial of this case was that inasmuch as the executors and trustees, the original defendants, as well as the testator, were dead, it could not be easily or readily ascertained just how far any of them had heard of that opinion and acted upon it; but there was testimony tending to show, and to a

certain degree establishing the fact, that both the testator and his executors were aware of the opinion, and had acted upon it.

This evidence brings them within the decision of *Ratterman v. Ingalls*, and places the testator, and those acting for him afterward, the executors and trustees, in a position where, until such time as the law was established that this stock was taxable, they could not be charged with making a "false return" by reason of their having omitted to return this stock.

The contention of the plaintiff, however, in this case was that inasmuch as it appeared that other stocks which were known to be taxable, or should have been known to be taxable, were omitted also from the return, and that therefore the return was in fact "false," inasmuch as there was an entire omission to return any stocks, including those supposed to be taxable as well as those supposed not to be taxable.

And that involves, to some extent, the discussion of another question. Bearing in mind that the provisions of this statute as to previous years, and as to the fifty per cent., are in fact punishments or penalties for making a false return, the question arises how far an omission to return stocks known to be taxable is to bear upon stocks believed not to be taxable. It may be said that in one sense of the word the return is an entirety, and that if there be an omission on the part of the taxpayer to make return of property known to be taxable, then the entire return must be set aside as a whole, and it is in that sense of the word a false return, or an evasion of the law.

But on the other hand, inasmuch as the penalties and punishment are affixed for making a false return as to specific items, it seems to me the principle involved can only be applied to the particular stock in question, and that the law cannot be made so broad as to hold, that because he neglected to return stocks known to be taxable, he shall be punished for not acting in good faith in not returning those believed not to be taxable.

And if that question in making the return partially false be eliminated from the case, I cannot see where the distinction can be made between the case at bar and *Ratterman v. Ingalls*. And, in addition, inasmuch as the logical effect of the case before the Supreme Court is to hold that the penalty for the current year, that is to say, the year when the tax is first placed on the tax duplicate, is in fact a punishment for making false returns, then, although they did in that case affirm the judgment of the superior court, I am of the opinion that their language should be given its logical effect, and therefore, the judgment in this case must be that the defendants be liable for the taxes only upon the value of their stock for the year when it was placed on the duplicate, the year 1887.

W. L. Avery and L. W. Goss, for plaintiff.

Wm. Worthington and John W. Warrington, for defendant.

## TAXATION—EXPERIMENT STATION.

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[Wayne Common Pleas, 1892.]

\**REZIN B. WASSON ET AL. V. COMRS. WAYNE CO.*

The act of the general assembly "to authorize the several counties of the state to raise money to secure the location of the Ohio Agricultural Experiment Station, and to provide for such location," Ohio L., 88, 353, authorizing the commissioners of any county in the state, desiring the location of the Ohio Agricultural Experiment Station by making donations therefor, and empowering such commissioners to raise the money for such donation by a tax on all taxable property in such county, as listed on the county duplicate for taxation, the amount of which proposed donation to be fixed by said commissioners, does not contravene article 12, section 2 of the constitution, which provides, "laws shall be passed taxing by uniform rule, all moneys, credits, etc., and also all real and personal property according to the true value in money," and is not in violation of article 10, section 7 of the constitution, which provides that "commissioners of counties, trustees of townships, and similar boards shall have such power of local taxation for police purposes as may be prescribed by law," but is a valid law.

\*This judgment was affirmed by the circuit court, but the circuit court was reversed by the Supreme Court; opinion 49 O. S., 622.

ages from it. It is simply and purely a state institution, controlled by the state, owned by the state, officered by the state for the benefit of the people of the state.

The plaintiffs rely upon the case of *Fields v. The Commissioners of Highland county*, 36 Ohio St., 476. The syllabus of the case is as follows: "An act of March 29, 1869, to authorize the commissioners of a certain county to locate and construct turnpike roads, Rev. Stat., secs. 8047 to 8057 inclusive, which exempts certain lands therein named from taxation for the improvements therein provided for, is in conflict with sec. 2, article 12 of the constitution, and is, therefore, void.

Section 7 of the act referred to in this case provides, "No such taxes shall be levied on any lands, which have been heretofore assessed for the construction of any turnpikes, or improved road or roads already constructed, or in the course of construction at the time of the levy of the taxes, unless the amount that would be ratably levied upon such lands exceeds the amount of such assessment, and in such cases such excess only shall be levied or collected." Concerning this section the court says, "Land before assessed for similar improvements are exempt from taxation to the extent of the assessment previously made, and the burden from which such lands are thus relieved, is cast on the remaining property of the county. In the city of *Zanesville v. Richards*, 5 Ohio St., 589, respecting the effect to be given to this provision of the constitution, it was held that "no tax, either for state, county, or township, or corporation purposes, can be levied without express authority of law;" and "that this section of the constitution is equally applicable to, and furnishes the governing principle for, all laws authorizing taxes for either purpose," and that "it requires a uniform rate per cent. to be levied upon all property according to its true value in money, within the limits of the local subdivision for which the revenue is collected, subject only to the exemption specifically provided for in the section." That the act violates this provision of the constitution, in case the fund to be raised to construct the road or roads is for general revenue purposes, as distinguished from a fund arising from local assessments founded on the principle of furnishing an equivalent by special benefits to the property assessed, is not doubted by counsel for the defendants. But they contend that the purpose of the legislature, as evinced by the act, was to provide for a local assessment upon real and personal property especially benefitted to pay the cost of a local improvement. In this view we do not concur. If effect be given to the act, the commissioners are authorized to establish roads anywhere in the county, and to levy a tax, from year to year, of two mills on the dollar of valuation on all property of the county, to pay the cost of construction, except such lands as have been previously assessed for similar improvements, without any reference to the special benefit conferred. And in the exercise of this discretion they may establish one or more roads, as they may deem the public interests to require, or they may establish none; and if they see fit to establish but one, they are required to cause the property of every citizen of the county, save the excepted lands, to be taxed, however remotely the owner may live from the road constructed, and notwithstanding his property may derive no more benefit therefrom than lands in a remote country. Were we to construe the act as one intended to create an assessing district bounded by county lines, and to authorize all the property therein, both real and personal, except the exempted lands, to be assessed for the roads constructed, on the principle that such property was specially benefitted by the improvement, and that it is within the power of the legislature to enact the statute with such effect, we would sanction a very easy mode of violating the constitution. There is nothing in the language of the act that indicates any intent on the part of the legislature to provide for assessment, as distinguished from taxation. Nothing, in other words, to indicate that the act was passed in the exercise of power to authorize local assessments, on the principle of special benefits conferred. On the contrary, it was enacted in the exercise of the taxing power. The fund to be raised to pay the cost of the roads to be constructed under the act, was to be provided by a tax levied and collected as ordinary road taxes are, with the difference that ordinary taxes are raised from a levy on all the taxable property, and the taxes under this act upon a part only. The lands formally assessed for improved roads cannot be taxed under the act, because expressly exempted; and the remaining property cannot be taxed because of such exemption. The restriction upon the power to lay a tax on all the property on the grand duplicate of the county, is in direct conflict with the provision of the constitution above quoted, requiring all property, with certain exceptions, to bear its equal and just proportion of the public burdens."

We are now led to inquire, what are the provisions of the law in question?

Section 1 of the act provides, "That the commissioners are empowered to raise money for such donation by tax on all taxable property as listed on the county duplicate for taxation."

Section 2 provides, "That such tax shall not exceed one mill on the dollar of the taxable property of the county in any one year, nor shall the aggregate of all levies for such purpose exceed ten mills on the dollar."

This law surely is not open to the objection that all the property of the county is not to be taxed for the purpose of making a donation to secure the Experiment Station, and is not in conflict with the constitution requiring all real and personal property to be taxed by uniform rules according to its true value in money, provided the act is otherwise constitutional.

In *Western Union Telegraph Company v. Mayer*, treasurer, 28 Ohio St., 622, the Supreme Court says: "The provisions of article 12 of the Constitution of Ohio are not grants of power to the legislature, but limitations and restrictions on the general power conferred by article 2, sec. 1, and among other things sec. 2 of article 12 requires that all property subject to taxation shall be taxed by a uniform rule, and according to its true value in money."

Can the general assembly authorize the people of the county to tax themselves for a public improvement, where the state at large has an interest in such public improvement, and where some peculiar local benefit would thus accrue to the people of such county?

Upon this subject we have no authority directly in point, but the principles underlying the question are discussed in *Cooley on Taxation*, where on page 123 he says: "It has been decided to be competent for the legislature to authorize a town to tax itself in aid of the erection of buildings for a state educational institution to be constructed within it. In the particular case the purpose, as regards the state at large, was clearly public, but the locality was allowed to assume a special burden on the ground of special benefits. A case in New York perhaps goes further, inasmuch as it sustains the authority of the legislature to require a village to render such assistance. While it may be entirely proper to regard the incidental benefits to the locality as constituting a just basis for an exceptional tax upon it, no such ruling would be admissible where the building itself was not to be owned and controlled by the public, and where consequently the sole ground for any taxation would be incidental benefits to flow from a private undertaking. This has been so clearly shown in a case from which we have already quoted, that we copy from the opinion instead of attempting any statement of the general doctrine in our own language."

*Merrick v. Amherst*, 12 Allen, 500. See also *Marks v. Trustees of Pardue University*, 37 Ind., 155; *Burr v. Carbondale*, 76 Ill., 455; *Hensley Township v. People*, 84 Ill., 544; *Livingston County v. Darlington*, 101 U. S., 407.

"That is not the kind of public benefit and interest which will authorize a resort to the power of taxation. Such benefits accrue to the people of all communities from the exercise in their midst of any useful trade or employment, and the argument, pursued to its logical results, would prove that compulsory payment or taxation might be made use of for the purpose of building up and sustaining every such trade or employment, though carried on by private persons for private ends, or the purposes of mere individual gain and emolument. That there exists in the state no power to tax for such purposes is a proposition too plain to admit of controversy. Such a power would be obviously incompatible with the genius and institutions of a free people, and the practice of all liberal governments, as well as of all judicial authority, is against it. If we turn to the cases where taxation has been sustained as in pursuance of the power, we shall find in every one of them that there was some direct advantage accruing to the public from the outlay, either by its being the owner or part owner of the property or thing to be created or obtained with the money, or the party immediately interested in and benefitted by the works to be performed, the same being matters of public concern; or because the proceeds of the tax were to be expended in defraying the legitimate expenses of government, and in promoting the peace, good order and welfare of society. Any direct public benefit or interest of this nature, no matter how slight, as distinguished from those public benefits or interests incidentally arising from the employment or business of private individuals or corporations, will undoubtedly sustain a tax. In thus endeavoring to define how the public must be beneficially interested in order to justify the raising of money by taxation in cases like the present, we of course do not intend to include all purposes for which money may be so raised. Taxes may be levied and collected for charitable purposes, but these constitute a peculiar ground for the exercise of the power which does not exist here."

So claims found in equity and justice in the largest sense, and gratitude, will support a tax; such claims, however; and we think all others where taxation is proper, except claims founded in charity, may be referred to the general principle above spoken of, or public interest in or benefits received by the transaction out of which the claims arose. Citing *Cartis v. Whipple*, 24 Wis., 350, 354, per Dixon, Ch. J.

The Supreme Court of Massachusetts in 12 Allen, 500, 501, 502 and 505, says: "The legislature have power to pass a statute authorizing a town to raise money for an agricultural college to be established therein by the Commonwealth, under U. S. St. of 1862, c. 130.

"At the outset of this inquiry, it is important to understand the precise nature and character of the institution for which the money is proposed to be raised. By an act of the congress of the United States, U. S. Stat. of 1862, c. 130, there was granted to each state of the Union an amount of public land, equal to thirty thousand acres for each senator and representative in congress to which such state was then entitled; the proceeds of which land, when sold, were to be invested by each state accepting the grant in a perpetual fund, the interest of which was to be inviolably appropriated to the endowment, support and maintenance of at least one college, the leading object of which should be to teach such branches of learning as are related to agriculture and the mechanical arts. Among other conditions appended to this grant were provisions that each state should within five years provide a college for such branches as above described, and that no part of said fund or interest thereon should be applied either directly or indirectly to the purchase, erection, preservation, or repair of any building. The grant thus made was accepted by the state by Stat's 1863, c. 220; a corporation was established under the name of the Trustees of the Massachusetts Agricultural College, with power to establish and conduct a college for the purpose contemplated by the act of congress.

"If the establishment of a public institution of general utility or necessity in a particular locality would be productive of appreciable benefits to persons or estates in the vicinity, either by increasing the value of property there situated, or by the opportunities which it would afford to those residing in the neighborhood to enjoy certain common privileges and advantages with greater facility and at a less cost than others having equal right to participate in them, but who reside on or own estates more remotely situated or in distant parts of the state, we can see no reason why these special advantages or benefits should not be taken into consideration in determining the mode in which the public burden of defraying the cost of the institution should be apportioned and distributed.

"While perfect equality in raising the money for public charges is unattainable, it would certainly approximate more nearly to an equitable apportionment of them to provide that such part of the expenditure for a public object as will inure directly to the benefit or profit of a certain town or district, should be borne by the estates situated and persons resident therein, leaving only that sum to be treated as a public charge, and to constitute a general assessment on all persons and property in the commonwealth, which may reasonably be supposed to be expended for the equal and common benefit of all.

"Such a distribution of a public burden would be reasonable because it would tend to equalify; it would be proportional because it would be borne in proportion to the benefits which each would receive."

The Supreme Court of Michigan in *Callam v. The City of Saginaw*, says: "The question arises, therefore, whether a city can be authorized to raise by corporate funds and taxes the entire money required for a court-house for the county. The point is fairly presented, as the proposed uses are not joint, but separate, and in case of removal the county is to refund the entire expenses. No precedents have been found precisely analogous. The power is rested by the defense on the validity of city expenditures for purposes of public character, which make a city more desirable as a residence, promote its improvement and the increase of its taxable property, and add to the comforts or prosperity of its inhabitants. It is claimed that the city would at all events be obliged to pay a proportionate share of the cost, as a part of the county; and that if the benefits of an improved building beyond a cheaper one will mainly aid the city when it is built, that may justify the assumption by the city of the whole expense. There is no lack of authority for allowing municipal corporations to aid, or in some cases, to establish improvements which are not purely for municipal purposes. Parks, educational buildings, pleasure grounds, highways and other works of use and embellishment are generally open to all the public at large, and it would be of little advantage if they were not. It is this which draws people to cities and adds to their business and population. No doubt there is a line between those expenditures which by long usage and consent are deemed public, and those which cannot be so regarded.



but communities which have a reasonable respect for the amenities and comforts of life are usually the strongest. It is also very common both in this country and in England, from which we have drawn the principles of our common law, for cities in building their municipal buildings to furnish accommodations, gratuitously or otherwise, for public officers and bodies which do not represent the city. It is very common to find city halls and similar buildings used for state and county, court or executive purposes.

"The question whether the city of Saginaw, which must at the present ratio of taxation, bear about one-fifth of the expense of a court-house, may be authorized to raise money enough to build the whole of it, does not therefore seem to be much whether it can raise anything more than its ratable portion for what is not strictly a municipal purpose, but how much it can raise without violating principle. It seems to us that if the door can be opened at all, this is not a matter for the courts to decide. The legislature cannot compel a city to be generous to the state or county, but we do not think the constitution forbids a city—if authorized by statute—from determining for itself whether such an investment of the city money for purposes in which the city is directly concerned in part, will not be wise and profitable. It may put up handsome instead of mean buildings for its own uses, and may accommodate the county in those buildings upon as easy terms as it chooses, and we do not see that what is now proposed involves substantially any very different principle.

In *Gordon v. Carnes et al.*, 47 N. Y., 612, 613 and 614, the Supreme Court of New York says: "To undertake to review the action of the legislature in this respect, and to enforce, by judicial power, absolute equality of taxation, or to declare a law unconstitutional on the ground that a locality is taxed for what might seem to the court more than its just proportion of an expenditure, for a public purpose, would be a usurpation of the province of the legislature.

"No such question arises where a tax is imposed upon a particular locality to aid in a public purpose which the legislature may reasonably regard as a benefit to that locality as well as to the state at large. When the legislature has proceeded upon the ground of such mutual benefits, and has undertaken to make the apportionment of the expenses of the undertaking, with reference to the benefits resulting respectively to the state and to the locality, inequality of apportionment cannot be alleged for the purpose of impugning the validity of the act.

"The normal school in question was to be established pursuant to chapter 469 of the laws of 1866, for the education of teachers for the common schools. The village was, according to the proposals made by the trustees, to furnish the land and the buildings required, and to supply furniture to the school to a specified amount. These were to be conveyed to the state and placed under the direction and control of its officers, and the school was to be managed by a local board appointed by the superintendent of public instruction.

"The village, however, did not undertake to defray any part of the expense of conducting or maintaining the school or any of its departments, and the act plainly implies that these expenses are to be borne by the state.

"From this brief summary of the project, it is apparent that the establishment of the school may well have been deemed by the legislature a benefit to the locality, as well as to the state at large, and the furnishing of the land, buildings and furniture by the village, may have been considered no more than its just contribution toward such benefit. We cannot say, judicially, that the establishment of this school, was so foreign to the interests of the inhabitants to the village that it was beyond the legislative power to authorize the village to contribute towards its establishment."

In 101 U. S. Reports, the Supreme Court of the United States in construing some of the decisions of the Supreme Court of Illinois, says: "Testing the validity of these bonds, by the decisions of that tribunal, rendered prior to and unmodified at the date of their issue, we would be obliged to hold that they were issued for a corporate purpose. And, while the doctrines announced in *Livingston County v. Weide*, if applied here, would establish their validity, the principles announced in previous cases, and in the subsequent cases of *Burr v. City of Carbondale* and *Hensley Township v. The People*, seem quite as clearly to sustain their validity. If, as adjudged by the Supreme Court of Illinois it was, within the true meaning of the constitution of 1848, a corporate purpose to impose taxes to pay bounties to those who were enlisted or were drafted into the army of the United States, or to secure the location of a State Normal or State Industrial University, or to pay municipal bonds issued, by way of donation, to aid in the construction of a railroad—if taxation in the constitutional sense, was for a corporate purpose

whenever imposed for a public purpose—we do not perceive upon just what ground it can be held not to be a corporate purpose for a municipality to make, under express legislative authority, a donation to secure the location within its limits of a state reform school, wherein juvenile offenders and vagrants may receive such care, discipline, education and employment as, while affecting, or contributing to their reformation, will protect the community in which they live from evils and dangers which confessedly result from idleness and vagrancy among the young.

“Had the acts under which these bonds were issued, provided for the establishment of a reform school in Livingston county, for the discipline, education, employment and reformation of juvenile offenders and vagrants within its limits, it would not be claimed, in view of the course of decisions in the state court, that the legislature has transcended its constitutional power. That the school established was a state institution, to be maintained after being established at the expense of the state, but in the benefits of which the county where it was located would participate, does not, it seems to us, affect the legislative power. It is a matter rather of public policy or expediency, the determination of which, the power existing, belongs to the legislative department. It is well said by the Supreme Court of Illinois, and “in the enactment of laws the legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no expressed or necessarily implied constitutional provision intervening, it is the sole judge. It has also the undoubted right to take a comprehensive view in determining the necessity of a law, and the character of the purpose to be accomplished by it. A court, with any propriety, cannot arrogate to itself all power and wisdom in such matters; and if there be grave doubt as to the nature of the purpose, the doubt must always be solved in favor of the action of the legislature. 62 Ill. 273. In a previous case the court had said that, “A proper respect for the legislative department requires us to regard its acts as *prima facie* constitutional.” 42 Ill., 14.

On the fourth day of May, 1879, the legislature of this state passed an act authorizing the city of Cincinnati to build the Cincinnati Southern Railway by taxing the property of the city for the purpose.

The constitutionality of this law was questioned, and the Supreme Court of Ohio in the case of Walker v. the City of Cincinnati et al., 21 Ohio St., 44 and 45, says: “And upon the question of fact whether a particular road is thus essential to the interests of the city, this court in the case of the C., W., Z. R. R. already referred to quote approvingly from the case of Goodin v. Crump, 8 Leigh R., 120, in which it was said: “If then the test of corporate character of the act is the probable benefit of it to the community within the corporation, who is the proper judge whether a proposed measure is likely to conduce to the public interest of the city? Is it this court, whose avocations little fit it for such inquiries? Or is it the mass of people themselves—the majority of the corporation, acting (as they must do if they act at all) under the sanction of the legislative body. The latter assuredly.” And in Sharpless v. Mayor of Philadelphia, 21 Penn. St. R., 147, it was said by J. C. Black: “If the legislature may create a debt and lay taxes on the whole people to pay such subscriptions may they not with more justice, and greater propriety, and with as clear a constitutional right allow a particular portion of the people to tax themselves, to promote in a similar manner a public work in which they have a special interest? I think the question cannot be answered in the negative.” \* \* \*

“I cannot conceive of a reason for doubting that what the state may do in aid of a work of general utility, may be done by a county or city, for a similar work which is especially useful to such county or city, provided the state refuses to do it herself, and permits it to be done by the local authorities.” The question in that case was upon the validity of subscriptions of stock made by the city of Philadelphia in aid of two railroads. One of these was the Hennfield road, which had its eastern terminus at Greensburg, three hundred and forty-six miles west of Philadelphia. Both subscriptions were sustained, and the court said, it is the interest of the city which determines the right to tax her people. That interest does not necessarily depend on the mere location of the road.” \* \* \*

“But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers and by the legislature. For us it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency not of law, much less a constitutional law.”

Upon this branch of the case, we are of the opinion that if the Agricultural Experiment Station will be of any peculiar local benefit to the people of Wayne

county, that the legislature had power under the constitution to pass the act in question, and that it is a valid law. Who is to determine the question whether the Experiment Station will be of any peculiar local benefit to the people of this county? Undoubtedly this is the province of the court; but can the court, looking to the act of congress and the acts of the general assembly of this state creating the Agricultural Experiment Station, and the evident objects to be attained by the station when in successful operation, which are intended for the peculiar benefit of the agricultural interests of this county and state, and considering the question whether such an institution located in this county would not stimulate the farmers of this county to inform themselves upon the various topics experimented upon at the station to a greater extent than if it was located at some other point in the state, and considering further the fact that the bulletins of the station are to be published at the station, as provided in the act of congress, thus rendering the information they contain more accessible to the people of this county than to any other part of the state at large, except through the mails where all the people of the state have equal advantages; and the further facts that the moneys appropriated by congress and the general assembly of the state for the support of this station will, in all probability, be largely expended in this county, and being satisfied that an observance on the part of the farmers in this county, of the various experiments practiced at the station, will tend to improve the condition of the soil and crops of the county, I am not now prepared to say that the people of this county will not derive some benefit from the location of the Experiment Station in this county.

The plaintiffs further claim the law is in contravention of article 10, sec. 7 of the constitution, which provides that "commissioners of counties and trustees of townships, and similar boards, shall have such power of local taxation for police purposes as may be prescribed by law." The plaintiffs contend that in this section the convention framing the constitution is dealing expressly with the power that may be conferred upon county commissioners and similar boards to tax for local purposes. In only one other article of the constitution is the authority of these local bodies to tax at all recognized, which is in article 8, sec. 5, in which by implication the power of counties, cities, towns and townships to create debts, to repel invasion, suppress insurrection, and defend the state in war is recognized.

In article 10, sec. 7, above quoted, the grant of power to counties is under a separate consideration, while the general grant of legislative power may be in certain cases held to cover the right of taxation this special provision is of great importance in determining the nature and extent of that power, for that is the subject directly under consideration.

The substance of the plaintiff's claim is that county commissioners have power only to levy local taxes in their county, when authorized by law to do so for police purposes.

In the *Commissioners of Hamilton County v. Mighels*, 7 Ohio St., 118 and 119, the Supreme Court of this state says "counties are local subdivisions of the state created by the sovereign power of the state of its own sovereign will without the particular solicitation, consent or concurrent action of the people who inhabit them. The former organization is asked for or at least assented to by the people it embraces. The latter is superimposed by a sovereign or paramount authority. The municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people, and a county organization is created almost exclusively with a view to the policy of the state at large for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy.

The plaintiffs in support of their claim cite *Sessions v. Crunkilton et al.*, 20 Ohio St., 358, where McIlvane, J. says township trustees have power of local taxation with two limitations only, to-wit: it must be prescribed by law, and can be exercised for "police purposes" only.

"The mode of exercising the power of local taxation by trustees in the making of ditches, etc., is prescribed by the act of May 1, 1862. And when exercised for the purpose of constructing ditches, drains and water courses, which are demanded by or are conducive to the public health, convenience or welfare, it is within the constitutional meaning of "police purposes."

"Police purposes" ordinarily arise in the administration of the affairs of cities and towns, in the exercise of their power and duty to promote the public health,

convenience and welfare; but by the 7th sec. of article 10, taxation for police purposes is expressly conferred on trustees of townships." In other words, a township ditch that will be conducive to the public health, convenience and welfare, is a "police purpose," but are "police purposes" the only purposes for which the commissioners of counties shall have the power of local taxation? In *Cass v. Dillon* 2 Ohio St. 622, Judge Thurman, says: "The constitution did not create the municipalities of the state, nor does it attempt to enumerate their powers. It recognizes them as things already in being, with powers that will continue to exist, so far as they are consistent with the organic law, until modified, or repealed. Thus, there is no express provision that a county may make a road, or contract a debt, yet no one will doubt for a moment that it may do both. Indeed, its power to contract debt is recognized, beyond even the authority conferred by law. It is clearly assumed in sec. 5, article 8, that it may create debts to repeal invasion, suppress insurrection, or defend the state in war, although no such power has ever been conferred by statute, so far as I can discover. If it can thus incur debts, it may, of course, levy taxes to pay them; notwithstanding its only express grant of the taxing power is by article 10, section 7, for 'police purposes.'"

"The same thing may be said of townships, cities, towns and villages."

In *Walker v. The City of Cincinnati et al.*, 21 Ohio St., 52, Chief Justice Scott, says: "In *Cass v. Dillon*, 2 Ohio St., 613, 614, it was held, and we think properly, that the limitations imposed upon the state by the first three sections of article 8, were not intended as limitations upon her political subdivisions—her counties and townships. And the clear implications of the fifth sec. are, that counties, cities, towns and townships may create debts to repel invasion, suppress insurrection, or defend the state in war, which the state may assume," and may also create debts for other purposes, which the state is forbidden to assume.

In *State ex rel. Hibbs v. Board of County Commissioners of Franklin county* 35 Ohio St. 458, the Supreme Court held:

"An act requiring county commissioners to cause a designated road to be improved, and to levy a tax to defray the expense thereof, where the road is open to the public, is not invalid for want of power in the general assembly to pass it."

"An act providing 'That the commissioners of Franklin county be and they are hereby authorized and directed to levy \* \* \* a special tax not to exceed,' etc., to improve a county road, is a mandatory statute, and the commissioners may be compelled by mandamus to obey its provision."

On the twenty-eighth of March, 1864, the general assembly passed an act, "authorizing the county commissioners, trustees of townships, and city councils to levy a tax for the payment of bounties to volunteers, and to refund subscriptions made for that purpose." The constitutionality of this act was questioned, and it was claimed to be in contravention of sec. 7, of article 10 of the constitution. In the case of *Cass township v. Dillon*, 16 Ohio St., 40, Judge White says: "We do not deem it necessary to inquire whether the act can be supported under this section of the constitution or not."

Looking at the occasion and object of the statute, it is, in our opinion, authorized under the general grant of the legislative powers of the state to the general assembly, contained in sec. 1, art. 2. It was enacted *flagrante bello*; and its object was to aid the several localities to which it relates, in furnishing their allotted quotas of troops to the United States, to enable it to suppress a hostile military power, which sought, by force of arms, to overthrow the government. This case was approved and followed in the *State ex rel. Anderson v. Harris et al.*, Commissioners of Holmes county, 17 Ohio St. 608.

On the twenty-first of March, 1887, the general assembly passed an act as follows:

#### AN ACT

To erect a statute or other suitable monument in commemoration of the public services of General William Henry Harrison, and to submit the question of levying a tax to defray the expenses of the construction of said monument to the qualified electors of Hamilton county, Ohio.

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, that the governor shall appoint a commission of seven citizens of Hamilton county, who are authorized to contract for and have erected, a statue or other suitable monument, in Hamilton county, in commemoration of the public services of General William Henry Harrison, at an expense of not more than \$25,000.

SEC. 2. To defray the expenses for the construction and erection of said monument, the commissioners of Hamilton county are authorized to levy and assess upon the grand duplicate of the taxable property of said county, one-tenth of one mill on the dollar in the year 1887, as hereinafter provided.

SEC. 3. Before such tax shall be levied, the question of making such levy shall be submitted to a vote of the qualified electors of said county of Hamilton, at the election on April next. The commissioners of Hamilton county shall prepare ballots for said voters as follows: "Harrison monument—Yes." "Harrison monument—No." If the majority of the votes cast shall be in the affirmative, the commissioners shall proceed to levy and assess said tax at one-tenth of one mill on the dollar, but not otherwise.

SEC. 4. If the tax should be levied and collected, the commissioners appointed by the governor, shall draw the money from the treasury of Hamilton county from time to time, as it may be required to pay for the construction of said monument, only on the order of the mayor of Cincinnati.

It was claimed this act was in contravention of sec. 7, article 10, of the constitution. The superior court of Cincinnati says, "The demurrer raises two questions:

First. Is the act entitled "An act to erect a monument in commemoration of the public service of General William Henry Harrison," 84 O. L., 221, constitutional? We are of the opinion that by the act no discretion in the levying of the tax is vested in the county commissioners. That they are by its terms compelled to submit the question of the levy to the vote of the qualified electors of Hamilton county, and upon an affirmative vote to make the levy. That in so doing, therefore, they are mere instruments appointed by the legislature for the exercise of the broad power of taxation placed by the constitution in that body. The act is, therefore, not a violation of sec. 7, article 10, of the constitution, providing that commissioners of counties shall have such power of local taxation for police purposes as may be prescribed by law. State ex rel. Hibbs v. Commissioners of Franklin county, 35 Ohio St., 458.

We are of the opinion that the purpose for which the tax under the act is to be levied, is a public purpose. The erection of a monument in honor of a man who has rendered valuable service to his country is an enduring acknowledgment of the country's gratitude, which will be a strong incentive to patriotic service by other citizens. Cooley on Const. Lim., 605. Burroughs on Taxation, page 20.

The custom of erecting such monuments at public expense, is so well established in our country and in England and in nearly all other civilized countries, that it tends to support the proposition that an expenditure of that sort is made for a public purpose. The argument that such a power is liable to abuse is hardly sufficient to show that it does not exist, and the remedy for any such abuse, as in other cases of abuse of legislative power, lies within the legislature itself, or with the people rather than with the judiciary.

The people of the country which was the home of such a man, have a peculiar interest in his memory, which, added to the fact that the influence of a monument is necessarily local, makes the purpose in erecting it properly a local purpose. Walker v. Cincinnati, 21 Ohio St., 15.

The fact that the execution of the law is made to depend upon a vote of the qualified electors of Hamilton county is not a delegation of legislative power, or a violation of sec. 26, article 2, of the constitution. Newton v. Mahoning, 26 Ohio St., 618.

We think it is evident from the constitutional provisions and the decisions of the courts referred to, that county commissioners have power and authority to levy and collect taxes when authorized by law, for other than "police purposes."

If county commissioners may levy and collect taxes to construct a public road to be used by the people of a county, to pay bounties to volunteers, and to erect monuments to preserve and perpetuate the memory of great men, we are unable to see why they have not the power under the constitution of securing the location of an Agricultural Experiment Station to this county by making a donation for that purpose when authorized by an act of the general assembly to do so.

It seems to me the benefits, which the court has a right to presume will flow from the location of the station in Wayne county, to the people who are almost exclusively engaged in agricultural pursuits, fully warrant the commissioners in making the donation provided for in the act in question, and of raising the amount of such donation by a tax upon all the property of the county.

But let us consider what is meant by "police purposes." "The power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, whether with penalties or

without, not repugnant to the constitution, as they judge to be for the good and welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise. *Cooley Con. Lm.*, page 714."

In *People v. Budd*, 117 N. Y., 14 and 15, the court says: "The power of the legislature to regulate the charge for elevating grain, where the business is carried on by individuals upon their own premises, depends upon the question whether the regulation falls within the scope of what is called the police power, which is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the state, necessary for the public welfare. The existence of this power is universally recognized. All property, all business every private interest may be effected by it and be brought within its influence. Under this power the legislature regulates the uses of property, prescribes rules of personal conduct, and in numberless ways, through its prevailing and ever-present authority, supervises and controls the affairs of men in their relations to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interests of society. It has limitations; it cannot be arbitrarily exercised so as to deprive the citizen of his liberty or property. But a statute does not work such a deprivation in the constitutional sense, simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters indifferent, except as they affect public interest or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the constitution was adopted. The generality of the terms employed by jurist and publicists in defining this power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity and duty, as each case is presented, to determine whether the particular statute falls within or outside of its appropriate limits, "It is much easier," said Chief Justice Shaw, in *Comm. v. Alger*, 7 Cush. 53, "to perceive and realize the existence of this power than to mark its boundaries or to prescribe limits to its exercise."

Section 2 of the act of congress defining the object and duty of the experiment station, provides "That it shall be the object and duty of said experiment stations to conduct original researches, or verify experiments on the physiology of plants and animals; the diseases to which they are severally subject, with remedies for the same." Everyone is aware that the public health is affected by the character of the animal and vegetable food eaten in a community. If it is unwholesome, it tends to produce disease and death. A swamp in the community tends to produce fevers and malaria, and a ditch, whether county or township, that will drain it and thus promote the public health, convenience and welfare of such community, is within the police power of the state. 20 Ohio St., 358.

Now, we are led to query whether the establishing by law of an institution that will educate the people of Wayne county, how to prevent and cure the diseases among their domestic animals and plants such as are used for human food, and thus conduce to the public health and welfare of the people of the county, would not be a police purpose within the meaning of sec. 7, article 10, of the constitution. Why may not pure food have as much to do with the public health and welfare as pure air?

It is undoubtedly the duty of the courts to declare an act of the general assembly unconstitutional and void when clearly satisfied that such an act is in conflict with the constitution, but courts should act with great caution before they pronounce the solemn act of a co-ordinate branch of the state government void.

In *Railroad v. Com. of Clinton county*, 1 Ohio St., 77, the Supreme Court of Ohio says: "The presumption is always in favor of the validity of a law, and it is only when manifest assumption of authority and a clear incompatibility between the constitution and the law appears, that the judicial power will refuse to execute it."

In *Goshorn v. Purcell*, 11 Ohio St., 653, the court says: "The general language of the constitution authorizes the enactment of such statute. If a doubt exists as to the intention of that language, which is the most that can, we think, be properly claimed, such doubt does not authorize a court to disregard the statute. The rule is clearly established that a case of doubt will not authorize a court to say that a legislative enactment conflicts with a provision of the constitution."

In *Armstrong et al. v. Treasurer of Athens county*, 10 Ohio, 237, Judge Hitchcock says: "Before we can declare the legislative act unconstitutional and void on the ground that it violates the constitution of this state, the case must be free from

doubt, the violation must be palpable. So long as doubt remains, the legislative act should be enforced."

In *Fletcher v. Peach*, 6 Cranch, 128, Chief Justice Marshall says: "The question whether the law is void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case."

Feeling satisfied that the law in question does not contravene either sec. 2 of article 12, or sec. 7 of article 10 of the constitution as claimed by the plaintiffs, the demurrer to the petition is sustained, and the petition is dismissed at the cost of the plaintiffs.

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## STATUTE OF LIMITATION—WAIVER.

144

[Hamilton Common Pleas, 1892.]

### MARTIN JOYCE V. THOMAS P. HART, ADM'R, ET AL.

The bar of sec. 6113, providing that an administrator shall not be held to answer to the suit of a creditor, unless it be commenced within four years, is not to the right, but to the remedy; an administrator may waive the bar of the statute of limitation, and also the bar of sec. 6113.

SAYLER, J.

It appears from the evidence that one John Delaney died March 31, 1883, leaving a will by which he bequeathed to his daughter, Mary O'Brien, being married, \$1.50, and bequeathed and devised all the rest and residue of his estate to his wife, Mary Delaney; that the said Mary Delaney was a second wife, and said Mary O'Brien was a daughter by a former wife; that Mary Delaney was appointed executrix of the will, and proceeded to administer the estate, notice of the appointment was given April 20, 1883; that Mary O'Brien had a claim against the estate for money which she had earned and given to her father to hold for her, which was barred; that after the death of her father, her step-mother promised that she would make a will and divide the estate between her and Martin Joyce, a son of Mary Delaney by a former husband, and that therefore she took no steps to secure her rights against her father's estate. It further appears that Mary Delaney died December 11, 1889, intestate, and that the real estate which she had taken by devise from John Delaney went by descent to her said son, by a former husband, Martin Joyce. After the death of Mary Delaney, Thomas P. Hart was appointed administrator de bonis non of the estate of John Delaney, whereupon Mary O'Brien presented her claim against the estate of John Delaney to Hart, the administrator, who rejected it, and she thereupon brought a suit before a magistrate against the administrator; that on the trial of the case, Hart was present and heard the evidence, and became satisfied that she had a just and valid claim, and that the claim should have been allowed, and he thereupon took no further steps to defend against the claim; there being no personal property in the estate to pay the claim, the administrator commenced proceedings in the probate court to sell the real estate for the purpose of paying the same. The plaintiff brings this action asking that the administrator be restrained from the prosecution of said proceedings in the probate court; and that the judgment before the magistrate be declared null and void; and that the administrator be enjoined from allowing the same as a claim against the estate.

It is claimed on the part of plaintiff that the claim was barred by the statute of limitations, being more than six years old, and further that the claim was barred by the provisions of sec. 6113, Rev. Stat., under which no executor, after having given notice of his appointment, shall be held to answer to the suit of any creditor of the deceased unless it be commenced within four years from the time of giving bond.

I think it is clear, from an examination of secs. 6109, 6110, 6111, 6113, 6114, 6120 and 6121 of the Rev. Stat., that the bar of the action against the administrator is a bar not to the right; but to the remedy. Under sec. 6113 no executor or administrator, after having given notice of this appointment as provided by law shall be held to answer to the suit of any creditor of the deceased, unless it be commenced within four years from the time of his giving bond, excepting in cases where the cause of action shall accrue after the expiration of the four years, and before the estate is fully settled, and no cause of action against any executor or administrator shall be adjudged barred by lapse of time, until the expiration of one year from the time of the accruing thereof.

If this statute is a bar to the right, then the lapse of four years would end the claim, but, under sec. 6114, if new assets are received by the administrator after the expiration of the four years such assets may be subjected to the payment of a claim on which suit is brought, within one year after the creditor had notice of such assets.

It is well settled that the bar, under sec. 4976, is not to the right, but to the remedy, (see 8 Ohio, 250), and that the bar must be pleaded, and the court in the case of Fisher's Executor v. Mossman, 11 Ohio St., 42, says on page 45: "The clause of the statute under which an action on these notes is barred is a part of the administration act, and not of the general act concerning the limitation of action; but we can see no good reason why the question should be regarded as being at all different on that account. This question was well considered, and ably discussed by Williams, C. J., in a case substantially analogous to this (11 Conn. R., 160), and it was there held: "That statutes of limitation, being statutes of repose, suspend the remedy, but do not cancel the debt;" and in that case, the court held that where a creditor held a note secured by a mortgage, and the mortgagor having died, and the action on the note being barred by the lapse of four years under the administration act, the creditor may yet maintain his action in equity on the mortgage. See also 26 Ohio St., 525; 4 S. & M., 165.

I think, therefore, there is no doubt but that under the law of Ohio, the effect of the bar of the action under sec. 6113 of administration statutes is the same as the effect of the bar under the general act providing for the limitation of actions.

An administrator may waive the bar of the statute of limitations even where the claim will require the sale of real estate to pay it, *Lewis v. Rumney*, L. R., 4 Eq., 451, 452.

In Ohio, real estate is made assets, provisionally in the hands of the administrator, subject to the payment of debts. *Favorite v. Booher's*, adm'r, 17 Ohio St., 557. *Faran, adm'r, v. Robin*, 17 Ohio St., 252, 253. In the case of *Faran, adm'r, v. Robinson et al.*, 17 Ohio St., 242, four years had elapsed after notice of appointment, and before the presentation of the claim and bringing of suit on the same, and it was argued in the Supreme Court that the claim was barred by the lapse of four years, but the court sustained the judgment. The court, however, found there



was no fraud, mistake or culpable negligence on behalf of the administrator in the defense of the action.

Wood on Limitation of Actions, sec. 188, says, an administrator is not bound to set up the statute of limitations, but that he is bound to set up a statute which limits the time within which an action shall be commenced against him in his official capacity; but further on in the section, he lays down the doctrine that when a claim is not sued on within the time prescribed by law, there is no debt, and such is the law of New York, (111 N. Y., 204). But as above seen, that is not the law of Ohio; the debt still remains and only the action is barred.

In the case of Pollock v. Pollock, 1 Circ. Dec., 408, the court held that under sec. 6097, a court cannot render judgment on a claim which has been rejected, and suit not brought within six months; but under this section, if the suit be not commenced within six months, the party is forever barred from maintaining any action thereon.

Under sec. 6097, when a claim has been rejected by an administrator, the party shall commence a suit for the recovery thereof within six months. I can see no reason why a magistrate should not have jurisdiction in any amount not exceeding \$300. A suit for the recovery of money is certainly an action for money.

Section 6352, under which Kennedy v. Thompson, 2 Circ. Dec., 254; Gordon v. Walton, Ib., 246 and Bank v. Little, Ib., 496, were decided is different in terms. It provides that if the claimant recovers judgment, "the judgment shall be against the assignee or trustee, that he allow the same in settlement of his trust," which is clearly an equitable proceeding.

It appears in the case at bar, that the claim of Mary O'Brien was just and valid; that she was led to delay taking steps to protect herself by the statements of her step-mother; that the administrator de bonis non after hearing her evidence, became satisfied that her claim was just, and therefore took no further steps to resist it, and did not set up the bar of the statute.

I am of the opinion he had the right to waive the bar, and I find no fraud, mistake or culpable negligence on the part of the administrator, and I do not think a court of equity could in good conscience interpose to prevent an administrator paying a just claim.

But further, an administrator is liable to those interested in the estate if he improperly admits and pays a claim, (2 Ohio St., 492) he is guilty of devastavit. (Wood on Limitation of Action, sec. 188), the parties, therefore, have their action at law for damages.

The petition will be dismissed at plaintiff's costs.

N. C. Rockhold, for Martin Joyce, plaintiff.

Hollister, Roberts & Hollister, for administrator de bonis non.

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## STREET ASSESSMENTS.

[Superior Court of Cincinnati, January Term, 1892.]

THOMAS B. PUNSHON V. CINCINNATI (CITY).

Where a lot has been assessed for the purpose of a street improvement under a petition subscribed by three-fourths in interest of the owners abutting on any street or highway, as provided in sec. 2272, Rev. Stat., and when there is a subsequent assessment for a different street or highway on which said lot may abut, within a period of five years, and the owner did not subscribe the petition for the same, such lot will be liable for the assessment for the second improvement in an amount not to exceed twenty-five per cent. of the value of the lot or land after the improvement is made.

HUNT, J.

The plaintiff in this case, Thomas B. Punshon, is the owner of a lot in Cincinnati at the northeast corner of Rapid Run road and Academy avenue, fronting eighty-six (86) feet on Academy avenue and extending lengthwise on the Rapid Run road for a distance of 137 feet.

In 1887 Academy avenue was improved in front of said lot in pursuance of a three-fourths petition praying for the improvement, and signed by the plaintiff, and an assessment levied against this lot in the sum of \$337.79. In 1890 the city of Cincinnati improved the Rapid Run road along the lengthwise side of this lot and assessed the lot of plaintiff in the sum of \$547.00. The assessment for the first improvement was paid in full. The plaintiff did not sign the petition for the second improvement. The plaintiff sets up the twenty-five per cent. limitation under sec. 2271 Rev. Stat., and claims that under sec. 2283 Rev. Stat., he is only required to pay for the second improvement, one-fourth of the value of the lot then, less the amount paid for the first improvement. In other words, the plaintiff claims that these two assessments together exceed 25 per cent. of the value of the lot, and that on the second assessment he is only liable for a difference between what he paid on the first assessment, and 25 per cent. of the present value of the lot.

The city claims that the plaintiff by signing the petition for the first improvement, waived the restrictions contained in sec. 2283 Rev. Stat., and is not entitled to the benefit.

The legal question is, to what extent, if at all, did the plaintiff waive the benefit of sec. 2283 Rev. Stat., by signing the three-fourths petition.

The case involves simply a construction of sec. 2283 of the Rev. Stat., and also incidentally of secs. 2271 and 2272 in connection with sec. 2283. Sec. 2283 provides "that assessments shall be so restricted that the same property shall not be assessed for making two different streets, within a period of five years, in such amounts that the maximum assessments herein provided will be thereby exceeded.

It is contended by counsel for plaintiff that the "maximum assessment herein provided," means 25 per cent. limitation provided in section 2271. The city of Cincinnati, on the other hand, insists that the "maximum assessment herein provided" in the case at bar relates back to sec. 2272, because the three-fourths petition for the improvement of Academy avenue was a waiver of the provisions of sec. 2271 as to that improvement. In a word, the plaintiff having signed a three-fourths petition for Academy avenue, it was in effect a waiver of the 25 per cent.

limit not only for the purpose of that particular assessment, but also for any other purpose in which that particular assessment might be considered under the provisions of the law.

The plaintiff having signed a three-fourths petition for the improvement of Academy avenue, waiving the 25 per cent. limit of assessment under sec. 2271 and placing himself under the provisions of sec. 2272 for the purpose of that assessment, he necessarily remains subject to the provisions of sec. 2272 so far as Academy avenue assessment is concerned. He would not only be liable so far as the collection of the assessment for Academy avenue is concerned, but also so far any other assessment upon the same lot may be considered in connection with the said Academy avenue assessment. When the city, therefore, subsequently made an assessment for the improvement of Rapid Run road, it is entitled to collect 25 per cent. of the value of the property, unless such assessment, together with the Academy avenue assessment exceed the full value of the property as contemplated under sec. 2272.

We hold that the "maximum assessment herein provided" in the language of sec. 2283, when applied to this case, is the value of the property so far as the two assessments are concerned. The plaintiff, by the signing of the petition for the first improvement, waived the 25 per cent. limit provided for by sec. 2271. Having waived it for the purpose of Academy avenue, the plaintiff cannot say afterward, that he is entitled to have the Academy avenue assessment together with the subsequent assessment, limited to 25 per cent. of the value of the property, when, by his own voluntary act, he has agreed that the Academy avenue assessment alone may exceed 25 per cent., and may be as much as the full value of the property. It would hardly be proper to permit the plaintiff, after having practically agreed that the Academy avenue assessment might exceed 25 per cent. of the value, to say that the assessment, together with the Rapid Run road improvement, should be less than 25 per cent. It cannot be claimed that the signing of the petition for Academy avenue constitutes a waiver of the 25 per cent. limit as to the Rapid Run road improvement, but it certainly does constitute a waiver of the 25 per cent. limit so far as the Academy avenue assessment is concerned whether considered alone or whether considered in connection with another assessment. If the Rapid Run assessment itself exceed 25 per cent., as it is conceded to do, it should be reduced to 25 per cent. of the value of the property.

There is an agreed valuation, and a decree may be taken in accordance with the finding.

F. C. Ampt, for plaintiff.

Corporation Counsel, contra.

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## DESCENTS.

[Preble Common Pleas, March, 1892.]

## \*MALINDA DEEM V. WILLIAM RISINGER ET AL.

By the statute of descents of Ohio, one who murders his parent, for the purpose of inheriting the parent's property, is not thereby prevented from inheriting such property. *Owens v. Owens*, 100 N. C., 240, approved; *Riggs v. Palmer*, 115 N. Y., 506, disapproved.

## MEEKER, J.

The facts in this case necessary to be stated to show the question presented for consideration, are as follows: The plaintiff, Malinda Deem, filed her petition in this court on November 29, 1889, alleging therein that on the — day of January, 1889, one Caroline Sharkey, a widow, was the owner of lands described in plaintiff's petition, and that defendant, Elmer Sharkey, then of the age of twenty-two years, was her only child. That on the said day he unlawfully killed and murdered his mother. That she died intestate, and that plaintiff is a sister and heir-at-law of said Caroline Sharkey, deceased, and as such is seized in fee and the owner of the undivided one-fifth part of said premises, and demands partition thereof. The defendants, Thomas Millikin, Foss & Fisher, Felix Marsh, and The Farmers' & Citizens' Bank of Preble county, filed separate answers and cross-petitions in said case in which they deny the claim of plaintiff that she is an heir-at-law of Caroline Sharkey, deceased, and allege that said Caroline Sharkey died a widow intestate, the owner of said premises, and leaving the said Elmer Sharkey, her only child and heir-at-law her surviving, and that they are the owners of certain mortgages upon said premises executed and delivered by said Elmer Sharkey after his mother's death, and they ask that the amounts due on said mortgages be paid out of the proceeds of the sale of said property in the order of their priority. To these several answers and cross-petitions of said mortgages plaintiff filed a reply, and certain other defendants, brothers and sisters of Caroline Sharkey, deceased, and legal representatives of her deceased brothers and sisters, jointly filed an answer, alleging in said reply and answer that said Elmer Sharkey willfully and maliciously killed his mother at the time aforesaid for the purpose of succeeding to and possessing himself of said estate and premises; that for said crime he was afterwards indicted, tried, and found guilty of murder in the first degree and sentenced to death, which sentence was executed on December 19, 1890. They allege that by reason of his crime he did not and could not take by descent from his mother any estate, title or interest in said premises. They deny, therefore, that he conveyed any title or interest in said premises by said mortgages so executed by him and held and owned by cross-petitioners above named. To this reply and answer said holders and owners of said mortgages filed general demurrers. The case is submitted to this court on said demurrers.

The only question presented is whether Elmer Sharkey inherited the property in question from his mother at her death. It must be conceded that he did, unless the fact that he murdered her changed the course of descent. Inheritance in this state is regulated by statute, and the common law rules of descent have no application. An examination of our statutes of descent and distribution is necessary in order to determine the question presented. Section 4158, of the Rev. Stat. of Ohio provides that, "When a person dies intestate having title or right to any real estate or inheritance in this state, which title came to such intestate by descent, devise, or deed of gift from an ancestor, such estate shall descend and pass in parcenary to her kindred in the following course:

"First—To the children of such intestate, or their legal representatives."

Section 4159, provides that, "If the estate came not by descent, devise, or deed of gift, it shall descend and pass as follows:

"First—To the children of the intestate and their legal representatives.

"Second—If there are no children or their legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate.

\*This judgment was affirmed by the circuit court; opinion 3 Circ. Dec., 491,—and the circuit decision affirmed by the Supreme Court on the reasoning of the case; unreported 53 O. S., 668.

"Third—If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives."

These sections plainly direct where the property should go upon the death of Mrs. Sharkey. They do so without condition or limitation. The language is that, "when a person dies intestate," then under the first subdivision of each of these sections the child *den* shall inherit, and the cause or manner of death of the intestate is made in no way to affect or change the course of descent. These sections simply mean what they plainly say. There is no provision in our chapter of descent and distribution that the right to inherit shall be forfeited for crime however atrocious it may be, even when the heir is guilty of murdering the parent from whom he inherits; nor does the statute intercept for such cause the transmission of an intestate's property to heirs and distributees, and in the absence of a statutory provision to that effect I can not recognize any such operating principle. So imperative is the statute that an heir is bound to accept the estate cast upon him by the statute. The law vests the estate in him, and his title does not depend upon any condition—not even his acceptance. No act of his is required to perfect his title. He can not, by any act, cause the estate to remain in the ancestor; for the latter is incapable of holding it, after his death. Nor can he, by a disclaimer, transfer the estate to any other person, as the heir of the ancestor. *Watson v. Watson*, 13 Conn., 85.

The statute being silent, the inheritance should not be avoided because of heir's criminal act. No considerations of public policy demand it, as it is satisfied by the proper execution of the laws and punishment of the criminal.

It is contended, however, that the statute should not be so construed; that the legislature never intended that a child who murdered his parent should inherit the property of such parent. I cannot accede to this claim. If such had been the intention of the legislature it would have enacted such a provision in the statute to meet such a contingency. Our chapter of descent and distribution contains many exceptions and conditions intended to meet contingencies that may arise in human affairs, and the absence of such a condition in a contingency like the one under consideration, is certainly significant that no such intention existed, and implies a prohibition of such an intention. The question to be decided is, what did the legislature enact; not what it might have enacted if this or a similar case had been presented to the minds of that body at the time the sections regulating this matter were enacted. It is safe to presume that the legislature did not mean that a condition should be read on to these sections by a court in interpreting them which should require more words and sentences than the sections themselves contained. To give these sections of the statute such a construction I would thus have to read into them a provision that the right to inherit property should be forfeited for crime. I do not consider this the province of the court. It is the province of the legislature to direct through what channels estates of intestates shall go—not the business of the court. It is not the province of the court to improve the language of the statute; it is to expound it. It is the duty of the court to give effect to what the lawmakers have enacted or put in the statute, and to all of it; not to repeal and substitute. The question for the court is not so much what the lawmakers meant, but what their language means. *Senior v. Ratterman*, 44 Ohio St., 672.

The legislature having in clear and unmistakable terms fixed the course of descent, I am not at liberty to disregard their plain provisions in this case, nor by reason of equitable considerations give them a construction so liberal, as would in effect insert a provision therein not enacted by the legislature. If it were not for the plain and imperative terms of the statute, and if considerations of an equitable nature could affect the decision of this question, I should not hesitate to declare that no one should profit by his own crime, especially as in this case where the crime was so unnatural, so brutal and atrocious that the human mind shudders to contemplate it. But while these considerations might properly be appealed to the legislature, the consideration of this question, by the court, must be confined within the chapter of descent and distribution, and said section of the statute regulating this matter must be construed literally, and not by the rules of equity. *Patterson v. Lampson*, 45 Ohio St., 91.

We are supported in this view by the case of *Owen v. Owen et al.*, 100 N. C., 240 (S. C., 6 S. E. Rep., 794), decided by the Supreme Court of that state in May, 1888. In that case a widow was convicted upon a charge of being accessory before the fact to the murder of her husband, and brought suit to have her dower assigned in the real property left by him at his death, and the Supreme Court reversing the judgment below, say: "That they were unable to concur in the conclusion that to allow

her dower would be in effect to reward crime, by conferring benefits that result from and are procured by its commission, for the reason that while the law gives her dower, and makes it paramount to the claims of creditors even, there is no provision for its forfeiture for crime, however heinous it may be, and even when the husband is its victim. The only statutory provision which, for criminal misbehavior, bars an action prosecuted for the recovery of dower, is when she shall commit adultery, and shall not be living with her husband at his death. \* \* \* As there is no other act of the wife which, by statute, known to us, works a forfeiture, we do not see how any legal obstacle can be in the way of her seeking to get what the law in unqualified terms gives her. Is the right of the wife to share in the personal estate, as a distributee, lost or affected by the fact that the intestate died at her hands or through her procurement? Does the child who slays a parent, thereby lose his right to participate, with his brothers and sisters, in the distribution of the personal, or to take his part of the descended real estate? Or, reversing the matter, does the husband who kills his wife, impair his right under the statute of distribution, to succeed to the ownership of her personal property left after payment of debts? Or, in general terms, does anyone, as a consequence of an unlawful taking of human life, become thereby disabled to take a part of the estate left by the deceased which the law gives him, and gives him subject to no such condition? We are unable to find any sufficient legal grounds for denying to the petitioner the relief which she demands, and it belongs to the law-making power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife." The case of *Riggs et al. v. Palmer et al.*, 115 N. Y., 506 (S. C., 22 N. E. Rep., 188), is cited as supporting the claim made in this case, that Elmer Sharkey, having murdered his mother, forfeited his right to inherit her property, etc. In that case, a boy sixteen years of age, being aware of the provision in his grand-father's will, which constituted him the residuary legatee of the testator's estate, caused his death by poison. He was convicted of the crime, and the children of the testator contested his right to take any of the testator's property, under the will, and to have those provisions in the will in his favor cancelled. The court held, that by reason of the crime he committed, he was deprived of any interest in the estate left him under the will. I do not consider this case a controlling one. It was decided by a divided court. The general term of the Supreme Court had held the other way. The civil law seemed to be the controlling authority with the court. That, of course, could not be an authority here, as that is the written law. So in the Code Napoleon, modeled upon the Roman civil law, provision is made that one cannot take property by inheritance or will from an ancestor whom he has murdered. This provision has been copied substantially in the civil code of Lower Canada. Descent in this state is regulated by written law, but it contains none of those provisions of the civil law. The learned judge who wrote the majority opinion of the court of appeals, in that case, conceded that the murder of the testator by a legatee was not one of the statutory grounds of revocation of the testator's will, and said that, "It is quite true that statutes regulating the making, proof, and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer." And the court then proceeds, and by a liberal construction of the statute, based upon equitable considerations, reaches the conclusion announced. The dissenting judges, in their opinion, ably combat the reasoning by which the majority of the court arrived at such a conclusion, saying: "That the question was not affected by considerations of an equitable nature. That the matter did not lie within the domain of conscience. That the question the court was dealing with was, whether a testamentary disposition can be altered, or a will revoked, after the testator's death through an appeal to the courts, when the legislature had, by its enactments, prescribed exactly when and how a will might be made, altered, and revoked, and with such comprehensive particularity as left no room for the exercise of an equitable jurisdiction by the courts over such matter."

I think the case of *Kent v. Mehaffey et al.*, 10 Ohio St., 204, strongly supports the claim of the dissenting judges in *Riggs v. Palmer*, and repudiates the doctrine upon which the majority of the court in that case apparently rested their decision. In *Kent v. Mehaffey et al.*, a testator being blind told J. to bring him his will, and J. handed it to testator inclosed in an envelope with three seals. Testator having felt the seals, handed it back with the seals unbroken, to J. directing him to throw it into the fire and burn it. J. pretended to do so, but, in fact, put the will into his pocket, and threw another paper into the fire, calling upon testator to listen and hear it burn; and the testator smelling the paper burning, believed the will destroyed as he had directed, and died in that belief. After testator's death the will

was produced and admitted to probate. *Held*: That such facts do not amount to a revocation under the statute, and on page 222 the court says, that to hold otherwise would be to revoke a will in a manner which the statute forbids, and would in effect nullify the statute, and that as the statute had prohibited the revocation of a will, except under certain formalities, equitable considerations would not enlarge the statute.

The case of Shellenberger v. Ransom, decided by the Supreme Court of Nebraska, and reported in 47 N. W. Rep., is also cited by counsel for plaintiff. In that case a father had murdered his own daughter in order to inherit her property, and the court held that he could not inherit, and the judge delivering the opinion of the court, said: "That the law upon her death *prima facie* gave him her estate. That he could inherit only where her death was the result of natural causes, or a cause of which he was innocent. \* \* \* I quite agree with the court of appeals, Riggs v. Palmer, *supra*, that had it been in the mind of the framers of our statute of descent, that a case like this would arise under it, they would have so framed the law that its letter would have left no hope for the obtaining of an inheritance by such means." The decision of this case is based upon that of Riggs v. Palmer, *supra*, and a construction of the statutes of descent of that state was adopted which for the reasons already expressed, I do not regard as the rule of construction in this state, nor can I adopt such a cannon of construction.

There is another reason for the view I have taken. On the death of his mother, Elmer Sharkey became substituted in her place as owner of her property by the act of law. Herron v. Herron, 47 Ohio St., 549.

An estate of inheritance is cast upon the heir immediately upon the death of the owner. Lavery v. Egan, 143 Mass., 392; Watson v. Watson, 13 Conn., 85.

Elmer Sharkey then, became the owner of the property in question immediately upon the death of his mother. It was then his property. His title was without condition; his ownership absolute. His right to enjoy and control the same was fully guaranteed by the constitution of the state and the laws thereunder. He could only be deprived of the same by due process of law. To hold that he forfeited the same by reason of his crime would involve the imposition upon him by this court of an additional punishment. Crimes in this state are all statutory. There is no statute of this state prescribing that as a part punishment for his crime he should be deprived of his property. Such legislation is expressly prohibited by the constitution. Section 12, art. 1, of the Bill of Rights, provides that, "No conviction (of an offense) shall work corruption of blood or forfeiture of estate." The Supreme Court in 3d Ohio St., 487, in construing this clause of the Bill of Rights say: "That no man's property can be forfeited as a punishment for crime." Elmer Sharkey has expiated his crime upon the gallows. The highest penalty the law exacts for crime has been visited upon him. In his trial and punishment the law has vindicated itself. The law is satisfied. It is not in the power of the court to add further penalties.

The demurrers are sustained.

J. W. King, attorney for plaintiff.

Thomas Millikin, Foos & Fisher, and Marsh & Marsh, attorneys for mortgagees.

## MASTER AND SERVANT.

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[Superior Court of Cincinnati, 1892.]

### ABRAHAM DAVIES v. JAMES GRIFFITH & SONS.

1. When a builder assures a carpenter employed by him that a scaffold to which the latter has objected as being constructed of insufficient material and insecure, is all right, and the carpenter mounts it and he is injured by its fall, he is not guilty of contributory negligence, if any apprehension of danger were allayed by such assurances, and an ordinarily prudent man would, under the circumstances, have relied upon them.
2. The builder was bound to use ordinary prudence in selecting good materials for the scaffold.
3. If the materials were selected by a superior, the builder would be liable, and the question as to whether he is a superior is one for the jury.
4. A workman may have been a superior, and part of his work may have been of the same kind as that of the injured workman.
5. If the materials were selected by a fellow-servant, then the builder would not be liable.

SMITH, J. (Charge to the jury.)

The plaintiff alleges that the defendants are engaged in the business of building contractors; that on or about the twenty-fifth of September, 1890, he was in their employ as a carpenter; and that by virtue of said employment he was at work on a building in process of construction on Oak street in this city; that the defendant negligently provided insufficient material for scaffolding for use in said employment, and negligently provided and kept in use insufficient scaffolding; that on said day, while plaintiff was in the discharge of his duties as said employee by reason of the negligence aforesaid, and without any negligence on his part, the material used in said scaffolding, and said scaffolding broke and gave way, thereby causing plaintiff to fall, breaking his knee-cap and fracturing the bones of his leg, causing him great pain and suffering, and permanently injuring him, wherefore he asks judgment in damages against the defendant.

To these allegations of the plaintiff, the defendant answers admitting it that is a partnership, but to all other allegations it files what is called a general denial.

The determination of the case involves the application by you to the facts, as you shall find them to be, of the law governing the relations between employer and employee, or as such relations are more technically described in the law, between master and servant.

Where it becomes necessary in the course of employment of the servant to construct and use a scaffold, the master is bound in the selection of the material, and in providing and keeping in use the scaffold, to use such care to see that the material is proper for the purpose, and to use such care in providing and keeping in use a safe scaffold as an ordinarily prudent man under all the circumstances would use. This rule does not make the master an insurer of the fitness of the material used, or that the scaffold provided or kept in use is safe, nor is it necessarily satisfied by the degree of care that might ordinarily be exercised, because such care might not be within the meaning of the term "due care." But it requires such watchfulness, caution and foresight as under all the circumstances a man of ordinary prudence would exercise in view of the consequences that might result from the furnishing of insufficient material for scaffolding, or keeping in use insufficient scaffolding. And in this connection it is important to bear in mind that a servant assumes the necessary, ordinary, inseparable and inherent risks incident to his employment, although this rule presupposes that the employer has exercised ordinary and reasonable care in the selection of materials and the providing and keeping in use proper and sufficient instruments and scaffolds.

If the jury should find that in the selection of the material or in providing or keeping in use the scaffold the defendant used such ordinary care as I have described, then the defendant is not liable, although it may have turned out that the material was defective or the scaffold insufficient. On the other hand, if you should find that the defendant did not exercise such ordinary care, and that the plaintiff himself was free from contributory negligence as I shall hereafter explain the law upon that subject to you, then the defendant would be liable. And the rules of law which I shall now proceed to define as to the liability of the defendant are to be taken in connection with the law as I shall hereafter charge it to you on the subject of contributory negligence.



As it is frequently impossible for the master to perform his work without one servant, it frequently becomes necessary for him to employ a number of them, and where such servants are engaged in the common service of the master, and no relation of subordination exists between them, they are regarded as fellow-servants; and generally speaking, the master is not responsible for any injury which results to a fellow-servant by the negligence of his fellow, save only in those cases where the master was negligent in the selection of the servant.

So, as it is frequently impossible for the master to be present during the work of the servants, it frequently becomes necessary for him to have some one to stand in his place in his absence to give orders and direct the work, and to the extent that such servant is employed by the master to act for him, his acts and orders within the scope of his employment are those of the master, and the master is responsible for any injury that results to the servants under such superior servant by reason of such acts and orders, the same as if they were his own.

And if the jury believe from the evidence that Paul Bingman was the superior, and not a fellow-servant of plaintiff, and stood in the place of defendant, then defendant would be responsible for his negligence as such superior; and this would be the case even though he may have done work of a kind or kinds similar to that done by plaintiff or by a fellow employee of plaintiff.

If the jury are satisfied, therefore, that the injury to the plaintiff was caused solely by the negligence of his fellow servants, as I have described that relation to you, then your verdict must be for the defendant; but if you find that the negligence of the defendant, either in providing insufficient material for scaffolding or, in providing or keeping in use insufficient scaffolding directly contributed to plaintiff's injury, it would be no defense that the negligence of a fellow-servant jointly contributed with such negligence of the defendant to cause such injury, or that a fellow-servant of the plaintiff might, by the exercise of ordinary care or caution, have prevented the injury.

So, too, if the jury should find that any fellow-servant of plaintiff was guilty of negligence in using insufficient material for the scaffolding, or in putting up the scaffolding, such negligence of said fellow-servant would not defeat a recovery if the jury also find that the defendant, or the superior servant having charge of the construction of the scaffold, if you find there was such superior servant, were informed that the scaffolding was not safe; and that the defendant, or such superior servant, by the use of such care as an ordinary prudent man would have exercised under all the circumstances, could have prevented plaintiff from going upon the scaffold, or caused him to leave it before it fell.

If you should find the defendant not guilty of negligence under the rules of law, as I have given them to you, then your verdict will be for the defendant. But if you should find that the defendant, measured by such rules of law, was negligent, then it must be borne in mind, however, by the jury, as I have previously said, that all the foregoing rules of law, which I have given to you are to be taken in connection with another rule of law of great importance, viz.: That if you should also find that the plaintiff himself was guilty of contributory negligence, without which contributory negligence the accident would not have occurred, then the plaintiff is not entitled to recover.

The theory upon which the law proceeds in actions of negligence is, that although one is injured by the negligence of another, yet such injured person is not entitled to recover from that fact alone, unless he himself was free from such negligence as a man of ordinary prudence under all the circumstances would be free from.

Thus, when a master orders a servant to do something, and it is apparent to the servant that there is an immediate and threatened danger to such servant, if he undertakes to obey such order, and notwithstanding such danger, he nevertheless undertakes the work, he cannot recover for any injury which arises from such threatened danger. Because his duty and right is to refuse to obey the order, and if he fails to exercise this right, he is held in law to have waived his right to recover for such injuries.

Thus, to take an extreme illustration of what I mean: If, for instance, it is the duty of the servant to carry goods for his master from one room to another, and while the room in which the goods are stored is on fire, the servant with full knowledge of the fire, nevertheless simply continues without any orders to go into the room and bring goods out, he could not recover from the master because he happened to receive burns while so engaged; and in such a case the court would be warranted in instructing the jury as a matter of law, that such act upon the part of the servant was contributory negligence.

But, unless the court can say, as a matter of law, that the servant is guilty of contributory negligence, the question is one for the jury to determine under all the circumstances of the case; and if you find that in view of all such circumstances a reasonably prudent man would not, in Davies' place, have undertaken to make and go up on this scaffold and work thereon, then he is guilty of contributory negligence, and on the contrary if you find that a reasonably prudent man, situated as Davies was, would have gone upon such scaffold and worked thereon, then he is not guilty of contributory negligence. And in this connection, it is proper for the jury to consider the fact, if you find such to be the fact, that the plaintiff objected to constructing the scaffold from the material from which it was constructed, and that defendant assured plaintiff that such material was all right. And if you should find that any apprehensions plaintiff had were allayed by such assurances, and that an ordinarily prudent man would, under all the circumstances, have relied upon such assurances, then plaintiff would not be guilty of contributory negligence in the use of said materials. But if, on the contrary, you find that such assurances would not have been in the mind of an ordinarily prudent man, situated as Davies was, sufficient to induce him to rely upon them, then he would be guilty of contributory negligence in using such materials and working upon the scaffold.

Again, if the jury should find that although the plaintiff did not exercise what would be considered ordinary care in using the material for the scaffold, but that when he got on the scaffold he believed it to be safe, such negligence would not defeat a recovery, if you should further find that afterwards the defendant was informed that the scaffold was not safe, and that the defendant, in the exercise of ordinary care, could have prevented plaintiff from going on the scaffold, or caused him to leave it before it fell. And this would also be true although the defendant may have used due diligence in providing proper material for scaffolding, or, in the first instance, may have provided a sufficient scaffold.

The burden of proof is upon the plaintiff to establish by a fair preponderance of the testimony, the negligence of the defendant; while the burden of proof is upon the defendant to establish by a fair preponderance of the testimony, that the plaintiff is guilty of contributory negligence, unless the testimony, which the plaintiff himself has introduced, is such as raises a presumption of contributory negligence upon his part, in which event the burden is then upon the plaintiff to remove such presumption.

The expression, "the weight of the evidence" does not necessarily mean that one side has more witnesses than another. It simply means that if, after weighing the testimony of all the witnesses with reference to their credibility, exactness of memory and all the circumstances surrounding their testimony, the evidence of one side outweighs that of the other, then such side is said to have the weight of evidence.

"The jury are the sole judges of the weight of the testimony and the credibility of the witnesses. If one witness testifies directly opposite to another, the jury is not bound to regard the weight of the evidence as evenly balanced; the jury has a right to determine from the appearance of the witness on the stand, his manner of testifying, his apparent candor and fairness, his apparent intelligence or lack of intelligence, his relationship, business or otherwise to the party, his interest, if any, his temper, feeling or bias, if any, and from all other circumstances appearing on the trial, which witness is the more worthy of credit, and to give credit, accordingly; and of course if witnesses are otherwise equally credible, greater weight should be given to the testimony of those who swear affirmatively to a fact rather than to those who swear negatively, or to a want of knowledge or recollection."

So if a witness is an employee of either party, and the jury should believe that such witness has testified under fear of losing his employment, or a desire to avoid censure, or fear of offending, or a desire to please his employer, such fact may be taken into account in determining the degree of weight which ought to be given to the testimony of such witness.

"But men are not under suspicion or disability as witnesses simply because they are employees, and it will not do to assume that a man has disregarded his oath, and is unworthy of belief simply because he is an employee. It is for you to determine whether this relation has in any way embarrassed them or restrained them from telling the truth."

If you find that the defendant was not guilty of negligence, or if he was, that the plaintiff was guilty of contributory negligence, your verdict will be for the defendant.

If you find that the defendant was guilty of negligence and the plaintiff free from contributory negligence, you will find for the plaintiff and determine his damages, if any, that he has suffered; and in this connection it would be proper for you to consider the temporary or permanent character of the injury, loss of time and wages, and expenses necessarily incurred in his sickness.

(The jury returned a verdict for the plaintiff.)

James & Cook, for the plaintiff.

P. J. Cadwallader, for the defendants.

tion as I shall deem it necessary to refer to at present. There are other allegations as to what the council will do with the money raised from the sale of the bonds, but as the case has been tried, the question in the case is this only—Is the law constitutional? We must look to its provisions to determine what may be done thereunder. The answer admits the act, the resolution, the proclamation of the mayor, the election, and that Columbus Grove is the only village in Ohio to which the act can apply. That defendant is about to issue the bonds authorized and provided for by the act and in pursuance thereof. Denies that it proposes to give and donate said bonds or the proceeds thereof to any person or corporation in any unlawful way, but avers that it intends to devote said bonds and their proceeds to the purposes authorized by said act, and in accordance with the constitution and laws of Ohio, and not in violation thereof. So, by the pleadings and the admitted facts the question is whether the act in question is in violation of art. 8, sec. 6, or art. 13, sec. 1, or art. 2, sec. 26. I fully realize the importance of the questions raised in this case. I do not pass upon them until after the fullest possible examination and consideration in the limited time at my disposal. I must not forget that the presumption is always in favor of the validity of an act of the general assembly. The interference with the act by any court however high can never be permitted in a case involving doubt, farther than to construe and apply the law. For a stronger reason should a lower court like this be very sure before it declares a solemn legislative act beyond the powers of the body which enacted it, a violation of the constitution of the state. But on the contrary, if any court is called upon within its jurisdiction by a taxpayer or its humblest citizen, to protect his person or his property, from the enforcement of a law clearly unconstitutional, it is the sworn duty of that court to protect him or his property so far as it is within its power. By its title (and we may look to the title to determine the object of the words of the statute—41 Ohio St., 483), we find the act was intend to, "authorize" this "village to issue bonds for the purpose of aiding and encouraging manufacturing establishments to locate in said village." By sec. 1 we find, that the proceeds of the bonds to be issued thereunder, are to be "applied to the securing and encouraging manufactures in said village."

The act contains no further provisions of any kind for the use of the money to be raised by its authority. It is intended and proposed either to raise money to aid and encourage manufacturing establishments to locate in the village or to secure and encourage manufacturers in said village. If the act be constitutional, the village can at most only do one of these things, perhaps the latter. Any step outside would be a violation of the act itself. So to determine its constitutionality we cannot go outside of the act itself.

In any event the act does not permit anything further than the use of the money so raised to aid and encourage manufacturing establishments to locate in the village, or to secure and encourage manufactures in the village.

It applies only to manufacturing establishments, or manufactures, which probably means the same thing and nothing else.

And so—First—Is the act in violation of, or within the constitutional inhibition of art. 8, sec. 6 of that instrument? That section provides, "The general assembly shall never authorize any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association,

whatever, or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association."

The constitution of 1802 contained no such prohibition. When the constitutional convention of 1850-1 met, they were confronted with an alarming condition of affairs. For want of some check of this kind, counties, villages, and townships, had recklessly incurred debts, in aiding enterprises, by becoming stockholders in them, and otherwise. Enterprises that yielded no return, other than mandamus and injunction suits and tax-encumbered lands. To forever put a stop to this reckless exercise of the power of taxation, for the benefit of private enterprises, this section was adopted by the convention, and ratified by the people. The courts when called upon have jealously guarded its provisions, giving them full force and effect. What does it prohibit?

The granting of authority to any county, city, town or township, to—Become a stockholder in—Raise money for—Loan its credit to—Loan its credit in aid of—Or raise money in aid of, any corporation or association or joint stock company whatever. The courts have been called upon many times to pass upon the validity of laws in the light of this section.

The case relied upon by defendant to sustain the constitutionality of the act in question is that of *Walker v. Cincinnati*, reported in 21 Ohio St., page 14, et seq. I have read the case with care more than once. The reasoning is clear and the careful reader is not left in any doubt as to just what the court meant to decide in that case—What it intended to define as the law of that case. The question presented, was as to the constitutionality of what was known as the "ten million" law. That act authorized cities of the first class having a population exceeding 150,000 inhabitants to construct a line of railroad leading therefrom to any other terminus. It authorized the borrowing of, not to exceed ten million dollars and the issuing of the bonds of the city therefor. Under that law Cincinnati resolved to build a railway from Cincinnati to Chattanooga, Tenn. The people of the city voted in favor of the project, and the suit was instituted to determine the validity of the act. The court at the outset on page 40 say, "This is the first instance, in the history of the state, so far as we are aware, in which the general assembly has undertaken to authorize municipalities to embark in the construction of railroads on their own sole account as local improvements." It holds that this legislation is within the general scope of legislative power, unless specially prohibited. It holds further, that without this special prohibition the legislature might authorize subscriptions to the stock of railroad corporations, by counties, and cities, and villages, and townships. On page 54 of the decision, after quoting art. 8, sec. 6, the court (Scott, C. J.) says, "The mischief which this section interdicts is a business partnership between a municipality \* \* \* and individuals or private corporations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur liability or expense. They may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein."

But the court says, that while they cannot aid any other association, in construction of any work of public utility, yet that in the construction of a railroad, a public improvement for the benefit of all its people (and it holds that a railroad is such, and not a private enterprise), that a city

may be authorized to build on its sole credit, and for itself solely, to be controlled by itself entirely, a railroad, and that that act coming within this rule is constitutional. This is as far as the court goes in that case, and it is conceded that it went farther in that case than it ever has in any other, on this question under the present constitution.

It is clear that the court in that case, intended to restrict this right of cities and counties, even in building works for their own sole use, and to be managed solely by the municipalities building them, to public improvements.

The case of *C. W. & Z. R. R. v. Commissioners of Clinton County*, 1 Ohio St., 77, decided by Judge Ranney, and under a statute under the old constitution, as liberal as it was, plainly draws the line here. On page 95 Judge Ranney says, "The incorporation of private companies, for the construction of works of a public character, is one of the lawful means that may be employed," for such construction. "It is upon this principle, and this alone, that they have always been invested with the power to exercise the right of eminent domain." "If then the general assembly may lawfully embark the state in the construction of these works, especially if it may authorize private companies to construct them, and they still retain their public character, it would seem to follow, for a stronger reason, it might authorize the counties to construct those of a local character, having special relation to their business and interests," but, "it is only such works of a public character as the state itself might make, or authorize the counties to make, that can be aided by subscription to the stock of the corporation, nor does the citizen become a member of the corporation."

Listen to this: "Where the right of eminent domain stops, there the right to incur any obligation for the public stops."

As I have said, this decision was based on legislation under the constitution of 1802, which by the present constitution is expressly prohibited. Yet the reasoning is so clear, and the limitations of legislative power, even under that constitution, so plainly pointed out, that I have quoted from it freely, and would recommend its careful perusal.

In the case of *Taylor v. The Commissioners of Ross County*, 23 Ohio St., 76, this branch of the subject was fully discussed.

Commenting on the decision in the case of *Walker v. Cincinnati*, and in speaking of the "Ten Million" law, or that part of it which permitted a temporary lease of part of the road constructed, pending the construction of the balance the court say, "The constitution does not prohibit the employment of corporations, or individuals as agents to perform public services, and if it should be deemed wise and economical to authorize municipalities, who own water works or gas works, to lease them as a means of supplying public needs, we know of no constitutional impediment." "But," say the courts, "this is a different thing from investing public money in the enterprises of others, or from aiding them with money or credit." The court says further on page 83, "when public money or credit is furnished, to be used in part construction of a work, which, under the statute authorizing its construction, must be completed, if completed at all, by other parties out of their own means, who are to own or have the beneficial control and management of the work when completed, the public money, or credit thus used, can only be regarded within the meaning of the constitutional provision in question, as furnished for or in aid of such parties."

Thus even when used for public improvements.

Further. "The extent of such aid can make no difference. The mandate of the constitution is, that such aid shall never be authorized. Whatever is furnished must be exacted by taxation, and whether the amount be large or small, to recognize the authority under which it is sought to be imposed, would be to deny the protection guaranteed by the constitution to every taxpayer."

"Taxes can be levied only for public purposes." *Id.*, 83.

This case was followed and approved by that reported in 37 Ohio St., 80.

Now for the act in question. What are its provisions? What is its purpose? That is a hard question to answer. According to its title, it is an act authorizing the village to issue bonds for the purpose of aiding and encouraging manufacturing establishments to locate in said village. According to sec. 1, the proceeds of bonds issued under it are to be applied to the securing and encouraging of manufactures in said village. In either case the bonds of the village are to be issued and the plaintiff's property taxed to pay them. In either case the bonds are to raise money. That money is to be used, say, as provided in sec. 1, to the securing and encouraging of manufactures in said village. To make it available, some portion of it, and whether great or small, it makes no difference, must be used to aid manufactures. The defendant has proven (and its intentions do not alter the case; I refer to it as the most favorable view of the law,) that they proposed buying lands, and erecting buildings, for the use of manufactures. If the law authorized that in terms, it would be clearly unconstitutional, under all of these authorities, even if the use were for a public improvement. The law is indefinite and ambiguous, but the common sense of the school boy would tell him, that unless this money was to aid, loan, donate to, build for, buy for, or in some way assist these concerns, it would be folly to raise it and pay interest on it.

If the law authorized the raising of this money to aid a public improvement such as a railroad, it would be clearly void as shown by *Taylor v. Commissioners* and *Walker v. Cincinnati*, because the sole control and ownership is not to remain in the village. It is to donate or aid in some way, and the constitution says "No," to that. But a manufacturing establishment is private and not public.

No case can be shown in Ohio where a right to operate a manufacturing establishment by a city or village, or aid in the operation of one, has been upheld by the courts. The right of eminent domain has never been granted them nor can it be.

The act is clearly in violation of art. 8, sec. 6 of the constitution and void.

It is claimed further, that the act is in violation of art. 15, sec. 1, which provides that "the general assembly shall pass no special act conferring corporate powers," and art. 2, sec. 26, which provides "all laws of a general nature shall have a uniform operation throughout the state."

And, first.

I do not see why the legislature did not designate Columbus Grove in terms. That is the only village that ever did or ever can come within its provisions. That village was and is the only one having "at the last federal census" the population named. If it was an attempt to classify that sized villages it was a poor job. It cannot be done in that way. The statutes as they exist now—secs. 1546 to 1550—classify cities and villages, and under that classification Columbus Grove is a village of the

second class. There is no doubt but that laws passed relating to any of these classes, are general laws, and without the prohibition of sec. 26, art. 2, I have no doubt but that the same power might enact a law further classifying cities and villages, and that laws relating to such classes would be held to be general laws, within the meaning of the constitution.

But to do this they must be classified, and no single village picked out to which alone the act can ever apply. The population of classes may be limited, but not by any past census. The class must be so fixed that any city or village, when it arrives at that point, may become one of it. That this act is of a general nature is not questioned. That it does not have a uniform operation throughout the state is equally as clear. Whether this act be so local and special in its application as to come within the exceptions in *Attorney General v. Shearer*, 46 Ohio St., 275, or *Same v. Covington*, 29 Ohio St., 102, I do not care to examine, as I have not the time, and the case is disposed of on other grounds.

Does the act come within the inhibition of art. 13, sec. 1, of the constitution? That section reads, "The general assembly shall pass no special acts conferring corporate powers."

There is no distinction under this section, between private and municipal corporations. The inhibition extends as well to conferring additional powers on an existing corporation as to the creation of a new one. *The State v. Cincinnati*, 20 Ohio St., 18; 23 Ohio St., 445; 31 Ohio St., 607.

This act is a special act. It does confer additional corporate powers upon Columbus Grove—the power that it had not before, to issue its bonds, tax its people, to aid manufactures.

Vide *Brinkerhoff, C. J.*, 20 Ohio St., 36:

"I think the following positions impregnable:

- (1.) The general assembly cannot by a special act, create a corporation.
- (2.) It cannot by special act, confer additional powers upon corporations already existing.
- (3.) In the purview of these propositions, and of the constitutional provisions upon which they are based, there is no distinction between private and municipal corporations."

I believe that this act is in conflict with art. 13, sec. 1, of the constitution and is void.

The injunction will be made perpetual at the costs of defendant.

[Hamilton Common Pleas, 1892.]

**HANNAH A. DOCKTERMANN v. WILLIAM HENRY ELDER.**

1. A parol partition of real estate, if originally fair, is binding, when there has been long acquiescence and acts of confirmation on the part of the parties making the partition.
  2. A wife is dowable only in the portion assigned to her husband in the partition.
- SAYLER, J.

In the year 1851, Thomas J. Docktermann and William W. Docktermann were the owners in common of two acres of land adjoining the town of Harrison, bounded on the south by Harrison pike, on the north by Water street, and on the east by Hill street.



William and his wife Hannah Ann (now the widow and plaintiff herein), then lived on the part of said tract of land which, on the subdivision, became lot 6.

In February, 1851, Thomas and William agreed to subdivide the property; William to take the half lying on Harrison pike and Thomas to take the half lying on Water street. It does not appear that any further steps were taken in the matter until some time in March of that year, when Thomas came to William and represented to him that by a division of the land as agreed in February, he, William, would get the more valuable, or at all events the more available, portion, and then proposed that he, Thomas, should take the quarter lying on the corner of Harrison turnpike and Hill street; and the quarter on the opposite corner, being, as afterwards subdivided, lots 1, 2, 3, 7, 8 and 9, and that William should take the other two quarters, being lots 4, 5, 6, 10, 11 and 12, and as an inducement to William to consent to this proposition, offered to give him the unexpired term of a lease held on a house across the street from the property. It does not appear what, if any value, this leasehold had. They thereupon agreed upon this division, and on the — day of March, 1851, William W. Docktermann and Hannah A. Docktermann executed a deed to Thomas J. Docktermann for the said southwest and northeast quarters, being lots 1, 2, 3, 7, 8 and 9. No deed appears from Thomas to William for the other two quarters. The lease of the house was turned over to William.

I think it is clear from the evidence that Thomas then went into possession of lots 1, 2, 3, 7, 8 and 9, and that he and his grantees have had open possession of them ever since; and that William then went into possession of lots 4, 5, 6, 10, 11 and 12, and that he and his grantees have had open possession of them ever since.

Soon afterwards William and his wife moved into the leased house across the street, and remained there for a time, when they went to Iowa, but returned, and about 1864, they bought a house and moved it on lot 11 or 12, and moved into it. They continued to live in Harrison till the death of William in 1877, and the widow remained there till some four years ago. The plaintiff lived in Harrison while the improvements were being built on lots 1, 2 and 3, and knew of their erection; they were built during the life of William. But she did not know of any building being on lots 7 and 8 till about a year ago. She knew there was a house, but did not know it was on the Docktermann lands. On October 3, 1870, William W. and his wife sold a lot, 61 feet on Hill street, lying 25 feet south of Water street (being parts of lots 10, 11 and 12), for \$550. On January 2, 1856, they sold 40 feet on Hill street, being parts of lots 10, 11 and 12 for \$200. On March 6, 1854, they sold 42 feet on Hill street, being parts of lots 10, 11 and 12, for \$200. On July 10, 1854, they sold lot 6, for \$350. On August 30, 1864, they sold 25 feet on Hill street, being parts of lots 10, 11 and 12, for \$110. The plaintiff says they sold lots 4 and 5 to Mr. Bartlet. In the deeds of October 3, 1870; January 2, 1856; March 6, 1854; August 30, 1864, the wife joins in the granting, warranty and testatum clauses releasing dower. In the deed of July 18, 1854, the wife joins in the testatum clause releasing dower. The deed of August 30, 1864, was made while William was in the war, and is executed on his part by an attorney in fact. On this sale the wife received the purchase money, \$110.

On March 7, 1863, Thomas J. Docktermann and his wife conveyed lots 1, 2, 7, 8 and 9, to one James Campbell, by a warranty deed. On

February 4, 1854, they conveyed lot 3 to one Morgan by a warranty deed.

The title of lots 1, 2 and 3 is now in William Henry Elder, and the title of lot 9 and two and one-half feet off the west side of lot 8 is in W. H. Biddinger, and the title of lots 7 and 8 less two and one-half feet off of the west side of lot 8 is in Elizabeth Williams.

The improvements on lots 1, 2 and 3, consist of a church, pastor's residence, school house, with a stone wall on the west and south lines; all built between 1867 and 1877. There is a four room frame house on lots 7 and 8 built four years ago. There is a two story frame house on lot 9 built two years ago.

The plaintiff married William W. Docktermann in 1850, and William was seized of the undivided one-half of the two acre tract during their marriage. At the time the plaintiff, Hannah A. Docktermann, signed the deed to Thomas in 1851, she was under eighteen years of age.

The plaintiff, Hannah A. Docktermann, claims that as she was a minor when she executed the deed to Thomas, her act in executing it did not release her right of dower in the lands conveyed by it, and she brings these suits to enforce her right to dower in the said premises. 10 Ohio, 127.

I think it clear that a partition of the premises was made by Thomas and William in 1851. In February they agreed to divide it in a particular way. It does not appear that either party acted on this agreement. Thereupon in March, they agreed that the respective parties should take portions of the property other than agreed upon in February, and thereupon they respectively entered into possession of the tracts as then agreed upon; William having executed the deed to Thomas. It would seem from the evidence, that had the division been carried out as proposed in February, William would have received the more valuable portion of the property, and that by the division under the agreement of March each party got a fair share of the property. It seems to me, therefore, that the transfer of the unexpired lease on the house was not for the purpose of equalizing the share William received with the share Thomas received; but Thomas felt bound by his agreement of February, and offered the lease to induce William to forego the advantage of that agreement, and to agree to a more equitable division.

I do not think the agreement of February could be sustained as a partition; it does not appear that possession was taken under it, and even if possession was taken it was held only till March of the same year, when the parties made the new agreement, entered into possession, and they and their grantees have been in possession since.

If Thomas had executed a deed to William for the share set off to William, at the same time William executed the deed to him, I think there could be no question as to the fact of partition. Such deed, however, does not appear. In place of taking title by deed, William then went into possession of the portion assigned to him, and he and his assigns having remained in possession more than twenty-one years, title has passed the same as though a deed had been then made.

In the case of *Woodhill v. Longstreet*, 3 Harrison (N. J.), 405, 18 N. J. Law, 405, the court contending that a parol partition is not binding, and after reviewing the authorities, says, on page 411: "If in this case, the court intend to say that a parol partition followed by twenty years possession, in conformity with it, will be sufficient, I shall not differ from them."

In the case of Piatt et al. v. Hubbell et al., 5 Ohio, 243, the court say at page 244: "It is evident the partition was in fact made between the parties in 1814, which at that time was equal; and that all the adult parties took possession of their respective shares, and ever since held them in severalty, built upon and improved them on the faith of its validity. This court, in chancery, would not disturb a parol partition, originally fair, in which there had been so long acquiescence, and such acts of confirmation."

The case Lloyd v. Conover, 1 Dutcher, 47, is to the effect that a parol partition, accompanied by an occupation of five or six years is not binding, while the case of Cummins v. Nutt, Wright R., 713, is to the effect that a parol partition accompanied with nine years possession, when division fences have been made, is binding.

I think these cases establish the doctrine that when a partition has been made, if originally fair, it is binding when there has been long acquiescence and acts of confirmation on the part of the parties making the partition, even though the partition be made by parol. I am of the opinion that the partition, partly by deed and partly by parol, made under the agreement of March, 1851, accompanied with possession of Thomas and William, and their grantees of the respective portions ever since, was a valid partition. If it was valid, then it had the same legal effect as though made by a proceeding in court, or by mutual deeds of release, and one of the effects was to bar the dower of the widow of William in the property set off to Thomas. 6 Ohio St., 547; 13 Mass., 504.

The petitions will be dismissed at costs of the plaintiff.

Von Seggern, Phares & Dewald, for the plaintiff.

Stephens, Lincoln & Smith, Swing & Morse, and George B. Goodhart, for defendants.

## FIRE LIMITS—ORDINANCE.

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[Franklin Common Pleas, March 1, 1892.]

WILLIAM C. REYNOLDS V. JOHN T. HARRIS.

1. An ordinance of a city establishing a fire limit within a comparatively small portion of its territory under the provisions of sec. 9 of the act of February 28, 1888 (85 Ohio L., 37), is an ordinance of a general nature, and under the provisions of sec. 1695, Rev. Stat., does not take effect until ten days after its first publication.
2. An inspector of buildings, appointed under the provisions of said act, having issued a building permit after the passage of an ordinance establishing a fire limit, but prior to its publication, cannot under sec. 6 of said act revoke such permit upon the ground that the building covered thereby is within such fire limit, and a court of equity will not issue a restraining order preventing the holder of such permit from completing such building, it having been substantially erected before said ordinance became operative.

Application by the city of Columbus on its answer and cross-petition for a temporary restraining order preventing the plaintiff from proceeding with the erection of a building.

EVANS, J.

On the twenty-sixth day of February, 1892, the plaintiff filed his petition in this court and procured a temporary restraining order, restraining the defendant John T. Harris, inspector of buildings of the city of Columbus, from interfering with plaintiff and his superintendent and

workmen in the erection of the building hereinafter mentioned. On the next day the city of Columbus, on its own motion, was made a party defendant to the action, filed its answer and cross-petition, and on February 29th, applied for a temporary restraining order against the plaintiff, restraining him from proceeding with the erection of said building. The city's application was resisted by the plaintiff, and the questions involved were fully argued by council. The plaintiff's petition alleges, that he is the owner of certain real property in this city, describing it by lot numbers, that the city of Columbus is a municipal corporation of the first grade of the second class, and that the defendant Harris is the duly appointed, qualified and acting inspector of buildings of said city. The petition then proceeds as follows: "That on the fifteenth day of February, 1892, plaintiff being desirous of erecting a building within the limits of said city on his said premises, duly made application at the office of said inspector for a permit for that purpose, and duly furnished said inspector with a written statement of the location and intended use of the proposed building, together with the plans and specifications of the same, which he delivered to said inspector. That thereupon, and on the sixteenth day of February, 1892, said inspector, the defendant John T. Harris, duly gave the plaintiff the said permit he asked for, and demanded and received, from the plaintiff therefor the fees prescribed by law, to wit, five and 95-100 dollars. That said permit is in the words and figures following, to wit:

City Civil Engineer's Office, Columbus, O., Feb. 16, 1892.

No. 4.

Permission is hereby granted to William C. Reynolds to erect a three-story frame factory building situated on lot 1 and 2, Joseph Ridgway's addition on north side Broad, east of Frank street, said building to be completed by the first day of April, 1892.

J. T. Harris, Inspector of Buildings.

That thereupon, and on the sixteenth day of February, 1892, plaintiff proceeded under the authority of said permit, and in compliance with the terms thereof, and upon the faith thereof, to erect said building for which said permit had been so issued upon said premises, and ever since (until the interference hereinafter mentioned) has been, actively engaged in and about erecting the same, and has since said permit was issued expended a large amount of money for the material for said building, and has employed a large force of mechanics at work on the same, and said building is now nearly finished. That the plaintiff has expended some \$1,500 for said labor and material. That the defendant John T. Harris, on the twenty-sixth day of February, 1892, served on plaintiff's superintendent in charge of said building a pretended revocation of said permit, and unlawfully ordered said superintendent and the mechanics at work on said building to cease all work on said building, and compelled said superintendent and mechanics to cease all work on the same. That the defendant is unlawfully interfering with plaintiff's enjoyment of his property in the said building, and unlawfully threatens to continue his said unlawful interference with plaintiff and his said workmen, and is unlawfully hindering, delaying and preventing plaintiff from completing his said building. That the defendant unlawfully threatens to cancel said permit, and will, unless restrained by this court, unlawfully cancel the same, and threatens to subject plaintiff and his ser-

vants to the pains and penalties provided by law for erecting and working on a building in said city for which no permit has been issued by said inspector. That said permit was duly and lawfully issued to plaintiff by said inspector, and plaintiff upon the faith thereof, and without any violation on his part of the terms of said permit, or of the law relating to the erection of buildings in said city, or any other law, has expended a large amount of money, towit, \$1,500 for material for, and labor on, said building, and that he has rented said building to be occupied by the tenant by March 1st next.

That if defendant's said interference with plaintiff and his workmen, and his threats to continue to hinder, delay and prevent plaintiff from completing said building are carried out, plaintiff will not be able to proceed to complete said building, the money expended by plaintiff for the material and labor on said building will be wholly lost to plaintiff, the rents and profits to accrue to plaintiff from the lease of said building will be irreparably lost to plaintiff, and plaintiff will be illegally deprived of his lawful enjoyment of his property in said building and premises, and will be irreparably injured and suffer irreparable damages for which he has, and will have, no adequate remedy at law. That the defendant, unless restrained by this court, is about to and will unlawfully interfere with plaintiff and his workmen in the completion of said building, and will impair and destroy plaintiff's said property in said building, and will unlawfully cancel said permit and subject plaintiff to irreparable loss and damage thereby.

Wherefore, plaintiff prays that the defendant may be temporarily restrained, and on final hearing perpetually enjoined, from interfering with plaintiff and his agents and workmen and servants in the completion of said building, and from doing any act impairing plaintiff's rights under said permit, or his enjoyment of his said property in said building, and from cancelling said permit, and for such other, further or different relief in the premises as may be meet and proper and for costs." The petition is sworn to absolutely. On this petition, as I have said the plaintiff procured a temporary restraining order as prayed for. This application now arises on the cross-petition of the city of Columbus, made a party defendant herein on its own motion, and the question is, shall the city have a temporary injunction against the plaintiff. The cross-petition is as follows: "Now comes the city of Columbus, having heretofore been made a party hereto, and

"1. By way of answer that it admits that the plaintiff was and is the owner of the premises described in the petition; that it is and was, during the times mentioned in the petition, a city of the first grade of the second class; that the defendant John T. Harris is, and was during the times mentioned in the petition, the duly appointed, qualified and acting inspector of buildings of said city of Columbus. That said city further admits that the said Harris, as such inspector of buildings, duly granted and issued to the plaintiff a permit to the plaintiff to erect, upon the said premises, a three-story frame factory building. And this defendant, for want of knowledge or information with respect to the allegations of the petition not hereinbefore admitted, denies each and every thereof.

2. By way of cross-petition the said defendant, the city of Columbus, says that on February 15, 1892, the city council of said city duly passed an ordinance of which the following is a copy towit: An ordinance No. 6787. To establish fire limit No. 2 in the city of Columbus, Ohio.

Section 1. Be it ordained by the council of the city of Columbus, Ohio. That there be and there is hereby established a fire limit within said city to be known as fire limit No. 2, the boundaries of which are hereby established as follows: Said boundaries shall begin with the intersection of west Broad street and the Scioto river: thence northwestwardly along the west bank of said river to public landing place; thence southwestwardly to Mitchell street; thence south to Brad street; thence east to the place of beginning.

Sec. 2. This ordinance shall take effect from and after its passage and publication according to law.

Passed February 15, 1892.

C. O. Hunter, President of the City Council.

Attest: John M. Doane, City Clerk.

That said ordinance was duly published according to law and is in full force and effect.

That the premises described in the petition are within the boundaries of Fire Limit No. 2, as established in and by said ordinance.

This defendant further says that on February 25, 1892, the defendant John T. Harris, inspector of buildings aforesaid, duly revoked the permit referred to and set forth in the petition.

That the plaintiff, notwithstanding such revocation and in violation of law, is proceeding with a large force of men and with great rapidity and dispatch, to erect, upon said premises and within the boundaries of said Fire Limit No. 2, a three-story frame building not enclosed with walls constructed of brick, stone or other hard incombustible substances, nor does the foundation thereof rest upon solid ground, concrete or other solid and sufficient substructure, as required by law.

This defendant further says that the character of the building which the plaintiff is proceeding to erect is not only such as the law prohibits, as hereinbefore set forth, but the same is being constructed of highly inflammable material without any precautions whatever against fire, and, owing to its situation with respect to adjacent and contiguous buildings, is a menace to such buildings by reason of their liability to destruction from fire. That one of such buildings contains the machinery and a large part of the plant of The Columbus Electric Light and Power Company, which company is now under contract with the said city of Columbus, and is engaged in the performance of such contract, to light its streets and public places. That the destruction of said plant by fire from said building, now building, by said plaintiff, would plunge the city into darkness for a long period of time to the great inconvenience and injury of the citizens thereof.

This defendant says that the said plaintiff will, unless restrained by the order of this court, proceed to construct said building in contravention of law as aforesaid to its great and irreparable injury.

Wherefore the said defendant the city of Columbus, asks that the court allow an order restraining the plaintiff from proceeding with the construction of said building, such restraining order to operate during the pendency of this action or until the further order of the court in that behalf; and that upon the final hearing such injunction may be made perpetual, and for any and all such relief as may be found by the court to be equitable and just." The cross-petition is sworn to absolutely. In the 85th volume of Ohio L., beginning on page 34, is the act of February 28th, regulating the construction of buildings in Cincinnati. By a sub-

sequent act (87 Ohio L., 157, sec. 39), the provisions of the act, so far as they are applicable, are extended to the city of Columbus. Sec. 59 of the act of February 28, 1887, provides: "That it shall be unlawful for any one either as owner, agent, architect, contractor, superintendent or employec, to proceed in the work of placing materials upon or furnishing any labor in the construction of a new building or structure, or the alteration of an old building, in any city of the first class of the first grade, without first obtaining a permit therefor, and without conforming to all the requirements of this act." Sec. 9 provides, "the said city may, by ordinance, establish or extend fire limits; and if said city shall have squares blocked for fire protection, the same shall be considered to mean 'fire limits' under this act." Sec. 10 provides, "All buildings hereafter erected within the 'fire limits' of said city shall be enclosed with walls constructed of brick, stone, or any other hard incombustible substances and the foundation shall rest upon solid ground, concrete, or other solid and sufficient substructure."

It seems that under this scheme of legislation, it is sufficient for the cities to which it applies to pass the ordinance prescribing fire limits, and that the provisions of sec. 10 of said act, immediately upon the ordinance taking effect, go into operation.

Sec. 6 of the act provides: "Every permit issued by the inspector shall be subject to revocation should the inspector become convinced that the work done under said permit is proceeding in violation of law. Revocation of a permit shall be in writing, and shall be served on the owner, superintendent or contractor in charge of the work, or posted on the property; and from and after such revocation of permit, all contractors performing any work in or about said structure, buildings or premises shall be guilty of misdemeanor within the terms of this act, and subject to fine or imprisonment as herein provided."

The first question I meet here is whether the building is erected in violation of this act. Independent of the statute it must be conceded that the right to construct this building exists. A man may construct on his lot a building such as is described in these pleadings unless there is some statute or ordinance prohibiting it. The fact that it may create some danger to other buildings by the spreading of fire does not deprive the owner of the property of the right to construct the building.

It appears that the city may appoint an inspector of buildings, and that he may issue a permit to a person to erect a building. That has been done in this case. There is nothing here to show that the application was improper. The permit was issued by the inspector on the sixteenth of February, and the plaintiff began to erect his building. On the fifteenth the ordinance establishing the fire limit set forth in the cross-petition was passed by the city council. By its terms it provided that it should take effect from and after its passage and publication according to law. Section 1695 of the Rev. Stat., that is so much of it as relates to the case here, provides. "Ordinances of a general nature shall be published in some newspaper of general circulation in the corporation, if a daily twice, and if a weekly once, before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice."

Section 1698 provides: "It shall be deemed a sufficient defense to any suit or prosecution under an ordinance, to show that no such publication or posting as herein required, was made."

\$1,500 or more in its erection. What he had done was before this ordinance went into operation, there being no ordinance before the twenty-eighth of February. It had no effect whatever prior to the twenty-eighth. The plaintiff's application was made and the injunction allowed thereon on the twenty-sixth. The building was almost completed according to his pleading.

Now, I do not overlook the fact that this averment was denied in the cross-petition, but when it comes to considering the effect to be given to the averments in the petition and the denials in the cross-petition, it must be remembered that the denials are made for the reason that the city has no knowledge or information upon the subject whether the matters in the petition are true or not, and it therefore denies them. This form of denial affects the weight of the evidence when we come to consider the two pleadings as affidavits, both being positively sworn to. The facts set forth within the knowledge of the person swearing to them, it seems to me, are entitled to more weight when we come to consider whether the facts set forth in the petition appear here or not. The petition answers the purpose of a pleading and also answers that of an affidavit. Where the plaintiff sets forth the fact that the building was nearly completed, and that fact is simply denied by the city for the reason that it has no knowledge in regard to it, and for that reason denies it, such denial is not entitled to any weight as an affidavit in reference to proof of the fact.

The facts set up in the petition show that the plaintiff has almost completed his building, and that he has expended the sum of \$1,500 in doing so, and has done all this under a permit admitted to have been duly issued. These facts materially affect the situation, and the inspector having undertaken, on the twenty-fifth of February, and prior to the ordinance taking effect, to revoke this permit, the question is squarely presented whether he had the right to revoke it. He may have been convinced that this work was proceeding in violation of law, and may have revoked it for that reason. I assume that he acted in good faith, and that he revoked it upon the ground stated in the statute. He was convinced the work was being proceeded with in violation of law, but his being convinced of that matter does not impair the right of the plaintiff in a court of equity or a court of law. It was a valid and good permit under the law prior to the twenty-eighth of February at least. I suppose the inspector came to his conclusion upon a misapprehension of the law. Whether he supposed the revocation was valid or not, it could not affect plaintiff's right to the property, and its enjoyment by its preservation and use.

Now the question is whether the city can obtain an injunction after the plaintiff had gone on and expended \$1,500 in order to get his building up, spent that amount of money to get his building almost completed. Can he be enjoined from completing it? In other words, can this court now, by its injunctive process, interfere with his right of property, the right to enjoy the property he lawfully erected? The claim that this court could do so, springs, as far as I am advised, from sec. 10 of this statute: "All buildings hereafter erected within the 'fire limits' of said city shall be enclosed with walls constructed of brick, stone or other hard incombustible substances, and the foundation shall rest upon solid ground, concrete, or other solid and sufficient substructure." That is the kind of building required. Here is the remedy; sec. 7: "That any person, firm or corporation, either as owner, contractor or architect,



or any agent, trustee, director, officer or employee of any person, firm or corporation, who violates or authorizes a violation of any provision of this act, shall be guilty of a misdemeanor, and be subject to a fine not exceeding the sum of one thousand dollars, or an imprisonment not exceeding three months, or both in the discretion of the court or judge imposing the same."

Now, Mr. Reynolds, the plaintiff, had done nothing down to the twenty-eighth in violation of this act or any other act. The city has no right to interfere with what has been legally done. If this statute provides otherwise it is unconstitutional. Private property cannot be violated under the terms of the constitution. The legislature has no more power than I have to deprive a person of his property without due process of law. It is inhibited from doing so both by the federal and state constitutions. The doctrine is settled, that a person may construct a wooden building, and no injunction will lie for doing so, although such erection is prohibited by ordinance, unless the erection is shown to be a nuisance per se. The remedy the courts say must be found in the penalty imposed in the statute. *Village of St. John v. McFarlan*, 20 Am. R., 671, s. c., 33 Mich., 72; *Waupun v. Moore*, 17 Am. R., 446; s. c., 34 Wis., 450.

Equity never lends its aid to enforce a forfeiture. I think this court has no right to interfere with what has been lawfully done by the plaintiff. It cannot interfere with his building.

There is but one other question that suggests itself. The plaintiff having proceeded thus far by authority of law to construct the building, and nearly completed it, and made this large expenditure of money, it seems to me that a court of equity ought not to restrain him from completing it. There is nothing in this law against a man completing a building that is lawfully nearly completed. The provision is, "All buildings hereafter erected within the fire limits." "Hereafter" relates to the time after the twenty-eighth of February when the ordinance became operative. This building was not erected after the ordinance took effect, and therefore does not fall within the provisions of this statute, which were set in operation by the ordinance.

It is true that in the next to the last section of the statute it is said that a court of equity may, on the application of the inspector, in a suit brought in the name of the city, issue an injunction to enforce the provisions of the statute, but in the case at bar the building was not erected or altered in violation of the provisions of this act, because it was erected before the ordinance of February 15th went into effect.

The conclusion reached is that the city is not entitled to an injunction, and its application for that relief is denied.

C. P. L. Butler, for the plaintiff.

Paul Jones, City Solicitor, Florizel Smith, Assistant City Solicitor, and George B. Okey, for the city.

## JURISDICTION.

[Toledo Police Court, 1892.]

## STATE OF OHIO V. GEORGE N. LYSIGHT.

1. Exclusive jurisdiction is the necessary attendant upon exclusive legislation. The constitution of the United States declares that congress shall have the power to exercise "exclusive legislation" in all "cases whatsoever," over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. When therefore, a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased, by the very terms of the constitution, *ipso facto*, falls within the exclusive legislation of congress, and the state jurisdiction is completely ousted.
2. By virtue of the provisions of sec. 5391 of the Rev. Stat. of the United States, if any offense be committed in any place which has been or may hereafter be ceded to, and under the jurisdiction of the United States, which offense is not prohibited, nor the punishment thereof is not especially provided for, by any law of the United States, such offense shall be liable to and receive the same punishment as the laws of the state in which the place is situated, now in force, provide for the like offense when committed within the jurisdiction of such state. And congress by direct reference to the state law in force when this section was passed, adopted the state law and made it a part of the acts of congress, the same as though it had been specifically enacted in the form of a statute by that body.

SALA, J.

The defendant, George N. Lysight, was arrested on the eighteenth day of February on a warrant issued from the police court of the city of Toledo, on the aforesaid date, and was tried upon an information drawn under sec. 6823 of the Rev. Stat. of Ohio, charging the defendant with an assault and battery upon one Jacob E. Hime, charged to have been committed within the city of Toledo, county of Lucas and state of Ohio, on the seventeenth day of February, 1882.

To the said information the defendant plead not guilty. Upon the trial of the case the state offered testimony tending to show the commission of the offense, and the evidence introduced established the fact that the offense was committed in the custom house located at the intersection of Madison and St. Clair streets in the city of Toledo; that the defendant admitted the corpus delicti of the offense, and as a matter of defense interposed the objection that the court had no jurisdiction to try the accused, for the reason that said offense was committed upon the property belonging to the United States government, and in support of said defense introduced evidence to establish that fact, making a motion in court to discharge the defendant for the reasons above stated.

The principal question raised by the motion to discharge the accused, raises the question of the jurisdiction of this court as to the right to inquire of offenses committed on government property.

We must first make inquiry as to whether or not the legislature of the state has by any act ceded jurisdiction to the United States over any property purchased or to be purchased for government purposes in the city of Toledo.

We find that the legislature of Ohio, on April 29, 1854, passed a resolution directing and commanding the representatives and senators in Washington to pass legislation to provide for custom houses at Toledo, Cleveland and Sandusky City. In accordance with that resolution addressed to the senators and representatives as aforesaid, congress passed

appropriate legislation to establish a custom house in the city of Toledo. The legislature of Ohio, on February 20, 1856, passed an act ceding to the United States of America jurisdiction over certain lands and appurtenances in the cities of Cincinnati, Toledo, Sandusky and Cleveland, Ohio, and exempting the same from taxation, which reads as follows:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that jurisdiction of the lands and their appurtenances that have been or may be purchased in said cities for the erection of the aforesaid buildings be, and is hereby ceded to the United States of America; provided, however, that all civil and criminal process issued under the authority of said state, or any officer thereof, may be executed on said lands, and in the buildings that may be erected thereon in the same way and manner as if jurisdiction had not been ceded as aforesaid; provided, also, that the quantity of land purchased, or to be purchased for the purpose aforesaid, shall not exceed one acre in each of the cities aforesaid."

"Sec. 2. That the lands above described, with their appurtenances, and all buildings and other property that may be thereon, shall forever hereafter be exempted from all state, county, and municipal taxation and assessment whatever, so long as the same shall remain the property of the said United States of America." (Vol. 53 Ohio Laws, p. 14.)

It is conceded by both parties in this case that the United States government purchased by a warranty deed lots 152 and 153 of Port Lawrence Division of the city of Toledo, Lucas county, Ohio, on the twentieth day of February, 1855, and that the government of the United States, after the purchase of property, erected thereon a custom house, used for the purposes of the United States government; that about the year 1880 the government desiring to build a larger and more commodious building, the legislature of the state of Ohio on April 9, 1880, passed an act to cede jurisdiction to the United States of certain lands in the city of Toledo, which is as follows:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that jurisdiction of the land and the appurtenances thereto which may be purchased in the city of Toledo for the erection of a public building for the use aforesaid, be and is hereby ceded to the United States of America; provided, however, that all civil and criminal process issued under the authority of said state, or any officer thereof, may be executed on said land, and in said building that may be erected thereon, in the same manner as if jurisdiction had not been ceded as aforesaid.

"Sec. 2. That the land above described, with the appurtenances and all buildings to be erected, and other property that may be thereon, shall hereafter be exempted from all state and county and municipal taxation and assessment whatever, so long as the same shall remain the property of the United States of America." (Vol. 77 Ohio Laws, p. 139.)

After the said act was passed, the government, on the fourteenth day of February, 1881, by warranty deed, purchased one-third of lot 151 of Port Lawrence Division of the city of Toledo; that on the fifteenth of January, 1881, the government purchased two-thirds of lot 151 of Port Lawrence Division, by warranty deed duly executed, and that the deeds of 1855 and 1881 reserved no right as to jurisdiction in the state; that after said act of 1880 was passed, and the purchase of said property took place, the government of the United States removed the old custom house and built on the site as conveyed in the deeds aforesaid, the government building known as the Toledo Custom House.

After an examination of the legislative enactments ceding jurisdiction to the United States over the property purchased or to be purchased by it, and finding that the government had by grant, under the acts of the legislature as aforesaid, acquired the property on which the government building now stands, we are led to consider the question as to what extent, and how far reaching, the jurisdiction so conferred extends.

Article 1, sec. 8, para. 17, of the constitution of the United States provides: "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, dockyards, and other needful buildings."

Under the article in question, has the state the right to cede the jurisdiction over any property within its limits to the government for government purposes, and has the government the right to accept the same? The question itself is settled beyond controversy by the language of the section itself, and needs no further argument.

The next question presented is, what jurisdiction does the state cede to the national government, and how far does the same extend as to depriving the state of jurisdiction over the same territory?

In the case of *Commonwealth v. Ethan A. Cleary*, 8 Mass., 72, the defendant was indicted in the court of common pleas for selling spirituous liquors within the town of Springfield, in the county of Hampshire, against the form of the statute of the state. Within the city of Springfield, the United States government owned property, on which were erected arsenals and other needful buildings for the manufacture of arms. The defendant was employed as an overseer in said armory, and while so engaged sold, with the consent of the superintendent of the same, spirituous liquors to different persons residing upon the grounds of the government; that he was indicted under a state law, in the nature of police regulations, and the question was reserved to the Supreme Court as to whether or not the defendant must be tried by the state or by the United States. The legislature of Massachusetts, had passed a similar statute ceding jurisdiction to the government over the territory purchased, with the condition, as in our own, that civil and criminal process might be served therein by the officers of the commonwealth.

The chief justice in delivering the opinion of the court, says: "On the facts agreed in this case, we are of the opinion that the territory on which the offense charged is agreed to have been committed, is the territory of the United States over which the congress have the exclusive power of legislation. \* \* \* No offenses committed within that territory are committed against the laws of this commonwealth, nor can such offenses be punishable by the courts of the commonwealth, unless the congress of the United States shall give to said court jurisdiction thereof. As a consequence of these positions, it is the opinion of the court that they have no cognizance of the offenses charged in this indictment, and that the defendant must be discharged."

Therefore, it is held, that territory ceded to the United States, and jurisdiction conferred upon the same by the state governments, carries with it the power of exclusive legislation under art. 1, sec. 8, of the constitution, and which means exclusive jurisdiction.

We next inquire as to what effect the condition contained in the act of cession has upon the jurisdiction conferred upon the national government as to the right to serve civil or criminal process within the territory so ceded for acts committed within the jurisdiction of the state out of the ceded territory.

It is argued by counsel for the state, that by reason of the state making that condition, as to the serving of civil or criminal process, that exclusive jurisdiction was not conferred, nor intended to be conferred upon the government, for acts committed by citizens of the state upon the government property, for the reason that the serving of civil or criminal process was an act of carrying out the jurisdiction of the state for the violation of the laws of the state by citizens thereof. To this argument we cannot assent, for the reason that when the state ceded jurisdiction, and the government purchased the property over which the state ceded jurisdiction, it became an independent sovereignty under the laws of the United States, and completely severed from the jurisdiction of the state in which it is situated; that the right to serve civil or criminal process is a means reserved to the state as a matter of convenience, so that the state authorities would not be compelled to make demand upon the United States government for the apprehension of criminals who committed acts within the jurisdiction of the state, and who fled to such property to avoid arrest by the state officials. For, without that provision, the governor of the state of Ohio would have to procure a requisition upon the president of the United States in the same manner as upon the governor of sister states, before a criminal could be apprehended and brought to justice.

This provision, and the act of our legislature is the same as in the act of the legislature of Massachusetts, ceding property to the government, in the city of Springfield, which the Supreme Court has construed in the case of *Commonwealth v. Clary*, above cited. The court say: "The assent of the commonwealth to the purchase of this territory by the United States had this condition enacted to it, that civil and criminal process might be served therein by the officers of the commonwealth. The condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals, and from the subsequent assent of the United States to the said condition, evidenced by their making the purchase, it results that the officers of the commonwealth, when executing such process, act under the authority of the United States."

In the case of the *United States v. Bevans*, 3 Wheaton, 232, William Bevans was indicted for murder, in the circuit court for the district of Massachusetts. The defendant was in the navy service of the United States, and committed the murder of a fellow-shipmate upon the United States ship of war "Independence," then lying at anchor in the Boston harbor. The question came up as to the right of jurisdiction between the state and the government, and Chief Justice Marshall, delivering the opinion for the court, says, in discussing the question of the jurisdiction of the state: "What, then, is the extent of the jurisdiction which a state possesses? We answer without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power. The place described is unquestionably within the original territory of Massachusetts. It is then within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States. \* \* To bring the offense within the jurisdiction of the courts of the Union,

ple as announced in the case of the Commonwealth v. Cleary, 8 Mass., 77, is sustained. The opinion of the court is delivered by Chief Justice Spencer, and on page 232 he says:

"In the case of the United States v. Bevans, 3 Wheaton, 388, Chief Justice Marshall said, 'the power of exclusive legislation under the 8th section of the first article of the constitution, which is jurisdiction, is united with cession of territory, which is to be the free act of the states.' The correctness of this remark is fully admitted; and if the United States had the right of exclusive legislation over the fortress of Niagara, they would have also exclusive jurisdiction; but we are of opinion, that the right of exclusive legislation within the territorial limits of any state, can be acquired by the United States only in the mode pointed out in the constitution, by purchase, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. The essence of that provision is, that the state shall freely cede the particular place to the United States, for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously, or by disseisin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state, when such occupancy is for the purpose of protection."

In the Ohio State Reports, in the case of Sinks v. Reese, 19 Ohio St., 306, the question arose in a contested election case, where the inmates of the Soldiers' Home at Dayton voted in a county election for county clerk. In the contest the question was plainly brought before the court as to the jurisdiction of the state of Ohio over said institution. In 1867, April 13, (Ohio Laws, 149), the legislature consented to the purchase, and ceded jurisdiction, of the lands and appurtenances which may be acquired, by donation or purchase, by the general government for a national asylum for disabled volunteer soldiers in the state of Ohio, and also said act provides for the right of serving civil and criminal process issued under authority of the state of Ohio, and that the same may be executed on said lands in said buildings in the same manner as if no jurisdiction had been ceded. The act further provided that nothing in the act shall be construed to prevent the officers, employees and inmates of said asylum who are qualified voters of the state, from exercising the right of suffrage in all county, township and state elections, in the township in which the said national asylum shall be located.

Chief Justice Brinkerhoff, in delivering the opinion of the court, says: "That congress had the right, under the constitution of the United States, and with the consent of the legislature of this state, to establish such an institution, we think there can be no reasonable question. \* \* \* The legislature of this state has consented to the establishment of this asylum (64 Ohio Laws, 149). \* \* \* This act of the legislature consenting to the establishment of the asylum within her borders, and ceding jurisdiction of the lands and appurtenances of the asylum to the United States, under the operation of the clauses of the eighth section of the first article of the constitution of the United States above referred to, fixes exclusive jurisdiction of the general government over this institution, its lands and its inmates, in all cases whatsoever, except as to the execution of process issued under state authority. \* \* \* This leads us to consider what is the legal status of persons who become residents upon the grounds, and within the limits of the institution thus within the exclusive jurisdiction of the United States; and how does it affect their claim to the elective franchise in Ohio, under its constitution

and laws? In passing on these questions, there is little need of speculative reasoning; for they have been in effect settled by repeated decision of courts of high and conclusive authority. By becoming a resident inmate of the asylum, a person, though up to that time he may have been a citizen and resident of Ohio, ceases to be such; he is relieved from any obligation to contribute to her revenues, and is subject to none of the burdens which she imposes upon her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the state of Indiana or Kentucky, or the District of Columbia. The constitution of Ohio requires that electors shall be residents of the state; but under the provisions of the constitution of the United States, and by the consent and act of cession of the legislature of this state, the grounds and buildings of this asylum have been detached and set off from the state of Ohio, and ceded to another government, and placed under its exclusive jurisdiction for an indefinite period. \* \* \* As for the concluding proviso of the first section of the Ohio act of cession, hereinbefore quoted, and the provision substituted therefor in the first section of the act amendatory thereof, it is unnecessary for us to consider and determine their proper construction and meaning, for the reason that it is not constitutionally competent for the general assembly to confer the elective franchise upon persons whose legal status is fixed as non-residents of the state."

In the case of Fort Leavenworth R. R. Co., plaintiffs in error, v. Purcival G. Lowe, sheriff of the county of Leavenworth, 114 U. S. Supreme Court Reps., 525, Mr. Justice Field, in delivering the opinion of the court, says: "When the title is acquired by purchase, by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows upon the declaration of the constitution that congress shall have like authority over such places as it has over the district which is the seat of government; that is, the power of exclusive legislation in all cases whatsoever. Broader or clearer language," says Judge Field, "could not be used to exclude all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of the attorneys generally. The reservation which has usually accompanied the consent of the states, that civil and criminal processes of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice." The legislature in Kansas reserved the right to issue state process, as in the laws of Ohio, and also reserved the right to tax railroad, bridge, and other corporations, their franchises and property on said reservation.

The question arose in that case upon the right of the state to tax railroad property located within the reservation, under the authority from the legislature ceding the property to the United States. The same questions arose as to the original purchase of the property by the United States, as in the New York case of *People v. Godfrey* (above cited). And Judge Field quotes with approval the doctrine as laid down in the case of *Sink v. Reese*, 19 Ohio St., 206. Upon a careful examination of the case of *Fort Leavenworth R. R. Co. v. Lowe* (above cited), it will be found that the doctrine of the principal case of *Commonwealth v. Clary* is sustained.

In support of the general doctrine we cite the case of the United States v. David Ames, Woodbury & M. Reps. (Mass.), 76; United States v. Edmund Davis, 5 Masons' Reps., (Circuit Ct. U. S.), p. 356; Story on the Constitution, vol. 2, sec. 1227.

But it is argued by counsel for the state that although that rule may be sustained as to residents of the ceded territory, yet as to citizens of the state in which the ceded territory is located who commit acts in violation of the laws of the state, upon the ceded territory, are excluded from the jurisdiction of the United States, and must be held to answer to the jurisdiction of the state courts.

To this argument we must dissent, for the reason that it is in contravention of section 8, art. 1, of the constitution, which says that "congress shall have exclusive jurisdiction in all cases whatsoever;" and as Judge Marshall in the case of United States v. Bevans, (above cited) says: "It is not the offense committed, but the bay in which it is committed, which must be out of the jurisdiction of the state." In this case, it is not the offense committed, but the place in which it is committed, which controls the jurisdiction of the court.

To the same effect is the case of Mitchell v. Tibbets, before the Supreme Court of Massachusetts, 17 Pick., 288. It was there held that a vessel employed in transporting stone from Maine to the navy yard in Charleston, Massachusetts, a place purchased by the United States, with the consent of the state, was not employed in transporting stone within the commonwealth, and therefore committed no offense in disregarding a statute making certain requirements of vessels thus employed. The court says: "To bring a vessel within the description of the statute she must be employed in landing stone at, or taking stone from some place in the commonwealth, and that the law of Massachusetts did not extend to and operate within the territory ceded, adopting the principle of its previous decision in 8 Mass." In that case one of the defendants was a resident of the state of Maine, and one a citizen of the city of Charleston, Massachusetts. Therefore, establishing the rule that citizens of a state in which ceded territory is situated are amenable to the jurisdiction wherein the act was committed, and not in the jurisdiction in which they have their citizenship.

It cannot be seriously doubted or questioned that the citizens of one state who commit a crime in a sister state, are punished by the laws of the place, in the jurisdiction wherein the crime was committed. Therefore the defendant could not raise the question of citizenship in another state to defeat the prosecution.

Thus is the law, by universal weight of authority.

It may well be doubted whether, under sec. 8, of art. 1, of the constitution, the states can cede, or the United States accept, a grant of property in a state without the right of exclusive legislation. In United States v. Cornell, 2 Mason's U. S. C. C. Reports, 67; Sinks v. Reece, 19 Ohio St., 306.

For a state court has no jurisdiction of criminal offenses against the United States, nor of the penal laws of the United States, nor can such jurisdiction be conferred upon the courts of the states by an act of congress. United States v. Lathrop, 17 Johns. N. Y. Rep., 3.

Therefore, if congress has not the power to so confer upon the state courts the right to punish for offenses committed against the United States, how can such a proviso of concurrent jurisdiction in a cession of jurisdiction from a state to the United States of property purchased by



the U. S. with the consent of the state, be valid when the very provision of the constitution itself provides that congress shall have exclusive legislation in all cases whatsoever over such territory or places so purchased with the consent of the legislature. To grant such power to congress, would give it authority to confer concurrent jurisdiction upon state courts for the punishment of offenses in places ceded as aforesaid, whereas the constitution provides that it must be exclusive. Thus, in the case of the United States v. Cornell (above cited), Judge Story, in delivering the opinion of the court, speaking on this subject, says: "In our judgment it comports entirely with the apparent intention of the parties, and gives effect to acts which might otherwise, perhaps, be construed entirely nugatory. For, it may well be doubted whether congress are, by the terms of the constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of the legislature, where such consent is so qualified that it will not justify the exclusive legislation of congress there. It may well be doubted if such consent be not utterly void."

But in the grant of jurisdiction by the state of Ohio to the government, of property purchased with its consent in the city of Toledo, no such concurrent jurisdiction is reserved to the state courts.

And therefore, the decision of the Supreme Court of the state of Ohio in the case of Sinks v. Reese, 19 Ohio St. Rep., is accepted by this court as conclusive of the question of exclusive jurisdiction of the United States over government property situated within the city of Toledo, and state of Ohio. Such is the universal weight of authority.

Counsel have argued with great force, that because the congress of the United States has not provided punishment for the offense of assault and battery, it is one of the reasons why the state courts should have jurisdiction so as to prevent persons violating the laws from escaping justice.

We do not think, from an examination of the statutes of the United States, that such a calamity can befall the people of a state, as has been depicted by counsel for the prosecution in this case. For, by sec. 5391 of the Revised Statutes of the United States, of the Crimes Act of 1825, which was amended April 5, 1866 (and found in U. S. Rev. Stat., 1878), it is provided: "If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the state in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such state; and no subsequent repeal of any such law shall affect any prosecution for such offense in any court of the United States."

And by the eighth section of art. I, paragraph 18, of the constitution, congress is invested with the power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Thus we see the constitution has given congress power to make all laws which are necessary and proper for carrying into execution the foregoing powers as given to the government as to exclusive legislation in all cases whatsoever, in all places purchased by the consent of the state in which the same shall be. And in pursuance of that power con-

gress has, in sec. 5391, provided for the punishment of offenses in places ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States. And it further provides that such offense shall be liable to, and receive the same punishment as provided by the laws of the state in which the same is situated, now in force, provided for like offense when committed within the jurisdiction of the state. The provision is also made that no subsequent repeal of any such state law shall affect any prosecution for such offense in any court of the United States.

Therefore, we see by the provisions of that statute that congress, by direct reference to the laws in force at the time of the adoption of that act, in states in which the property of the government is located and over which exclusive legislation was ceded to the United States, adopts such legislation and makes it the law of the United States, the same as though it were enacted in specific terms by an act of congress.

In support of this doctrine we cite the case *United States v. Edmund Davis*, 5 Mason's Rep., 356. Also *United States v. David Ames*, 1 Woodbury and Mass. Reps., 76.

Therefore, we must hold that the motion of the defendant to discharge is well taken, for the reasons above indicated; and that the state of Ohio has no authority to prosecute said defendant, neither has this court or any other court of the state of Ohio, jurisdiction to try and determine the guilt or innocence of the accused.

Defendant discharged.

T. H. Wheeler and J. Kent Hamilton, for the state.

B. F. Reno, for defendant.

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## NEGLIGENCE.

[Superior Court of Cincinnati, Special Term, 1890.]

JULIA SMITH, ADM'X, v. WM. POWELL Co.

*Liability of Employer for Injury to Employee.*

The statement of facts in this case and the special instructions given at the request of plaintiff are reported with the case 10 Dec. Re., 799. The general charge of the court to the jury was as follows:

NOYES, J. (Charge to the jury.)

The special charges requested by counsel upon either side, and which have already been given to you by the court, are so explanatory of all the questions involved in this case that there seems to be little remaining necessary to be said in a general charge. And yet, it may be well to give you in condensed form the instructions which are to guide you when considering your verdict.

This suit is brought by Julia Smith, administratrix of the estate of Jacob Smith, deceased, against the William Powell Company, a corporation, to recover damages for the alleged unlawful killing of plaintiff's intestate by the defendant company.

In order to entitle plaintiff to a verdict at your hands, it is essential that you find from the preponderance of the evidence two facts: First, that some carelessness and negligence of the defendant company occasioned the death of Jacob Smith; and second, that no carelessness and negligence on the part of the said Jacob Smith contributed to the result in any substantial degree.

The burden of proof is upon the plaintiff to show by the preponderance of the evidence, carelessness and negligence on the part of the defendant, and that it was the cause of the death of Smith. The burden is upon the defendant company, if it relies for a defense upon contributory negligence of Smith, to establish such negligence by a preponderance of the evidence, unless the evidence offered by plaintiff raises a presumption that Smith was himself guilty of contributory negligence, in which case it is incumbent upon the plaintiff to overcome this presumption by the preponderance of the evidence.

If plaintiff fails to establish by a preponderance of the evidence that the carelessness and negligence of the defendant company brought about the death of Jacob Smith, or if it shall appear to you from a preponderance of the evidence that the negligence of Jacob Smith contributed in any substantial degree to his death, then your verdict must be for the defendant.

It is claimed on the part of the plaintiff that the defendant company was careless and negligent in several particulars—in the imperfect and unsafe construction of the ashpits connected with the furnaces of the foundry; in the employment of an insufficient number of workmen; in the employment of incompetent persons to do work assigned them; in the use of defective and unsafe crucibles in which to melt the brass; in not warning the deceased, Jacob Smith, of the danger incident to his employment, etc. You have heard all the evidence, and it is for you to say whether or not the defendant company was guilty of carelessness and negligence in any or all of these particulars, and whether said negligence, if any, occasioned the death of Smith. And the negligence or action of the Powell Company's agents who were in position of authority over Smith, are to be imputed to the defendant company.

Every case where carelessness and negligence are charged, depends upon the particular circumstances surrounding that case. What might be care and prudence in one case, under different circumstances and conditions, and in the presence of greater risks and dangers, might be carelessness and negligence. You are to consider, therefore, whether or not, under circumstances of this case at the time of the accident as they have been made to appear to you in evidence, the defendant exercised ordinary care and prudence.

By ordinary care and prudence is meant such care and prudence as men of intelligence ordinarily, or commonly exercise under like circumstances. Extraordinary care and prudence is not required under the law, but the care and prudence should be commensurate with the risk and dangers to be naturally apprehended; and this applies to the conduct both of defendant and of plaintiff's intestate. In considering this branch of the case, you will recall the evidence as to what precautions, if any, were taken by the defendant company to secure a dry ashpit; how the pit was constructed; whether or not it was made in a workmanlike and reasonable manner; the nature of the ground in which the pit was placed; the effectiveness of the dry well in keeping the ashpit free from

water when kept perfectly bailed. Indeed, you will recall everything which has been testified to regarding the whole matter, and then conclude whether or not the defendant company did all that ordinary care and prudence required.

You will apply the same rule to the other matters complained of by the plaintiff, as to whether or not the necessary number of workmen were employed to reasonably insure safety in the absence of unavoidable accident; whether the defendant company had good reason to suppose that the workmen employed were competent to do in a proper manner, the duties assigned them; whether Riley was competent for his work, or defendant had good reason to believe him competent. Whether or not defendant kept in use, and had in use on the day Jacob Smith was injured, crucibles of the best make and most reputable construction. In regard to all these matters, consider whether or not the defendant exercised that care and prudence which a man of ordinary care and prudence is accustomed to exercise under like circumstances.

If it did employ such care, and you so decide upon a preponderance of the evidence, then your verdict must be for the defendant.

If, however, you find that the defendant was careless and negligent in one or more of the matters complained of, thereby causing the death of Jacob Smith, then you will consider the conduct of plaintiff's intestate, and decide whether or not he was guilty of contributory negligence which resulted in his death. You may take into account the position, the degree of intelligence, the means of knowledge, which Smith had; the nature of the duties which had been assigned him by the foreman; whether or not he knew, or had means of knowledge of the effect and danger of bringing melted brass in sudden contact with a wet surface, either from his experience and observation in the foundry on the upper floor of the building in which he worked, or from being warned and instructed in this regard; whether or not he had been ordered by the superintendent or foreman, or by William Powell himself, to keep the dry well connected with the ashpit constantly bailed out as a measure of safety; whether or not on the day of the accident Smith obeyed such orders, if given. For, if you should find that Smith knew the danger of a wet ashpit, that he had been instructed to keep the dry well free from water, that on the day of the accident he had not obeyed his instructions in this regard, this would be negligence on his part, and if this neglect was the sole cause of his death, there can be no recovery in this case.

You must weigh carefully the evidence on all these points, and then decide whether or not Jacob Smith was guilty of contributory negligence which resulted in his death.

If you find the defendant was guilty of carelessness and negligence, and that such negligence occasioned the death of Jacob Smith, and that the plaintiff's intestate Jacob Smith was not guilty of contributory negligence, then your verdict will be for the plaintiff.

If you find for the plaintiff, the measure of damages will be the financial loss which has been sustained by his family in the death of Jacob Smith. In estimating this loss you will consider the age of the deceased, his state of health, his possible length of life if the accident had not happened, the wages which he was able to earn, and the probable amount over and above his personal expenses which he would have been able to contribute for the support of his family. The amount so found will be the full measure of damages. You can allow nothing for the bereave-

ment and sorrow and heartache occasioned by this distressing occurrence, for this is not permitted by the law.

Take the case, gentlemen, carefully consider your verdict, and return the same in accordance with the law and the facts.

The special charges given will be taken by you to the jury room, and I suggest, though I do not direct, that if you have reason to re-examine these charges, it would be better for you to read them all, in order to have a more full understanding of the bearing of each than would be obtained by reading a single one. The general charge will not go to the jury unless by request of counsel.

Noyes, J. Where the charge reads "the best crucible," what is meant is "a good and reputable crucible." It may not be the best in the world, but I mean a good one.

James & Cook, for plaintiff.

Thornton and Albert Stephan, for the defendant.

(Verdict for plaintiff.)

### ASSIGNMENT—CORPORATIONS.

274

[Superior Court of Cincinnati, General Term, March, 1892.]

JOHN W. HARPER V. DALZELL, GILMORE & LEIGHTON CO.

Certain syndicates owning land entered into a contract with a partnership under which the partnership was to erect a glass factory on part of the land owned by one of the syndicates. Shortly after the contract was made the partnership assigned its contract to a corporation, the stockholders of which were the members of the firm and two additional persons. In an action upon the contract it was held:

1. That it was not error for the court at the conclusion of the testimony of plaintiff to allow the petition to be so amended as to state that the assignment of the contract was with the assent of the defendants. Such amendment did not change the cause of action.
2. The character, credit and substance of the contracting glass works was an important consideration with the contracting syndicates; and the contract was personal in its nature, and could not be assigned without the consent of the owner of the land.
3. As a corporation and its stockholders are not identical, the contract made to the firm could be assigned by its members to the corporation which they formed.
4. The assent of one of the syndicates to the assignment of the contract was not the assent of all, even though such other syndicates had no notice or knowledge of such assignment. They were not joint owners nor partners, and if they were this would not be within the scope of any member's authority.

SMITH, J.

The plaintiffs in error in this case acting on behalf of certain syndicates owning land in or near the city of Findlay in this state, in which locality within recent years large deposits of natural gas have been discovered, entered into a contract on the seventh of April, 1888, with a partnership in Wellsburgh, W. Va., known as Dalzell Bros. & Gilmore; under which contract said partnership was to erect and operate a glass factory in the city of Findlay; and in consideration thereof the plaintiffs in error were at certain stated periods to pay to them certain sums of money. Two months after the contract was entered into, the members of said firm formed a corporation, the stockholders of which were com-

posed of the members of the firm and two additional persons. This corporation was called "The Dalzell, Gilmore & Leighton Company."

This corporation claims to have carried out and completed the contract made by the plaintiffs in error with the partnership which had assigned its contract to the corporation immediately after the same was organized. It therefore instituted this action to recover the amount due under the contract.

The petition, after alleging the execution of the contract with the partnership and the assignment as aforesaid, further alleged that "it was agreed between the parties thereto that within thirty days after the completion of the building of said glass factory, the parties of the second part, to-wit: these defendants (plaintiffs in error), would pay to the parties of the first part, the sum of \$10,000; that as soon thereafter as the parties of the first part should have in their employment in said glass factory 250 employees, they, to-wit: these plaintiffs in error, would pay to said party of the first part an additional sum of \$2,500, and that when said party should have actually in its employment 300 employees, they would pay a further sum of \$2,500; provided that said number of 250 and 300 employees should be reached within a period of one year from the first day of October, A. D. 1888.

"That all the conditions of said contract upon its part had been fully performed; that the completion of the building of said glass factory was thirty days prior to the eleventh day of October, A. D. 1888; that on the twenty-third day of February, A. D. 1888, the plaintiff, operating said glass factory and conducting the business of the joint stock company, parties of the first part to said contract, had in its employ 250 employees, and on the twenty-ninth of June, A. D. 1889, had in its employment more than 300 persons; but that the defendants herein have failed to perform the obligations under said contract upon their part; that on the twentieth day of October A. D. 1888, they paid to this plaintiff the sum of \$5,000, and on the thirteenth day of November, A. D. 1888, the sum of \$3,000, to apply on account of said sum heretofore named, and that there is due and unpaid to this plaintiff the sum of \$2,034.57 with interest from said thirteenth day of November, 1888, the sum of \$2,500 with interest from said twenty-third day of February, A. D. 1889, the sum of \$2,500, with interest from the twenty-ninth day of June, A. D. 1889; for which sums, together with its costs in this behalf expended, they ask judgment."

It appears from the contract that the glass works were to be erected upon the Wyoming Place Addition which was owned by one of the syndicates, and upon certain lots definitely described in the contract; and there are also other covenants in the contract which are not material to the questions raised at bar.

The contract was signed as follows: Dalzell Bros. & Gilmore; John W. Harper, Trustee Howard Add.; E. T. Dunn, for Howard & Swing Add.; T. H. McConica, for Swing; W. B. Ely, for Clifton; Joseph Ramsey, Jr., for Wyoming.

The answer of the delendants sets up three defenses:

First—They deny entering into a contract with the plaintiff, the corporation, and allege that it was entered into with the partnership.

Second—They deny that the defendants have fulfilled the precedent conditions of the contract.

Third—They allege that they signed the contract as agents only, and that this fact, together with the extent of their authority was well known to the defendants.

The cause was tried before a jury, which returned a verdict in favor of the corporation against the defendants.

Three grounds of error have been argued before us:

First—That the court erred at the conclusion of the testimony of the plaintiff in allowing the petition to be amended so that it alleged that the assignment of the contract by the partnership to the corporation was made with the knowledge and consent of the defendants. It is contended that such amendment changed the cause of action.

Second—That the court erred in charging that the consent of one of the defendants to the assignment of the contract was the consent of all.

Third—That the court erred in instructing the jury on the subject of estoppel because no such issue was presented by the pleadings.

We do not think the first ground of error is well taken. The action was by the corporation which claimed to have performed the contract which had been assigned to it by the partnership, and the petition alleged that the defendants had made payments to it (the corporation). These allegations were in effect that the defendants had recognized the corporation as the party who was carrying out the contract, and therefore impliedly alleged the assent of the defendants to the assignment of the contract by the partnership.

Furthermore, if such is not the legitimate effect of these allegations, and there was a failure upon the part of the plaintiffs to make the material allegation as to assent, we are clearly of the opinion that it was proper for the court to allow an amendment to the petition inserting such an allegation in it; and as it does not appear that the defendants have been misled by the amendment or were in any way prejudiced by such action of the court, we see no reason to reverse the judgment on that ground. The amendment did not change the cause of action. It merely inserted in the petition a material allegation which had been omitted.

An inquiry as to the second ground of error, viz.: The correctness of the charge of the court, that the consent of one of the defendants to the assignment of this contract by the partnership to the corporation, bound all of them necessarily involves two preliminary questions, viz.:

First—Was the corporation identical with the partnership, to the extent that they constituted the same person; and therefore, was an assignment from the latter to the former merely an assignment in form and not in reality, the contract always remaining in the same person; and

Second—Was this contract unassignable to the extent that any assignment of it by the partnership was invalid unless with the consent of the defendants.

That the corporation in this case is a different person from the partnership is a proposition we think that is beyond dispute.

A corporation is a creature of the law, an artificial being, indivisible and intangible. The members of a corporation may all be in court, but the corporation itself may be absent. What all the members of a corporation may do is not always the act of a corporation.

But the corporation in this case was not limited in its stockholders to those persons only who had composed the partnership, but also included other persons. Such a corporation with the liability of its members different from that of the liability of a partnership, was with

reference to the contracting syndicates a different person, both in law and in fact, from the partnership.

Was this contract assignable without the assent of the defendants? The court below charged that the contract was a personal one, and could not be assigned without the consent of the defendants, and no exception was taken to that part of the charge by either party, although it has been argued here that the contract was assignable without such consent.

Now, it must be apparent without much reflection, that in this contract, where a number of syndicates contracted with the owners of a glass works to locate the same near their property, the personality of the owners is for three reasons an important feature.

First—If the persons are irresponsible, they may never carry out their part of the contract, and an action for damages would afford no compensation.

Second—If a partnership has contracted, there is an individual liability for the full amount of the damages in case of a breach of the contract; whereas, in the case of a corporation there is only a limited liability upon the part of each member of the corporation.

Third—The purpose of entering into the contract was not merely to secure a glass works at Findlay, but to secure one managed by men of character and standing which would, in all probability, become a permanent industry in the community; enhance its importance and the value of its land; and attract workmen to it who would want to buy homes for themselves. And this personal nature, we think, cannot be explained away by the suggestion that any glass works when erected might, after its completion, pass out of the hands of the original owners. That event is, of course, never impossible; but its immediate happening is not probable; and if the works are of such a character as reputable business men would establish, they are likely, even if sold, to pass into the hands of the same class of business men; because none others are likely to have the capital or experience to justify them in such a purchase.

Among the many authorities upon the subject of the assignability of contracts, we select a few well considered cases in which the law is clearly stated, and which seem to have an especial applicability to the case at bar.

In *Arkansas Valley Smelting Co. v. Belden Mining Co.* (127 U. S., 379), it was held that:

"A contract in writing, by which a mining company agrees to sell and deliver lead ore from time to time at the smelting works of a partnership to become its property upon delivery, and to be paid for after a subsequent assay of the ore and ascertainment of the price, cannot be assigned by the partnership without the assent of the mining company, so far as regards future deliveries of ore."

And that, "The defendant could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted."

In the course of the opinion of the court, Mr. Justice Gray said, "At the present day, no doubt, an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract whether by requiring something to be afterwards done by him, or by some other stipulation which manifests the intention of the parties that it shall not be assignable."



But everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract." *Humble v. Hunter*, 12 Q. B., 310, 317; *Winchester v. Howard*, 7 Mass., 303, 305; *Boston Ice Co. v. Potter*, 123 Mass., 28; *King v. Batterson*, 13 R. I., 117, 120; *Lansden v. McCarthy* 45 Mo., 106.

The rule upon this subject as applicable to the case at bar is well expressed in a recent English treatise.

"Rights arising out of contract can not be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence, such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." *Pollock on Contracts*, (4th ed.) 425.

In the case of *Lansden et al. v. McCarthy*, 45 Mo., 106, the syllabus of the opinion is:

"Where the contract may have been founded in personal trust and confidence, the assignee thereof cannot recover upon it without the consent of the party contracting with his assignor to the assignment."

In this case the defendant, who was in the meat business, had contracted with the proprietors of a hotel to furnish them all the fresh beef, pork and mutton that might be ordered by said proprietors for the use and consumption of said hotel for the year then next ensuing, at ten cents per pound, the proprietors of the hotel agreeing to pay for the meat so furnished promptly at the end of each successive month during the continuance of said contract. The proprietors assigned said contract to their successors, and the defendant refused to deliver meat to them under said contract, and his refusal was sustained. The court in its opinion said:

"The defendant's estimate of the solvency and pecuniary credit and standing of the plaintiff's assignors may have constituted an important inducement to the contract, without which he would not have entered into it. There was a credit given. The meat was not to be paid for on delivery, but at the end of the successive months, involving credit to an indefinite amount. The contract imposed no obligation upon the defendant to accept as his debtors any other parties than those with whom he contracted. Whether or not he would do so was a question for him alone to determine. He could not be forced into it against his will by an assignment of the contract without his consent."

Now, the "character, credit and substance" of the persons who were to erect the glass works must have constituted as we have previously seen an important consideration with the contracting syndicates; and the "rights arising out of the contract" were "coupled with liabilities," because the contracting syndicates were to advance money from time to time as the plant neared completion. It was therefore of importance to them that they should repose confidence in the persons to whom they made such advances; and further, if there was an individual liability of each partner in case the advancements were made to a partnership, it would be a material change in "liabilities" to have such advancements made to a corporation of which the partners were merely a part of the shareholders with the right to transfer the shares, and with only a limited individual liability.

Nor does the fact that the corporation glass works has completed its part of the contract alter the right of any syndicate to refuse to carry out its part of the contract, unless it has assented to the substitution of such corporation in place of the partnership; for the reason, as we have seen, that the "character, credit and substance" of the contracting company does not cease to become an important consideration to the syndicates, upon the erection of the plant, inasmuch as the syndicates desire a plant owned and controlled by men of such character as will make the plant a permanent one, and make it an important influence in building up the community in which it is located.

But even were this not the case; and the personal features of the contract ceased upon its execution and completion, yet the authorities hold that in such a case, certainly so far as those syndicates are concerned upon whose land the works were not erected, no recovery could be had from those syndicates who had been ignorant that the contract was executed and completed by another than the one with whom they had contracted.

In the case of *Boston Ice Company v. Edward Potter*, 123 Mass., 28, it appears that "the defendant in 1878 was supplied with ice by the plaintiff, but on account of some dissatisfaction with the manner of supply terminated his contract with it: that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Co. sold its business to the plaintiff, with the privilege of supplying ice to its customers, and the plaintiff afterward delivered ice to the defendant for one year without notifying the defendant that it had bought out the business of the Citizens' Ice Company until after the delivery and consumption of the ice.

The court held that there could be no recovery because there was neither an express or implied contract; and that "no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Co. Of this change he was entitled to be informed."

The following part of the opinion of the court is directly in point upon the question at bar.

"A party has a right to select and determine with whom he will contract and can not have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reason for so doing can not be inquired into. If the defendant before receiving the ice or during its delivery had received notice of the change, and that the Citizens' Ice Co. could no longer perform its contract with him, it would then have been his undoubted right to rescind the contract and to decline to have it executed by the plaintiff.

"But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. *Orcut v. Nelson*, 1 Gray, 536-542; *Winchester v. Howard*, 97 Mass., 303; *Hardman v. Booth*, 1 H. C., 803; *Humble v. Hunter*, 12 Q. B., 310; *Robson v. Drummond*, 2 B. & Ad., 303. If he had received notice and continued to take the ice

as delivered a contract would be implied. *Mudge v. Oliver*, 1 Allen, 74; *Orcutt v. Nelson*, *supra*; *Mitchell v. Lafaye*, Hoe N. P., 253."

The foregoing discussion brings us to the question of the correctness of the view taken by the court below, that the act of assent of one of the syndicate parties, to the assignment of the contract and its completion by the corporation in place of the partnership, was binding upon the other parties.

The question is presented by an exception to the general charge upon this subject, and by the refusal of the court to give special charges submitted by defendants.

Upon the subject of the assent of one being the assent of all, the court in its general charge said: "Under the contract the parties of the second part are in the position of individuals engaged in a joint enterprise that is jointly liable, if liable at all, and the acts of one in carrying out the provisions of the writing itself are the acts of the others, and all are bound as fully as if the particular act was the act of the aggregate body." This part of the charge was excepted to by the defendants.

This charge could only have had reference to the matter of assent, because that was the only matter in which it was attempted to bind all the parties by the act of one of them.

The court also refused to give the following special instruction requested by the defendants, which refusal was excepted to by them: "I charge you that if you should find from the evidence that notice of the formation of the corporation, the Dalzell, Gilmore & Leighton Company, and of the assignment of the contract by the partnership to the corporation was given to any one of the defendants, and he assented to it, but there was no notice to the others or knowledge upon their part, and no assent by them, they are not bound by the notice to and the assent by one. And the same would be true of notice to and assent by more than one, but not to and by all. Those who did not have notice and did not assent would not be bound."

The ruling of the court below that the assent by one was binding upon all can only be sustained upon the theory that by virtue of the contract sued upon the syndicates or their representatives on their behalf had entered into a relation with one another which in effect constituted them partners, and that the act of one was therefore the act of all; because whether the contract was joint, or was a joint and several one, in either case no relation of agency would be established for that reason between the parties to the extent that one of them could set aside the contract with the partnership with whom it was made, and enter into a contract upon the same terms with an entirely different person such as we have found the corporation in this case was.

Our inquiry therefore must be as to whether a partnership relation existed between the syndicates, and if so, whether the scope of the partnership business was such that one of the parties could substitute a different glass manufacturer in the place of the one originally contracted with, and bind the others by such substitution.

The contention of plaintiff is that such a partnership relation exists by reason of the principle declared in *Yeoman v. Laskey*, 40 Ohio St., 190, that "if two or more persons agree to jointly buy a tract of land for the purpose of jointly selling it and sharing the profits, they are partners for the transaction and as between themselves hold the rights and owe the duties of that relation."

But the case at bar does not afford an opportunity for the application of that principle. Here there was no joint ownership of the land. John W. Harper was trustee for the Howard Syndicate alone. He had no interest in the other syndicates, nor did the other parties to the contract or the syndicates they represented have any interest in the Howard Syndicate.

And the same condition of affairs existed as to E. T. Dunn, who was trustee solely for the Howard & Swing Syndicate. As to T. H. McConica, who was trustee solely for the Swing Syndicate, as to W. B. Ely, who was trustee solely for the Clifton Syndicate; and as to Jos. Ramsey, jr., who was trustee solely for the Wyoming Syndicate. The syndicates were separate from each other. There was no joint purchase ownership or contemplated sale of these lands. There was no intention among themselves that they were to be partners in the effort to induce the glass works to locate in Findlay. No division of profits and losses was contemplated. And measured by any test which may be applied to determine the existence of a partnership, we are unable to find that such a relation existed between the parties to this contract.

"If a joint or common enterprise is not entered into for the purpose of earning profits while together, there is no partnership. (Bates, Law of Partnership, vol. 1, 64.)

In illustration of this principle the following authorities may be cited. In *Porter v. McClure & Tourtellat*, it was held that "Where two persons are jointly concerned in the building of a mill, the promise of one to pay for advances made will not bind the other." The community of interest does not create them partners. To constitute them such, there must be an agreement ultimately to share in the profit and loss.

And in *Noyes v. Cushman et al.*, 25 V. T., 390, it is said:

"A mere community of interest in real or personal estate does not constitute a partnership; but where a purchase of that character is made and the premises are rebuilt or repaired for the purpose of prosecuting some joint enterprise or adventure, and under an agreement to share in the profits and loss of the undertaking, the contract then becomes one constituting a partnership, and each member thereof is liable as a partner, and they are liable jointly for services performed in perfecting their joint undertaking."

Now, in the case at bar, there is no community of interest in the land upon which the glass works were to be erected, and no anticipated share in profits and losses, and therefore no partnership.

But if we should find that a partnership was created by operation of law between these parties by reason of the contract entered into with the partnership glass manufactory, nevertheless we should be compelled to find that the partnership business created by such contract had reference entirely to the party contracted with; and that the act of one of such partners in releasing such contracting parties and substituting another in its place, without the consent of his co-contractors, was entirely outside of the scope of the partnership agency, and invalid as against such co-contractors.

As to whether the pleadings present the question of estoppel is a ground of error into which we have not found it necessary to inquire.

Judgment reversed and cause remanded.

MOORE, J. and HUNT, J. concur.

F. T. Cahill, J. B. Swing, for plaintiff.

Ramsey, Maxwell & Ramsey, for defendant.

## CONTEMPT.

289

[Clark Probate Court, 1892.]

## IN RE. MARY A. ROWEKAMP.

The probate court has no jurisdiction to punish for contempt the failure or refusal of an assignee in trust for the benefit of creditors to perform an order or judgment for the payment of money.

ROCKEL, J.

On January 13, 1892, this court in the above assignment made the following order in the distribution of the funds arising from the sale of the assignor's real estate: "Fourth—The remainder of said proceeds of sale, to-wit: \$558.19 said assignee shall pay to Georgiana Dawson to be applied on her mortgage claim being insufficient to pay the same in full." This order the assignee has failed to comply with for reasons not now necessary to state. On April 16, 1892, S. W. Dakin, to whom Mrs. Dawson had assigned her claim, filed a written motion herein for an order of contempt against said assignee for "failing, refusing and neglecting to obey the order made and finding in favor of Georgiana Dawson."

Summons was issued against said assignee, who appeared in court and moved that the proceedings be dismissed, for the reason that the court had no jurisdiction in the matter—that the neglect or refusal to obey an order for the payment of money could not be the subject of a contempt proceeding in a proceeding in the probate court.

The constitution provides, article 4:

"Section 8. The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, and such jurisdiction in *habeas corpus*, the issuing of marriage licenses, and for the sale of land by executors, administrators, and guardians, and such other jurisdiction, in any county or counties, as may be provided by law."

The constitution, it is seen, therefore does not confer jurisdiction in this case; if it exists it must be the creature of some legislative enactment.

Shortly after the adoption of the above constitutional provision the legislature, (vol. 51, page 167) passed an act "Defining the jurisdiction and regulating the practice of probate courts."

Sections 15, 16 and 59, now 544, 543 and 538 of the Revised Statutes, respectively, conferring jurisdiction in the nature of contempt proceedings are as follows:

"Section 538. The probate judge shall have power to keep order in his court, and to punish any contempt of his authority, in like manner as such contempt might be punished in the court of common pleas. (51 V. 167, p. 59.) "Section 543. If any person neglects or refuses to perform any order or judgment of a probate court other than for the payment of money, he shall be deemed guilty of a contempt of court, and the probate judge shall issue a summons directing him to appear before his court within two days from the service thereof, and show cause why he should not be punished for his contempt; or if it appear to such judge that he is secreting himself to avoid the process of the court, or is

about to leave the county for such purpose, the judge may issue an attachment instead of the summons above mentioned, commanding the officer to whom the attachment is directed forthwith to bring such person before such judge to answer for his contempt; and if no sufficient excuse is shown, he shall be punished in the same manner as provided for the punishment of contempt in the court of common pleas. 51 v. 167, p. 16.

Section 544. Orders for the payment of money may be enforced by execution or otherwise, in the same manner as judgments in the court of common pleas; and all such executions shall be directed to the sheriff, or, in his absence or disability, to the coroner. 51 vol. 167, page 15.

It is claimed by those in support of the jurisdiction of the court, that the court of common pleas having jurisdiction in like proceedings, this court by virtue of the provision of sections 538 and 544, has like jurisdiction, notwithstanding the fact that section 543 seems to limit it to all orders or judgments, other than for the payment of money. To thus hold will be to entirely eliminate this clause from our statute law. It is a general presumption that every word in the statute was inserted for some purpose, *Bloom v. Richard*, 2 Ohio St., 402. These three sections are the result of one legislative act. It is a settled rule of construction that the intention of the law-maker is to be deduced from a view of the whole, and every part of the enactment taken and compared together. He must be presumed to have intended to be consistent with himself throughout, and at the same time to have intended effect to be given to each and every part of the law.

And from this it results that general language found in one part is to be modified and restricted in its application, when it would otherwise conflict with specific provisions found in another; and this, from the reasonable and almost irresistible conclusion, that when the mind is directed to any particular subject the language used is more likely to express the intention than general words which might otherwise cover it, but from which it does not appear that the particular case was intended to be provided for. *State v. Blake*, 2 Ohio St., 152. Applying this rule of the Supreme Court, as well as what can be otherwise gathered from these sections, it seems to be very plain that this court has no jurisdiction in this kind of a contempt proceedings.

Section 538 does not, in a specific manner refer to the enforcement of an order to pay money, or a judgment. It has reference to the keeping of order in the court, and a punishment for a disobedience of such an order. This section confers upon probate courts that general common law power to enforce its writs and quiet disturbance or punish disobedience committed in its presence, and thus preserve the dignity of the court and the channels of justice unobstructed. If it stood alone I doubt very much whether it would confer upon this court jurisdiction of the matter in issue.

Section 544 provides, "orders for the payment of money may be enforced by execution or otherwise, in the same manner as judgments in the common pleas." It is argued that the word otherwise as here used, would justify the court to act and confer jurisdiction. But the remainder of this section, when it says that "all such executions shall be directed to the sheriff," etc., shows that this section applies to the enforcement of orders for the payment of money by execution, and not by contempt proceedings. And such has been the recognized practice in the probate court. Indeed, I never knew of an attempt to enforce such

an order by contempt proceedings in the court of common pleas. This section in the original act precedes 543; and thus we see that the legislature having provided for the enforcement of orders for the payment of money in this section, in the next proceed to give the court jurisdiction to enforce orders and judgments, other than for the payment of money. Orders, etc., under the first act to be enforced by executions, under the latter by contempt proceedings. If orders for the payment of money, may be enforced by proceedings in the nature of contempt under section 544, and all other orders, etc., under 538, the provisions of 543 are useless and of no avail.

Such construction should not be given where it is possible to give a construction that will give force to all the provisions.

I have been cited by counsel to the case of *In re Concklin*, 3 Circ. Dec., 40, but the question there arose under a statute section 5481, which expressly gave the court jurisdiction, and the question was not whether the court had jurisdiction, but whether the law was not in conflict with a constitutional provision, and therefore could not be enforced.

I can see no reason why the plain words of section 543 should not have their full meaning.

No other section bears directly in conflict with it, if at all. This section particularizes in what cases a contempt may lie. The others only generalize as to what may be a contempt. There is no doubt that in such case the words of the section particularizing should bear the greater weight, for here the legislative mind was more particularly drawn to the subject, and it is fair to presume, enacted that into law which was intended. The holding of this court therefore is that the probate court has no jurisdiction to punish for contempt the failure of an assignee to obey an order or judgment for the payment of money, and the proceeding will therefore be dismissed.

Geo. C. Rawlins, for assignee.

T. E. Scroggy, E. S. Wallace, for Dakin.

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## CORPORATIONS.

301

[Clinton County Circuit Court, 1892.]

### LEMAR V. STEPHENS.

Cox, Smith and Swing, JJ.

A decree fixing the statutory liability of stockholders, and assessing to them their *pro rata* share of the debts of the corporation will be set aside, if all the stockholders within the jurisdiction of the court were not made parties.

A decision was rendered, placing a construction on section 3260 of the Revised Statutes, which section provides for the manner in which the liability of stockholders of a corporation may be enforced. The stockholders in this case were quite numerous, some residing in and some out of the state. The case proceeded to trial before a master, over the objection of the creditors, and a large amount of testimony was taken, fixing the liability of the stockholders, and assessing the several stockholders their *pro rata* share of the debts of the corporation. Several months were occupied in taking the testimony before the master, and his report was confirmed and judgment entered thereon. The circuit court held, however, that it was error for the common pleas court to proceed until all of the stockholders, at least those within the jurisdiction of the

tion and use of said track, and has extended the same, upon its main track in front of and near the plaintiff's property, and has, since April, 1888, used and still uses, and will continue to use the same for switching back and forth at all hours of the day and night, for the making up and unmaking of freight trains, and gravel trains that extend from defendant's freight yard on the north side of the lower River road and across the road on the said track and on the main track of defendant to the western limits of said freight yards, in front of and beyond the premises of the plaintiff; that by reason of the location of said track across the street and the running of locomotives and cars thereon, and the continuance of the same, the access to and from said plaintiff's property is greatly disturbed, and the value thereof for business purposes and a residence has been greatly depreciated, by the noise and jarring, the noxious gases, cinders, smoke, soot, and fire sparks from the running trains of the defendant, and their locomotives.

That the locating of said track across said road and the running of locomotives and cars thereon, have made the plaintiff's property a dangerous and unsafe place for teams to stop at or stand, thereby greatly injuring said property as a location for a saloon or grocery; all to the plaintiff's damage in the sum of \$5,000.

The defendant files an answer in which it is admitted that it is a corporation organized and doing business under the laws of Ohio, owning and operating a railroad which runs through the village of Riverside in the county of Hamilton and state of Ohio; and in which it is further admitted that by the consolidation it has succeeded to all the properties, rights and liabilities of the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company; and that in the month of April, 1888, the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company did lay a track across the public highway in the village of Riverside known as lower River road at or near the intersection of Symmes street with said lower River road, and that since then the said track has been maintained and used by the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company until the time of the consolidation as aforesaid, after which it was and has been maintained by the defendant.

This is followed by a general denial of all the allegations of the petition.

It may be observed that the petition does not state that there is any such operation of the cars as amounts to a nuisance. It may not be necessary, it is true, to use the word "nuisance" in order to make a case of that kind, but it is necessary to state facts of equivalent import. It is not averred that the movement of the cars on the main track is unnecessary, unskillful or malicious, nor does the proof warrant it.

The plaintiff in error insists that issues raised by the pleadings and the bill of exceptions embody the following propositions of law:

First. Is the defendant in error responsible for consequential damages to the property of the plaintiff in error caused by the use of the main stem right of way in front of his property for switch-yard purposes, arising from smoke, cinders, odors and noise?

Second. Is the railroad responsible to the plaintiff for consequential damages arising from trains standing on the main track which have used or are about to use the connection track, from odors, smoke and noise, under section 3283, Revised Statutes?

Third. Is the railroad responsible to the plaintiff for any damages arising from the operation of that part of the train that is on the main



track in front of plaintiff's property, when part of the train is on the connection track in the street, from noise etc., under section 3283, Revised Statutes?

Fourth. Is the plaintiff entitled to recover for damages caused to his property by the cars of the defendant obstructing lower River road, under section 3283, Revised Statutes, and was there error in the court below in excluding testimony as to the delay or obstruction of the witness Burgoyne on that point?

Fifth. Was it not error to rule out the evidence as to the number of tracks which may be put on the tract of land leased by the railroad, as tending to show what the probable future use of the connecting track will be?

The questions thus raised by the plaintiff in error may be limited to two general propositions:

First. The liability of the railroad company, under the common law, for noise, smoke and vapors, etc., caused by the operation of trains upon its own right of way in the conduct of its business, and

Secondly. The statutory right of plaintiff to recover for such damages under section 3283 of the Revised Statutes of Ohio.

A railroad company in the exercise of powers confided to it as a common carrier in the public interest, cannot be held to the commission of a nuisance unless it conducts its business in an unreasonable and negligent manner. This is well illustrated in the case of Baltimore & Potomac Railroad Company v. Fifth Baptist Church, 108 U. S., 317. The court say at page 331: "Undoubtedly a railway over the public highways of the district, including the streets in the city of Washington, may be authorized by congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyances may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation."

In Parrot v. Cincinnati, Hamilton & Dayton R. R. Co., 10 Ohio St., 624, it was definitely held, "that a railroad authorized by law, and lawfully operated, cannot be deemed a private nuisance."

In Ruffner v. C., H. & D. R. R. Co., 34 Ohio St., 96, it was also held, "that where a railroad company is authorized to propel its trains and operate its road by the use of steam locomotives, no inference of negligence arises from the mere fact that an injury to adjacent property was caused by sparks emitted from such locomotive." In that opinion, page 97, McIlvaine, J., said: "It is not enough to show that the injury was caused by sparks escaping from a passing engine, without more. A party is not answerable in damages for the reasonable exercise of a right. A liability arises only when it is shown that the right was exercised negligently, unskillfully or maliciously."

It is contended, however, by plaintiff in error, that the case of Railway Company v. Gardner, 45 Ohio St., 309, practically reversed the case of Parrott v. Railway Company *supra*, and greatly curtailed the scope and effect of that phrase *damnum absque injuria*, and makes railroad companies responsible for many injuries and consequent depreciation of property which they escaped under the understood ruling in the Parrot case.

While it is true that in the Gardner case the right of recovery for damages caused by injury to access, and by smoke, noise, etc., has been greatly enlarged, yet we do not understand that there has been any change in the law of this state that a recovery must be based upon a legal injury and the invasion of a legal right.

It will be important to notice the view expressed by Owen, C. J., on page 317, in his opinion in *Railway Co. v. Gardner*, 45 Ohio St., 309, in commenting on *Parrott v. C., H. & D. R. R.*, 10 Ohio St., 624: "This was an action of trespass on the case brought anterior to the code, and seems to have been considered by the court without reference to the remedy which is contemplated and, indeed, provided for, by the act in question. For, whereas the court declares, in that case, that the owner of such lot has no more right to recover damages of the company than any citizen who resides, or may have occasion to pass, so near the street and railroad as to be subjected to like discomforts, the act in question expressly authorizes an action and recovery for injuries done by laying a track upon any such street or ground to private or public property, 'lying upon or near to the street or ground upon which the track is laid.'" \* \* \*

The statute reaches beyond the decision in prescribing a remedy for a party whose property is injured by the location and operation of a railroad track through the street of a municipal corporation. It is quite clearly apparent that the court, in the last case cited, was dealing with the subject of "noises, smoke, vapor or other discomforts," upon the assumption that they were such inconveniences as the public at large must bear in return for the public good to be acquired, and not as special and peculiar causes of injury and depreciation to the property affected, as contemplated by the statute before us, in its application to a case like the one at bar. The provision in force at the time of the injury complained of in that case of which section 3283 is an amendment, created no such remedy for land owners as we are considering." 46 Ohio L., 45.

In the case of *Penn. R. Co. v. Marchant*, 119 Penn., 541, the suit was by a property holder whose lot was situated relatively the same as the property of plaintiff in error to the main track of the railroad company. In both cases the railroad tracks were on their own property, and opposite to the house of the plaintiff. The complaint was based upon the fact of the increased number of trains arising from the use of the track for terminal purposes. The question was whether movements of the trains to the number of 1440 a day, and the consequent noise, smoke, jarring, etc., amounted to an injury to the plaintiff's property in a legal sense. It was held by the court in an elaborate opinion that it did not constitute such an injury.

Mr. Justice Paxson in announcing the opinion of the court used this language: "No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if in the enjoyment of such right, without negligence or malice, inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. \* \* \* No man is answerable in damages for the reasonable exercise of a right, where it is accompanied by a cautious regard for the rights of others; where there is no just ground for the charge of negligence or unskillfulness, and when the act is not done maliciously. *Panton v. Holland*, 17 Johns., 99. We need not consume

time by the further citation of authorities for so plain a proposition. It is settled law. \* \* \*

"It is true this principle is qualified to a certain extent. A man may not carry on a business which poisons the air, and renders it unhealthy in a thickly populated neighborhood, and especially in the center of a large city. For establishments which involve danger, such as powder mills; injuries to health, such as lead works, and manufactories and various kinds which involve noise and disturbance to neighbors, a man must seek a secluded place, where as few persons may be inconvenienced as possible.

These exceptions to the general rule are well established, and need not be further dwelt upon. But they have no application to the case in hand. The necessities of a railroad company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own. Hence the transportation of passengers and freight as near to the center of a town as possible, is in the direct line of its duty, whether that duty be performed by a corporation or individual. It is a part of the lawful use and enjoyment of property, and, where it is done without negligence, entails no legal liability therefor."

It is urged by the plaintiff in error that the decision of the court of appeals of New Jersey in the case of Penn. R'y Co. v. Angel, 41 N. J. Eq., 316, supports a different view. It will be observed, however, in the examination of that case, that the defendant railway company had a right of way in the street for passage merely, obtained by grant from the city of Camden, and that it attempted to use its right of way in the street for the purpose of a switching yard and for standing trains. The court properly decided that such use of a right of way in the street was an additional burden upon the adjacent property owners which would be restrained by injunction. It is evident that the court did not intend to go to the extent claimed by plaintiff in error; for the court of errors and appeals of New Jersey affirmed in the case of Beseman v. Penn. R. R. Co., in 20 Atlantic Rep., p. 169, the judgment of the Supreme Court of N. J., reported in 13 Atlantic Rep., p. 164. In the latter case the court quoted with approval the language of the chancellor in Railroad Co. v. City of Newark, 10 N. J., Eq., 352.

"It follows further, admitting the correctness of the views expressed, that the adjacent land owner cannot maintain an action at law for consequential damages, unless he can show a negligent exercise by the company of their legal rights; because no action at law will lie for a consequential injury, necessarily resulting from the exercise of a legal right under legislative authority."

Nor does the case of Owensboro' & N. R. C. v. Sutton, 13 S. W. Rep., 1086, decide more than that a right of passage in a public street does not involve the right to use it for a yard. In order to recover at common law there must be shown the invasion of some legal right.

It will be proper next to consider the right of recovery which may exist under the provisions of section 3283 of the Revised Statutes.

It is claimed by the defendant in error that section 3283 merely preserves such right of action as existed at common law, for the reason that the legislature in passing this section, used words of well defined legal meaning, "but every company which lays a track upon any such street, alley, road, or ground, or public property lying upon or near to such ground." "Injury" in the law, and especially in legislation of

this character, is a word of well-defined meaning, and means an interference with some legal right belonging to the owner of property alleged to be injured, and used by him as an appurtenance to such property.

Mr. Justice Harlan in *Sheppard v. Baltimore & Ohio R. R. Co.*, 130 U. S., 426, in which this statute was involved, said: "The express requirement that every railroad company occupying a street or other public ground, under an agreement with the municipal or other authorities, owning or having charge thereof," shall be responsible for injuries done thereby to private or public property, lying upon or near to such ground leaves little room for construction. The right to recover damages for such injuries is not limited to owners of property immediately upon the street occupied by the track or other structures of the railroad company. If the legislature had intended to restrict the right of action given by the statute to owners of the latter class of property, the words "or near to" would not have been used. "The manifest purpose was to place those whose property was 'near to' any public street thus occupied upon an equality, in respect to the right to sue, with those whose property abutted on the street."

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"This interpretation of the statute is, in our judgment, the only one justified by its words, although it may sometimes be difficult to determine whether particular property, alleged to have been injured by the placing of a railroad track or structure in a public street, is, within the meaning of the statute, 'near to' that street. It is certain, however, that property is 'near to' the street, so as to entitle the owner to avail himself of the remedy given by the statute, if the injury to it is the direct and necessary result of the occupancy of the street by the track or other structures of a railroad company. And an injury for which the company is liable, under the statute, arises when the diminution of the value of the property can be fairly attributed to such occupancy and use of the street."

In *Grafton v. Baltimore & Ohio R. R. Co.*, 21 Fed. Rep., 309. Mr. Justice Matthews gives construction to this act in the following words: "At any rate, there does not appear to be any ground, in the words or intention of the act for a distinction between temporary injuries to the use, and permanent injuries to the value, of the property injured; and, in the absence of any ambiguity, the statute must be taken to mean what it plainly says; and, there being no sufficient reasons to the contrary, must be so construed that the railroad company, in the case contemplated, shall be held responsible for all injuries of every description done by its work to the property of the plaintiffs in the action."

It is scarcely necessary to say, continues Mr. Justice Harlan, in *Shepherd v. Balt. & Ohio R. R. Co.*; 130 U. S., on page 432, "that the same rule as to compensation must be applied in the case of property 'near to' any street so occupied by a railroad company. The injury, in a case of that kind, may not, in every case, be easily ascertained, but the right of the owner, under the statute, to full compensation for it, is as clear as is the right of the owner of property abutting on the street, to be compensated for any substantial injury resulting from its occupancy by a railroad."

Owen, C. J., in the case of *Railway Co. v. Gardner* 45 Ohio St., on page 319, expresses the rule in this state under this act:

"While it may be conceded that in estimating the plaintiff's damages, the jury would not be permitted to take into account the conse-

quence of the operation of the railroad which were common to the community at large, no sound reason exists for excluding from consideration such elements of inconvenience, annoyance, danger and loss as result to the property, its use and enjoyment, from 'the smoke, noises and sparks of fire occasioned by the running of locomotives and cars along the track in front of the same,' if it be shown that these caused special injury and depreciation to the property. The right to the use of this street by the public as an ordinary highway was all that had been surrendered by the owners of these abutting lots prior to the location of the railroad track. In that use there were none of the elements of injury of which they now complain. Without their consent and against their rights, these new and injurious burdens have been imposed, and that in perpetuity and to their substantial loss."

What better rule of redress can be adopted than one "which requires that this loss should be fully repaired? that the injured party should be made whole by having restored to him, as far as this may be done in money, what he has lost in the depreciation of his property by reason of the new burdens to which it has thus been subjected?"

There can be no doubt, therefore, that an action could be maintained for injury not only resulting to abutting property, but to property "near to" any street so occupied by any railroad company under the provisions of the act. It is evident, however, that before there can be any recovery, there must be deprivation of some right enjoyed in connection with and as appurtenant to the property claimed to be damaged, and the injury must arise from the operation of the track in the highway or public ground. The statute in its effect must be confined to the track and improvements thereon within the limits of the public highway. This, indeed, seems not only reasonable, but a necessary construction of the statute, because the legislative mind is there directed only to the subject of the use of the highway whereon to construct and operate a railroad track, and the legislature would not undertake to create any responsibility except for acts done in pursuance of the authority to occupy highways and no other place. The statute says, in express terms, that the company which lays a track in the street or highway, shall be responsible for injuries done thereby, and no decision that has been cited construing the act in question has given any other construction than that the injuries must result from the laying of such track in the public highway.

The circuit court of Hamilton county in *Reeder v. C., C. & St. L. R. R. Co.* (decided April 5, 1892, unreported), held that the plaintiff was not entitled to recover for any damages resulting from the operation of the railway on its own property, but only for injuries caused by the operation of the track on the public highway.

The charge of the court at special term is in direct line with these authorities. We quote from the charge as follows: "The general assembly has provided for the compensation to property owners when property is affected or injured by the laying of a railway track in a public street, by requiring that any company which lays a track upon any such street, alley, road or ground shall be responsible for injuries done thereby to private property lying upon or near to such ground, which may be recovered by civil action brought by the owner before the proper court.

"The plaintiff claims that his property is situated near to the street upon which the defendants's track is laid, and we hold that it is near enough to authorize an inquiry as to whether the use and occupation of

the track for railway purposes is an injury to the property in question or not.

"Your inquiry should be limited to such special damages as the plaintiff suffers beyond that common to the community at large, and in a depreciation of the value of his property as may be occasioned by inconvenience and annoyance incident to the use and occupation of the defendant's connecting track within the lines of the lower River road—such inconveniences and annoyances as may affect the value of the property—*i. e.*, such as smoke, soot, cinders, noise or vapors occasioned by the running of the locomotives and cars along said connecting track."

It is assigned as ground of error that the court in special term excluded from the jury certain testimony touching the elements of damage to be considered in estimating the value of the plaintiff's property before and after the location of the railway tracks. The evidence thus offered tended to show that there was a diminution in value of the property because of the interruption to approach by the passing trains.

The record discloses that the alleged obstruction did not affect the plaintiff otherwise than as a traveler in the highway. If this were so, the rights of the plaintiff are merely those of any other traveler on the street as a member of the general public. The obstruction by passing trains in common with the public would not be an interference with the rights of the plaintiff in the enjoyment of his property. The rule, however, would be different in regard to smoke, or vapor or cinders from the operation of a railway on the highway which might affect the value of the property. But this could not well be said of an obstruction by trains on the highway at a point some two hundred feet distant from the property.

The principle was decided in *Jackson v. Jackson*, 16 Ohio St., 163, where it is held that "a claimant for damages in the alteration of a road is not entitled to recover where such alteration merely renders the road less convenient for travel without directly impairing his access to the road from the improvements on his land." *The Eagle White Lead Co. v. The City of Cincinnati*, 1 Sup. C. R., 154.

Perhaps the case of *Gilbert v. Greeley, S. L. and P. Ry. Co.*, 22 Pac. Rep., 814, is more directly in point. The cause of action arose by reason of obstructing travel on Twelfth street where the side track crossed it. The suit was brought by the plaintiff whose property was on the corner of an alley on Twelfth street and near the railway crossing. "He may or may not use the street," said the court, "more frequently in that direction than other people; but that is not the test. One traveler has no more legal ground of complaint on account of an obstruction in the public highway than others unless he be entitled to use the highway at the point of such obstruction for a different purpose than other people, or has suffered some special injury therefrom. The fact that he may be more frequently inconvenienced thereby does not give a cause of action."

We are, therefore, of the opinion from the evidence disclosed in the record and the propositions of law involved in this controversy, that the judgment of the court in special term should be affirmed.

MOORE and SMITH, JJ., concur.

Harmon, Colston, Goldsmith & Hoadly, for Railroad Co.

John S. Conner, and Miner & Carroll, for Fliehman.

## DEVISES.

313

[Superior Court of Cincinnati, General Term, March, 1892.]

## EDMUND H. PENDLETON ET AL. V. ROBERT B. BOWLER ET AL.

1. A devise to E. and C. in fee with the words "if they die without issue," is construed to be a devise in fee with an executory devise over in case E. and C. die at any time without leaving issue at their death; but if a different intention appears in the will the words are to be construed so as to carry out such intention.
2. Where a testator disposed of the income of his personal property during the life of his wife, and provided that should she die before E. and C. attained their majority, the income should go to his executor in trust for E. and C. as their guardian. *Held:* At the death of the wife E. and C. being of age, the personalty goes to them absolutely.
3. Where a will points to a period of distribution of the estate, the words "die without issue," are to be restricted to death without issue prior to the period of distribution.
4. In an action to quiet title to property, where the testator had disposed of the income of his personalty and realty during the life of his wife, had bequeathed the personalty and devised the realty to his children at the death of the wife, and had further provided that "in case my said children shall die without issue, then, after the death of my said wife Anne, the said property \* \* \* I give and devise," etc. *Held,* the death without issue referred to is one to occur prior to the death of the widow Anne, the life tenant.
5. A restriction upon the authority to sell the fee simple before the youngest of the children should arrive at the age of forty years, necessarily implied an authority to sell when that age was reached.
6. When an estate in fee simple is once given, language cutting it down must be equally clear.
7. A construction of a will that ties up an estate is not favored.

SMITH, J.

This is an action to quiet title, and has been reserved to the general term of this court upon a demurrer of certain of the defendants to the petition, upon the ground that the same does not state facts sufficient to constitute a cause of action; and also upon a motion of the plaintiffs to strike out certain parts of the answer of the other defendants, on the ground that such parts are irrelevant and immaterial.

The plaintiffs are the sole children of Nathaniel Pendleton, deceased, by his second wife Anne; and the defendants consist of Elliott H. Pendleton, the sole surviving child of said Nathaniel Pendleton by his first wife, together with the children and heirs of the other children, now deceased, of said Nathaniel Pendleton by his first wife.

The petition alleges that Nathaniel Pendleton died resident of Hamilton county, Ohio, leaving a last will and testament, a copy of which is set out in the petition; that said will was duly admitted to probate by the probate court of said county; that plaintiffs are the sole children of said testator by his wife Anne, who is now dead; that Charlotte, the younger of the plaintiffs, has arrived at the age of forty years; that the plaintiffs are, and since the death of their mother Anne have been, in possession of the real estate in the city of Cincinnati of which they are the absolute owners in fee simple, devised to them by the clause of said will, beginning, "after the death of my said wife Anne, I do hereby give and devise in fee simple, to the children I may leave by her, all the real estate above described, etc."

The answers filed by certain of the defendants and heretofore referred to, after admitting the death of Nathaniel Pendleton, the death of the second wife Anne, and the relationship of the parties to this action, contain allegations, the substance of which is that the property described in the petition was devised to Nathaniel Pendleton, deceased, by his first wife.

These allegations will be more specifically referred to later on in the consideration of the motion to strike out the same as immaterial and irrelevant.

The will consists of the will proper, which was executed on the twentieth day of October, 1852 and the codicil, executed on the fifteenth day of February, 1861.

The will proper is not divided into items, but is in the form of a continuous statement whose provisions, however, may be enumerated and briefly stated as follows:

First—The testator directs that all his debts shall be paid by his executors out of the personal property of which he may die possessed (except such as shall be hereafter specifically bequeathed), or out of the proceeds of certain real estate which they are authorized to sell.

Second—The rents arising from his real estate in the city of Cincinnati (including the real estate devised to his executors for payment of his debts, and including his residence, provided the same shall not be sold or occupied as hereinafter provided), together with all the rents, dividends and profits arising from his personal estate, or so much thereof as may not be sold for the payment of his debts as aforesaid, he gives to his wife Anne during her natural life.

Third—If his wife Anne remarries, he directs that the said rents be paid to his executor and son George H. Pendleton, upon the following trusts, to-wit: To pay to his wife Anne during her life the one-half of said rents and profits, and to apply the other half to the maintenance and education of any children he may have by his said wife Anne.

Fourth—In case of the death of his wife Anne before the children he may leave by her shall have arrived at the age of majority, he directs his executor, George H. Pendleton, to collect all rents and profits as aforesaid, until they shall arrive at their majority; and until that period to appropriate out of the same what is necessary in his discretion, for the support and education of said children, and to invest the surplus in real estate in Cincinnati or otherwise in the discretion of said executor, for the benefit of his said children.

Fifth—The disposition of his estate after the death of his wife Anne, is as follows:

“After the death of my said wife Anne, I do hereby give and devise in fee simple to the children I may leave by her, all the real estate above described (describing it) together with my house and lot on Fourth street, purchased of Judge McLean (in case my executors shall not sell as hereinafter provided, the said last mentioned house and lot on Fourth street), subject to the trusts above created, provided that my said children and their heirs, shall have no authority to sell, mortgage, or in any wise encumber said property until the youngest of my children shall have arrived at the age of forty years.”

Sixth—The use and occupation of his house on Fourth street, he gives to his wife Anne during her natural life, if she desires to occupy the same; but if she does not desire to occupy it, or, if she does desire to occupy it, then after her death, he authorizes his executors to sell and convey the same, either for cash or on credit, without valuation, or the



intervention of any court, if in their judgment it shall seem best, and in case of such sale he directs his executors to "invest the proceeds thereof for the use of my said wife and my said children, to be enjoyed by them in the manner and upon the contingencies hereinabove provided"

He gives and bequeaths to his wife all his furniture, plate, horses, carriages and library.

Seventh—The testator then uses the following language upon the proper construction of which the determination of this case rests:

"In case my said children shall die without issue, then after the death of my said wife Anne, the said property south of Court street, being part of out-lot 5, I give and devise to my children Elliott Hunt, Anna Pierce and Nathaniel, in fee simple, share and share alike. And in the same event, I give and devise all the residue of my estate above mentioned, to my children Susan, Martha, George, Elliott, Anna and Nathaniel and their heirs forever."

Eighth—The testator authorizes his executors to lease for a term of years, or perpetually, at any time before his youngest child shall arrive at the age of majority, any or all of his real estate above described, to such persons and upon such terms as they shall deem proper.

Ninth—He directs and empowers his executors to sell certain real estate in Spencer township if, in their judgment, it is proper, to discharge the debts which at the time of his death may remain on account of the purchase of said land, and convey to each of his children, Elliott, Anna and Nathaniel, the sum of five thousand dollars, and the residue of the land or of the proceeds, together with all the residue of his estate not herein otherwise disposed of, shall be divided among all his children share and share alike.

Tenth—He gives to his wife Anne the use of his property at Gambier during her life, and after her death it is to be divided among his children share and share alike; and with the consent of his wife, the executors may sell the property and invest the proceeds upon the same uses as provided for the land itself.

Eleventh—He appoints his wife executrix and his son George H. Pendleton executor.

#### CODICIL.

The codicil, as above stated, was executed February 15, 1861. It begins with a recital that whereas, on the twenty-sixth of October, 1852, he had executed his will, that he now desired "to make some additions thereto and alterations therein." The codicil, unlike the original will, is subdivided into items, of which the following is an abstract:

First—He devises to his daughter Susan Bowler and his son George H. Pendleton, each one undivided sixth part of the property conveyed to him by the C., H. & D. Railroad Company.

Second—He devises to George H. Pendleton and Elliott H. Pendleton and the survivor of them, the remaining two-thirds of the property devised in item I, and also the undivided half of certain property known as "Sportsman's Hall" upon the following trusts: They shall collect the rents from the property and pay them to Edmund and Charlotte; they may, with the consent of the latter persons, sell the whole or part and reinvest the proceeds; and shall convey the property devised or that afterwards acquired by reinvestment as aforesaid, to Charlotte and Edmund

as soon as Edmund shall have attained the age of thirty years, or in case of their death prior to that time, then to their heirs respectively.

Third—He gives to his former pastor and his wife, jointly, during their lives, and to the survivor of either during life, two hundred dollars per annum, to be paid by his executors in semi-annual installments.

Fourth—He gives to Annette. — one hundred dollars, to be paid to her by his executors in such sum as his wife shall appoint.

Fifth—He gives to his executors five thousand dollars, to become due to him from a son-in-law, the Rev. N. H. Schenck, as evidenced by notes secured by mortgage, in trust, to be invested for the use and benefit of his said wife and of his daughter Charlotte and his son Edmund, in all respects, according to the appointment and provisions of his original will hereinbefore mentioned.

Sixth—He gives to his said wife all his "railroad, canal, turnpike stocks and other stocks, monies, credits and personal property of whatsoever name and nature not hereinbefore disposed of, after the payment of my (his) debts according to the terms of my (his) said will."

Seventh—He appoints Elliott H. Pendleton to be the executor "jointly with my (his) wife and George H. Pendleton," and he also appoints him a co-trustee with George H. Pendleton in the execution of all the trusts created by said will.

As we have previously said, the contention of the parties arises upon the construction of the words, "die without issue," which are used in the original will. The plaintiff contends that these words are used to be referred to a period prior to the death of the wife Anne; while the defendants contend that they are not to be limited to any such particular period, but refer to a death without issue at any time. The language of the will in which the expression is used is as follows:

"In case my said children shall die without issue, then after the death of my said wife Anne, the said property south of Court street being part of out-lot 5, I give and devise to my children Elliott Hunt, Anna Pierce and Nathaniel, in fee simple, share and share alike; and in the same event I give and devise all the residue of my estate above mentioned to my children Susan, Martha, George, Elliott, Anna and Nathaniel, and their heirs forever."

Up to the year 1838, the rule in England was, that the words, "die without issue," meant an indefinite failure of issue, and thus created an estate tail; but this rule of construction has been changed there by statute, so that these words now mean a failure of issue at the death of the person whose issue is spoken of, and not an indefinite failure of issue unless an intention appears to the contrary. Hawkins on Wills, 212-214.

The courts of this state have declared that the old English rule of construction, which was in keeping with English policy to favor perpetuities, ought not be followed in this country, where the policy of the law is to discourage perpetuities.

In the case of *Parish's Heirs v. Ferris et al.* (6 Ohio St., 574), the Supreme Court was urged to hold that a devise to A. in fee, but if she die "without children" created an estate tail; but the court held that where there was a devise in fee to A., but "if he die without issue," or "without leaving issue," or "heirs of his body," or "children," or other words of similar import, the words are to be interpreted according to their plain, popular and natural meaning, as referring to the time of the person's death, unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purpose, and that the pre-

sumption was that the testator did not intend to create an estate tail. And in *Niles et al. v. Gray et al.*, (12 Ohio St., 327), the case of *Parish v. Ferris*, *supra*, was followed and approved, and the reason for the rule declared as follows:

The arbitrary and artificial rule of construction so long prevalent in the English courts, and so inconsiderately adopted and followed in some of the states of our Union, that such expressions, as "dying without issue," and the like, meant an indefinite failure of issue, when first adopted in England, could be excused and accounted for, if not justified, on two grounds—first, that from the very structure of the English government and English society, it was a part of English policy to encourage the perpetuity of family estates; and second, that these estates tail were common, prevalent and familiar to the mind of every testator. Here, on the contrary, the public policy is to discourage perpetuities, estates tail are utterly unknown to the generality of our people, our laws forbid them, and every presumption is against the supposition of an attempt to create them."

In *Taylor v. Foster's Adm'rs et al.*, 17 Ohio St., 166, and in *Piatt v. Sinton*, 37 Ohio St., 355, where there was a devise in fee with a devise over in case first devisee should "die without issue" the words were held to refer to the death of the devisee, and to a death at any time without issue.

Now, whatever may have been the reason which led to the adoption of the rule, it is beyond dispute that the rule in Ohio clearly is that a devise to A. in fee, with the words "if he die without issue," is construed to be a devise in fee, with an executory devise over in case A. die at any time without leaving issue at his death; provided, the will does not indicate a different intention upon the part of the testator; but if a different intention appears in the will the words are to be construed so as to carry out such intention. In the case of *Baker v. McGrew*, 41 Ohio St., 113, the court found from the language of the will a different intention upon the part of the testator. In that case the testatrix devised to C. B. and D. B., her grandchildren, one-sixth of her residuary estate. She then provided, that in case of the death of both grandchildren without issue, the property coming to them should be given to the other grandchildren of the testatrix. The court held that it appeared from all the words of the will that the contingency contemplated by the testatrix was one to occur prior to the distribution of her estate.

By reason of the statute of 1838 the rule in England is the same as in Ohio; but prior to the enactment of that statute the question had been judicially considered, and since then has been elaborately argued and considered as to the effect upon the construction of these words of the creation by the testator of a life estate prior to that of a fee; and in the case of *Edwards v. Edwards*, 15 Beavan, 363, decided in 1852, Sir John Romilly, Master of the Rolls, endeavored "to collect and classify the various decisions which had taken place as to the construction of gifts over in the case of death, or in the case of death under particular circumstances." He found that all such gifts fall under one of four classes, and that the case before him fell under the fourth class, namely: "Where a life estate is given to one in the subject of the gift, and on the determination of that estate, the subject of it is given to A. with a direction that if he shall die leaving no child, his share shall go to a survivor."

The case at bar falls within the fourth class described by the Master of the Rolls, inasmuch, as the testator here gives a life estate to his widow

Anne, and upon her death a fee to his children Edmund and Charlotte, and upon their death without issue, to other persons.

It is therefore of the greatest importance that we should determine what the law in England is as to the construction to be placed upon such a devise. Referring to this class of cases the Master of the Rolls, in *Edwards v. Edwards*, said:

"In this class of cases, it is obvious, that the event of death without leaving a child may be applied either to the period of distribution or to any point of time, either before or after that period, whenever it may occur: nor, if it were *res integra* would it be easy, in the absence of any indication of intention to be collected from the rest of the will, to determine which of these constructions ought to prevail. I consider it, however, settled, both by principle and authority, that in the absence of any words indicating a contrary intention, the rule is, that these words, indicating death, without leaving a child, as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution. The principle which regulates such cases is to be found in the often expressed desire of the court to avoid a construction so inconvenient as one which must suspend the absolute vesting of the subject of the gift during the whole life of the legatee or devisee, a principle which seems materially to have influenced Lord Brougham in his decision of *Home v. Pillans*."

In 1874, however, there came before the House of Lords, the now leading case of *O'Mahoney v. Burdett*, reported in 7 Law Rep., English and Irish Appeal Cases, 388; which case was immediately followed by another leading case on the same subject, viz.: *Ingram v. Soutten*, and reported on page 408 of the same volume of reports. In the former case the testator made a bequest of \$1,000 in the 3½ per cent. Irish stock to A. for her life, and after her death to her daughter B., but if B. should die unmarried or without children, the consols were to revert to C. The question in the case was whether the expression "If my niece should die unmarried or without children" was to be understood to mean the death of the niece unmarried or without children at any time whatsoever, or only during the lifetime of the tenant for life. As the case was one falling within the fourth class, described in *Edwards v. Edwards*, the decision consists for the most part of an examination of the correctness of that rule. Three Lords delivered opinions, and the conclusion of the Lord Chancellor is summed up as follows:

"I am unable to find in any case prior to *Edwards v. Edwards* any authority that the words introducing a gift over in case of the death unmarried or without children of a previous taker, do not indicate according to their natural and proper meaning, death, unmarried or without children, occurring at any time, or that this ordinary and literal meaning is to be departed from otherwise than in consequence of a context which renders a different meaning necessary or proper."

The fourth rule laid down in *Edwards v. Edwards*, was thus overruled in *O'Mahoney v. Burdett*.

In the case of *Ingram v. Soutten* *supra*, where the words "dying without issue" were used, and there was a preceding life estate, the court followed the rule in *O'Mahoney v. Burdett*, the Lord Chancellor saying, on page 416:

"I can find nothing whatever in the context or in the general scope of the provisions of this will which leads me to think that the words pointing to the death of Mary Soutten without issue, living at the time

of her death, are to be construed as pointing to her death otherwise than as at whatever time it may occur."

We understand the rule in the United States Supreme Court to be the same as that in England and Ohio. *Britton v. Thornton*, 112 U. S., 533.

The inquiry then, here, is, do the words "die without issue" as applied here to Edmund and Charlotte Pendleton, refer to their deaths at any time without issue, or does "the context render a different application of the words 'die without issue' necessary or proper?"

As the action is one to quiet title to real estate, the discussion at bar has largely, although not entirely been as to what was the intention of the testator in the disposition of his real estate. The disposition as to other pieces of real estate, the nature of the estates given, the results which would follow from the devise and every circumstance which could throw light upon the testamentary scheme as to the real estate have been the subjects of elaborate argument.

These different arguments we shall have occasion to examine hereafter. But we are disposed to think that greater and more satisfactory light can be had in discovering the testamentary scheme of the testator by an examination of the disposition which he makes of his personal estate, and we therefore proceed first to such an examination. The pertinency of such an examination becomes at once apparent when the circumstance is recalled that the provision in the original will which contains the words, "die without issue," relates to the personal estate as well as to the realty. Thus, the provision, to repeat it again, is "In case my said children shall die without issue, then, after the death of my said wife Anne, the said property south of Court street, being part of out-lot 5, I give and devise to my children Elliott Hunt, Anna Pierce and Nathaniel, in fee simple, share and share alike; and in the same event I give and devise all the residue of my estate above mentioned, to my children Susan, Martha, George, Elliott, Anna and Nathaniel and their heirs forever.

The "residue" of his estate embraces his personal property.

Briefly restated, the general provisions of the original will as to his personal property are: that he gives and bequeaths absolutely to his wife all his furniture, plate, horses, carriages and library. As to his other personal property he directs that his executors may pay his debts out of it, or out of certain real estate. After the debts are paid, the rents, dividends, issues, and profits arising from his personal estate, are devised to his wife Anne as long as she remains unmarried; but if she marries, these rents, dividends and profits arising from his personal estate go to his executor, George H. Pendleton, in trust, to pay one-half to his wife and the other half go towards the maintenance and education of his children during the life of his wife Anne. If his wife die before his children reach their majority, the rents go to George H. Pendleton as their guardian, until they attain their majority. Upon the death of Anne and the children attaining their majority, the personal property goes to the children Edmund and Charlotte.

As the testator intended that his wife should have only the income from his personal property, the will is open to the criticism of being loosely drawn in that, unless the executors are to have possession and control of the personalty charged with the duty of paying the income to the wife, it goes into her possession and control, and in case she disposes of it during her life to an innocent purchaser, the children, at her death, would be without remedy unless she left sufficient estate to replace it. But this looseness in the will is probably due to the fact that as long as

the widow remained unmarried the testator was willing to trust her to carry out his wishes. But, in case she married, the income from the personal property went to George H. Pendleton, executor, in trust to pay one-half to the widow and the other half to the children. In that event (her marriage), necessarily the possession and control of the personalty would also go to him; because, if the construction of the will requires that in the absence of any provision as to where the possession and control of the personalty goes, that it must go to the one who is entitled to the income, and, therefore, as long as the wife remains unmarried, to her during life, then for the same reason, in case she remarries and the income goes to George H. Pendleton in trust, the possession and control of the personalty should also go to him in trust.

But whatever criticism may be made as to the safeguards which the testator has thrown around the possession of the personalty while it remains in the hands of the widow, there can be no doubt whatever that his intention in his original will was that the widow should only have the income of the same during her life; and that in case she married she was to have only the income of one-half of the personalty, the remaining one-half of the income to go towards the maintenance and education of the children during her life; and if the wife should die before the children, then if the children are minors the income to go to George H. Pendleton as their guardian until they attain their majority.

Now it clearly appears from these provisions that the testator disposes of the income of his personalty during the life of the wife, and disposes of it according as she marries or not; but that, at her death, the personalty goes to her children by the testator; and in case they happen to be minors at the time of her death, goes to a guardian until they attain their majority.

Leaving out of view now for the moment the provision in the will relating to the death of Charlotte and Edmund without issue, we think, it beyond dispute, that the intention of the testator in his original will was that the personalty should pass to Edmund and Charlotte absolutely; because he clearly shows through the original will that he understands distinctly the difference between the enjoyment of the income of personal property, and the enjoyment of the personal property itself; and that when he intends an income only to be enjoyed, his meaning is not left in doubt. This appears from the disposition of the income only of all his personal property during the life of the wife except the furniture, plate, horses, carriages and library, which he gives to her without any qualification, and therefore absolutely; and all the provisions of the will show conclusively that upon the death of the wife and the children reaching their majority, the personal property goes to them. The will is not susceptible of any other intelligent construction.

But it is said that the testator in two places in the original will in referring to certain investments says that they are to be made "for the benefit" of his children, and "for the use of (his) my said wife and (his) my said children," thus indicating by the words "use" and "benefit" that the children are merely the beneficiaries of a trust interest in the personal property after they receive it. But this contention cannot be successfully maintained.

The first expression occurs in the first instance under the following circumstances: The testator has in mind the death of Anne before the children shall reach their majority. In that case he appoints George H. Pendleton executor and guardian "to collect all rents and profits aforesaid for the use of my said children share and share alike until they shall

arrive at the age of majority respectively;" provides that his children shall be supported and educated out of such rents and profits, and if any surplus of said rents and profits remain over, it shall be devoted first to any unpaid debts he may have, and the balance shall be invested "in real estate in Cincinnati or otherwise in the discretion of my executor for the benefit of my children."

We do not think that it is necessary that we should enter upon an argument to show that the word "benefit" used here does not make the children the beneficiaries only of this surplus thus invested beyond the time when they reach their majority, and that at their majority the investment itself goes absolutely to them.

The expression "for the use of my said wife and my said children," occurs in the provision relating to the power of sale of the homestead given to the executors. In case they shall sell it as there provided, the testator directs that they "shall invest the proceeds thereof for the use of my said wife and my said children to be enjoyed by them in the manner and upon the contingencies above provided." But as no trust is above provided with reference to the personal property which comes into the hands of the children after the death of Anne, this provision does not create such a trust; because it not only impliedly disclaims making any different provision from that which has been previously made with reference to the personal property, but distinctly affirms that it is to be governed by the disposition previously made.

It is said by counsel for defendant that the word "above" is improperly used here and should be "hereafter." But we see no reason for this claim. We are clearly of the opinion that the "manner" of enjoyment is clearly "above" described, and that the testator had in mind by the use of the word "contingencies" the marriage and death of the widow. Marriage is certainly a contingency, and although the death of a person is, technically speaking, not a contingency, but a certainty, yet death before a person's children reach their majority is a contingency. The expressions "use of my children" and "use and benefit of my said wife and children," as used in the original will, in no way contravene the intention plainly to be gathered from the rest of the will, that upon the death of the wife the personalty whose income she has enjoyed, goes absolutely to the children.

But it may be urged by defendants that although it may be the true construction of the original will, if the provision with reference to dying without issue is left out of view, that the personalty with the exception of the plate, furniture, horses, carriages, etc., is to go absolutely to the children upon the death of the wife, yet affect must be given to such provision; and that although such children do get such personalty absolutely just as they get the real estate in fee simple, nevertheless it is a gift with an executory devise over in case they shall die without issue; and that such provision necessarily modifies the absolute gift in the previous part of the will.

But the question is not whether such a provision would be lawful or whether the will would bear such a construction; but whether such a construction expresses the intention of the testator.

Now, if the contention of defendants is correct, then neither Charlotte nor Edmund would have anything more than a life estate in such personalty until one or the other should die leaving issue; and therefore until such an event happened they could only enjoy the income from the personalty; because to dispose of it would be contrary to the intention

of the testator whose intention was that they should preserve it intact until one or the other had died leaving issue. Otherwise, upon their death without issue, the property having passed out of their hands, would not be subject to the provisions of the will. Possibly, if such personalty had passed into the hands of a purchaser with notice, it could be followed; but if it consisted of money, unregistered government bonds, mortgage notes or other similar securities, any attempt to follow it would be utterly futile.

As the will shows by the creation of trusts in other parts of it, that the testator is familiar with a trust, it is altogether improbable that if he had intended Charlotte and Edmund to have received the personalty in trust after the death of his widow Anne, that he would have failed to say so, and to have provided a trustee, as could easily have been done.

Possibly the construction that defendants urge might warrant the further construction that Charlotte and Edmund would hold such property as trustees. But if they violated the trust and spent the property, the other heirs would be practically remediless; and if either should die before the other, after reaching the age of majority, he or she might will the property to strangers who would be entitled to enjoy the same until the death of the other without issue, in which case the difficulties we have pointed out would be increased and multiplied.

The construction of the original will by the defendants, therefore, so far as it applies to the personalty, is inconsistent with the absolute gift to Edmund and Charlotte upon the death of their mother, such as we cannot avoid believing it was the intention of the testator to make; and would furthermore impose a restriction upon the disposition of the personalty which the testator had utterly failed to make effective. We think that under the original will the words "die without issue" were intended by the testator, so far as the personalty is concerned, to refer to death before the mother, in which case none of the objections we have pointed out could arise, and in which case the plainly expressed intention of the testator as found in the other parts of his will could be carried out.

The original will which was executed in 1852, remained unchanged until 1861, a period of nine years, when a codicil was executed by the testator. The codicil made various devises as to real estate, and materially changed the disposition of the personal estate. Without undertaking to enumerate all the changes made in the codicil, it may be observed that whereas in the original will the personalty was left to the wife or to the wife and children during the life of the wife, with the principal to the children upon her death, the only absolute gift of personalty to her, being the furniture, plate, horses, carriages and library; in the codicil nearly all the personalty is given absolutely to the wife, the most important exceptions being an annuity to be paid by his executors to his former pastor and wife during their life, and a bequest of five thousand dollars due from N. H. Schenck, which was given to his "daughter Charlotte and son Edmund in all respects according to the appointments and provisions of my (his) original will hereinbefore mentioned."

There is nothing in the codicil to indicate that the attention of the testator had been directed to any difficulties which would arise under his will as originally drawn, such as would necessarily arise if the defendant's construction of it is correct, and that the codicil was drawn for the purpose of removing such difficulties; because, although the amount of



personal property involved in such difficulties is lessened, the difficulties themselves are not removed.

Thus the provision as to the disposition of the proceeds of the sale of the homestead remains as in the original will; and the five thousand dollars due from N. H. Schenck is given according to the appointments and provisions of the original will.

The income of the proceeds of the sale from the homestead and the five thousand dollars due from Schenck is enjoyed, therefore, by the widow Anne during her life unless she marries, when one-half of it goes to the children; and upon her death the principal goes to her children Charlotte and Edmund.

If we go back now to the controlling authorities in which the construction of the words "die without issue" has arisen, we shall find that the provisions of this will as to the personal property point to what is called a period of distribution at the death of the wife Anne, and that when such a period is found in a will the proper construction of it is that the words "die without issue" are to be referred to the period during the life of the wife Anne.

In *O'Mahoney v. Burdett*, *supra*, the Lord Chancellor explaining the decision in *Edwards v. Edwards*, where it was held that death without issue was to be referred to the period during the life of the tenant for life, said:

"The direction here for an assignment and transfer, coupled with immediate and absolute possession upon the death of the tenant for life, may well have justified the decision confining the contingency of death without children to the life of the tenant for life;" and in the same case Lord Hatherly said (403), "So again I apprehend in another class of cases, many of which were cited before us which have been decided since *Edwards v. Edwards*, one of them having been before myself; in those cases where the court has found upon the face of the will a positive direction to pay over the personalty to the legatee or to make a distribution among several legatees at a given time, the period of distribution being fixed at which, as it appears from the face of the will, the whole estate was intended to be entirely disposed of and divided, and to pass from the hands of the executors, the courts have laid hold of that circumstance to say, 'We hold this defeasance to be before that period of distribution arrives.' Holding it to be an unreasonable construction of the testator's will to say that he directed on the one hand that the money shall be absolutely paid and divided and distributed and put into the hands of those, who, having it in their hands, will, of course, spend it without any further trust, and on the other hand, that a subsequent event, namely, a certain person's dying childless after that distribution has taken place, should divest the property, that is to say, make it necessary for the executor to take steps to get back again, and recall that money which he has paid, in order to hand it over to those who would take under the executory devise. The courts have held that that was unreasonable. In the case I alluded to it was a trade, which was directed to be carried on by the executors until the son attained a certain age, when the trade (and not the trade only, but other property as well) was to be handed over to him, and then there was what appeared to be a divesting executory devise in the event of his dying without issue. I held in that case, and I should be disposed to hold the same again if a similar case came before me, that the time was evidently pointed out

when the final and complete distribution was to be made, and that the executory devise must be held to be referred to that time, because it was impossible to call the property back again and hold that the executory devise was then to take effect after there had been that full and complete distribution of the funds."

In *Ingram v. Soutten*, *supra*, the construction contended for by defendants was upheld, as said by Lord Hatherly, because, "There is no particular period whatever at which you can say that the funds are absolutely to be handed over." (418.)

In the case of *Olivant v. Wright*, (1 Ch. D., 346).

"A testatrix devised and bequeathed her separate estate to her husband for life, and after his death to be divided amongst her five children; and if any of her children should die without issue, that then that child's share should be divided among the children then living; but if any child should die leaving issue, that issue should take its parent's share. The five children of the testatrix all surviving the tenant for life; held: (reversing the decision of Bacon, V. C.) that the estate was, at the death of the tenant for life, to be divided between the five children absolutely."

The court held that the case was to be distinguished from *O'Mahoney v. Burdett*, and *Ingram v. Soutten*, for the reason that a period of distribution was plainly indicated at the death of the tenant for life, and that therefore the words "die without issue" should be referred to the period of the life of the life tenant. James, L. J., said, in the course of his opinion:

"The whole scheme of the will seems to be as plain as any scheme of a will can be so as to be a division at the death of the tenant for life, and every event which can occur upon the death of the tenant for life has been provided for. All is consistent with the intention that there is then to be a final division. Any other construction would lead to so many absurdities and contradictions that I cannot bring myself to entertain any doubt whatever as to what the intention of the testatrix was. It is the duty of the court by construction to give effect to that which appears to the court to be the plain intent of the words used."

In the same case Mellish, L. J., said:

"I am of the same opinion. I think it is quite clear that by the word 'divided' the testatrix meant that the executors were actually to divide the property, and that the *corpus* of the property, real and personal, was to be actually handed over and given to the children or their issue as the case might be. That seems to me to be made quite clear by the difference in the description as to how the property is to be enjoyed during the life time of the tenant for life and how it is to be enjoyed afterward. The tenant for life is only to receive the rents, interest and profits, and is not to have the *corpus*; but after his decease, it is to be divided among the five children. If, when the executors come to the division they find one of the children is dead, and is dead without leaving issue, they are to divide his share among the other children who are then alive. But if any of the children have died leaving issue then that issue will take the parent's share. All appears to me to point to one period of division, whereas, according to argument upon the other side, there might be several periods of division; and what is to happen if all the five children, one after the other, die without leaving issue does not exactly appear. Following the rule of the House of Lords it does appear clearly in this case that there are contrary intentions expressed in the will which show that "dying without leaving issue" was not

intended to refer to the time of the death of the person who dies, but to the time of the tenant for life."

The case of *Olivant v. Wright* was followed in England by that of *Besant v. Cox*, (6 CH. D., 604). In that case, "A testatrix devised lands to her daughter S. for life, with remainder to the husband of S. for life and after the death of the survivor of them to all the children of S. by her then husband who should be living at testatrix' death as tenants in common in fee, and added a proviso giving over the shares of any of the children of S. who should "depart this life without leaving lawful issue" to the survivors or survivor of the children that should have such lawful issue as tenants in common in fee.

*Held*: that the words "depart this life without leaving lawful issue" must be restricted to death without issue at the period of distribution, viz. the death of the surviving tenant for life."

In the course of his decision in this case Malins, V. C. said, (p. 609.)

"In that case (*Olivant v. Wright*) it names the number of children, but in the present case it is indefinite. 'All the children living at the death of the testatrix, and if any of my children shall die without issue.' Now, what was the construction put on the words 'if any of my children should die without issue?' That was held to mean if any of them should die in the life time of the tenant for life without issue; the consequence of which was that those who survived the tenant for life took absolutely, and the property could then be divided because the interests were absolute. No less than four judges, Lord Justice James, Lord Justice Mellish, Lord Justice Bramwell, and Lord Justice Brett, gave judgment in that case, and they all were bound as I am bound, by *O'Mahoney v. Burdett*. But *O'Mahoney v. Burdett* leaves the question open. Every will must be construed according to the intention of the testator, and I am satisfied, on the language of this will, as the Lord Justices were in *Olivant v. Wright*, that the intention of the testatrix was not to tie up the devisees during the whole of their lives, rendering the property inalienable and comparatively useless as long as they lived, but only to tie it up until the time the division took place, namely the expiration of the life estate. I entirely concur in the decision in *Olivant v. Wright*."

In the case of *Lewin v. Killey et al.*, (13 Appeal Cases) a case in the privy council, where there was a life estate given by the testator to his widow and certain absolute dispositions in favor of his children, the court held:

"That according to the whole scope and intention of the will the time of dying without lawful issue was confined to the time before the grant of the absolute interest. That is, during the life time of the widow; and that, after conveyance of the absolute interest no defeasance was contemplated."

The court said:

"The principle is that the time of dying without leaving lawful issue is confined to the time during which the absolute interest has not been conferred; but when that is once conferred the trust and the period of suspense is closed, and the possession is not to be disturbed."

The same principle has been adopted in America as in England. Thus in *Ferguson et al. v. Thomasson et al.* (9 S. W. Rep., 714), the court of appeals of Kentucky in a case where there was a preceding life estate and a devise to the children after the death of the mother with a provision in case any of the children should die without children or heirs

of their body. The court in holding that the words "die without children or heirs of their body" should be referred to the period, said.

"The will created a defeasible interest in the children subject to the life estate of the mother. It fixed no particular time by express words when they should come into possession and enjoy it; but the testator must be regarded as having had in view that they should do so at the time fixed by law, to-wit: At the termination of the life estate. The property was then subject to division among them, and in the absence of such an expressed intention, it should not be presumed that he intended their interest to be defeated by their death without issue, however far in the future it might occur."

See also, *McCornick v. McElligott*, 17 Atlantic Rep., 896, decided by the Supreme Court of Pennsylvania in which the principle announced in *Lewin v. Killey*, *supra*, was followed and approved.

As the provision directing the disposition of the estate in case the children die without issue relates to the realty and personalty, and as we have found that as to the personalty, it is to be referred to the period before the death of Anne, it necessarily follows that as to the realty it is to be referred to the same period.

But an examination of the provisions in the will disposing of the realty confirms this conclusion. The will provides as follows: "After the death of my said wife Anne I do hereby give and devise in fee simple to the children I may leave by her all the said real estate above described, (here follows a description of the real estate) together with my house and lot on Fourth street purchased of Judge McLean, (in case my executor shall not sell as hereinafter provided, the said last mentioned house and lot on Fourth street) subject to the trusts above created—provided that my said children and their heirs shall have no authority to sell, mortgage or in any wise encumber said property until the youngest of my children shall have arrived at the age of forty years."

The contention of the defendants in regard to the construction of this provision is that the restriction upon the authority of the children to sell, mortgage, or in any wise encumber, does not apply to the fee simple estate, but to the property, and that the interest which the children have in the property is not a fee simple absolute, but a fee simple subject to be divested at any time by an executory devise over by the death of both the children without issue; and that such a construction is one that harmonizes the two clauses of the will.

Taking the devising clause by itself, there can be no reasonable doubt, we think, that the intention of the testator was to give an absolute estate in fee simple, and that he intended by the provision that the children "shall have no authority to sell, mortgage, or in any wise encumber said property until the youngest of my (his) children shall have arrived at the age of forty years" that they should have no authority to sell, mortgage, or in any wise encumber the fee simple until the youngest child arrived at the age of forty years. The word "property" is the one that any testator would naturally use in such a connection. A man owning a fee simple does not, in speaking of a sale or mortgage of the property, think it necessary to refer to his fee simple interest in the same. That is of course referred to when he speaks of a sale or mortgage of the property. It is the customary, natural and popular language used in such a transaction; and the testator having previously defined the interest devised, which was the entire fee simple interest, naturally, in speaking of a sale, mortgage, or incumbrance, spoke of the

property and not of the fee simple. And the restriction upon the authority to sell the fee simple before the youngest of the children should arrive at the age of forty years, necessarily implied an authority to sell when that age was reached and the widow was dead.

In *Monteith v. Nicholson*, 7 Keene, 719, the testator provided that his bequests to certain legatees should go over in the event of their dying without issue either in his life time or afterwards. He also declared that none of the legatees should be entitled to any bequest until they attained twenty-one. He did not say affirmatively that they should be entitled if they attained twenty-one. But from the negative declaration that they should not be entitled until they attained twenty-one, the court inferred the intention to give them their estates absolutely at twenty-one, and held that death without issue therefore meant death before twenty-one, although the language of the will was general, namely, "die without issue either in my life time or afterwards."

As the testator in this case, therefore, gives an absolute power of disposition of the fee simple when the youngest child shall attain the age of forty years, and the widow Anne is dead, it necessarily follows that the words "die without issue" in this will do not refer to the period after the death of Anne, because if they did, they would directly conflict with the intention of the testator as we have found it to be, and would prevent the children from ever disposing by sale of an absolute indefeasible estate in fee simple.

But it is contended by the defendants that the restriction upon the right to sell, mortgage or encumber the fee simple of the property before the youngest of the plaintiffs shall attain the age of forty years, does not imply the right to sell such fee simple at that time, for the reason that by the operation of law the fee simple vested in the children at the death of the wife Anne; and that if plaintiff's contention, that after the youngest child had attained the age of forty years they could sell the fee simple is correct, then in as much as the widow Anne might still be alive when the youngest child reached said age, the sale might take place during her life, and that this would directly conflict with the plaintiff's own construction, which is that the fee simple estate which they have could be defeated by their death without issue before the death of Anne.

It is true, as claimed by the defendants, that the fee simple vested in the children by operation of law upon the death of the testator, and not upon the death of the widow Anne. But no one but a lawyer skilled in the special law of real property would be aware of the rule of law by virtue of which such vesting took place. The plain language of the devise which we have seen authorized a sale of the fee simple, can only be carried out by assuming that the testator did not understand this rule; and further evidence is given of that fact by an examination of its language. He does not say "I devise the property for life to my wife with remainder to my children;" nor does he say, "subject to my wife's life estate I devise the property to my children," but his language is: "after the death of my wife Anne I do hereby give and devise in fee simple to the children I may leave by her all the real estate, etc." Thus indicating by his language that he understood that the fee simple did not go to the children until the death of Anne.

The only fair construction that can be placed upon the devise, is that the testator contemplated that the plaintiffs should, when the younger of them had attained the age of forty years, have a fee simple estate capable of being sold or mortgaged; that he did not merely intend

that they should have the right to sell an uncertain contingent and defeasible estate; and that such intention is inconsistent with a construction which makes death without issue mean death at any time. Such a construction is, therefore, not the true one.

The following language of Lord Selborne in *O'Mahoney v. Burdett*, is in point here: (L. R. 7 H. L., 405.) "In *DaCosta v. Keir*, Russ., 360, there was evidence of an intention that the legatee should in some event take an absolute interest, which intention must have been wholly defeated if the divesting clauses could not be referred to a period earlier than the death of the legatee. \* \* \* A like conclusion (referring death without issue to the period of the death of the life tenant) may also *prima facie* be arrived at when the language of the will shows, as in *DaCosta v. Keir*, that the legatee was intended, in some event, to take an absolute interest, and when that intention can not in any event receive effect unless the operation of such a divesting clause is limited to a time earlier than the legatee's death."

It must also be borne in mind in the case that while it is true there is a presumption that the words "die without issue" are to be referred to a death at any time, unless the contrary intention appears in the will, yet it is also true, as is said by our Supreme Court in *Collins v. Collins*, 40 Ohio St., 363, approving the language of *Thornhill v. Hull*, 2 C. & F., 22:

"It is a rule of the courts, in construing written instruments, that when an interest is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest or estate can not be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words of the clause giving the interest or estate."

And it is also true as is said in *Bierce v. Bierce*, 41 Ohio St., 256:

"The policy of the law of Ohio is unfavorable to entails. Is it not also so unfavorable to provisions 'tying' up property that it will not by liberal construction create such limitations?"

And it is further to be remembered that in *Besant v. Cox*, *supra*, the fact that the referring of the words "die without issue" to any time instead of to a period of the life estate, resulted in tying up the estate in an absurd way, operated strongly upon the mind of the court in inducing it to reject such construction as the true one.

Thus Malins, V. C., said:

"Now, if this is intended to apply to the whole life of the devisees, the grandchildren, nothing can be more absurd than that, because they can none of them do anything with the property; they can not sell it, they can not mortgage it, they can do nothing with it during the whole of their lives. \* \* \* A more absurd will, in that view of the case, can hardly be made. To that construction, therefore, I am entirely opposed. But then there is another construction, absurd as the will may be, which will do more justice, and which is in accordance with the rules of this court, which say that in all cases of vesting property, you must make it vest absolutely, as early as possible, and in all these gifts over which have produced the inconsistency pointed out when they are to be during the whole lives of the devisees, the rule is to cut them down and make them operate as early as possible.

\* \* \* \* \*

"That is the obvious intention. It vests property at a much earlier period; it makes the property useful to the family who take it, instead

of tying it up for an indefinite period, viz. : during the whole of their lives, it may be without power of alienation.

\* \* \* \* \*

"But *O'Mahoney v. Burdett* leaves the question open. Every will must be construed according to the intention of the testator, and I am satisfied, from the language of this will, as the Lord Justices were in *Olivant v. Wright*, 1 Ch. D., 146, that the intention of the testatrix was not to tie up the devisees during the whole of their lives, rendering the property inalienable and practically useless as long as they live, but only to tie it up until the time of distribution took place, the expiration of the life estate. I entirely concur in the decision in *Olivant v. Wright*."

In view of these two rules of law, viz., that where an estate in fee simple is once given, language cutting it down must be equally clear, and that a construction which ties up an estate is not favored, the presumption in this case which attaches in the first instance to the words "die without issue" is at best a very light one. And if the fair construction of the devise is to give the devisees the right to sell the fee, such presumption is by reason of that fact alone entirely overthrown.

In deciding the questions raised by the demurrer to the petition, we are, of course, not at liberty to look beyond the will itself to the circumstances under which it is made. But as the answers of several of the defendants allege in substance, that the property devised under the will, came from the first wife of the testator, we have been pressed in the argument of the defendants, to discover in this will, the intention of the testator to have such property return to the family of his first wife, by a return to her children, in case his children by his second wife died without issue.

The reasons which we have given for the construction of the will which we have announced, are in no degree shaken by the circumstance, if true, that this property came to him from his first wife; because speculation as to what the testator ought to have done is idle in view of the fact that the will leaves no doubt as to what he has done.

But, under the defendants' own construction of the will, while of course the property would revert to the children of the first wife in the event of both of the children of the second wife dying without issue, yet such a provision is not the one that a sensible and intelligent man would adopt to accomplish the purpose which the defendants contend he had in mind. Thus, if after the death of the wife Anne, Charlotte should die before Edmund, she could will this property to whomsoever she choose, or, if she married, it would go to her husband, whether absolutely or for life we need not inquire. Now, as long as Edmund might live, such devisees or husband of Charlotte could enjoy the property, and if Edmund died leaving issue they could enjoy it forever. But if Edmund should die without issue, it is suddenly taken from them and sent over in a different direction. Now, this is not in keeping with the defendants' theory that the property should go back to the family of the first wife, because if that were the purpose of the testator, he would have provided that Charlotte's share, if she died without issue, should go back to the first wife's family, and that a similar course should be taken with Edmund's share if he should die without issue; or that if either Charlotte or Edmund died without issue, the property should go to the survivor.

If defendants' theory of the intention of the testator is correct, what possible reasonable explanation can be made of allowing the share of

The question is not a new one in this state. In *State v. Callard*, 8 Dec. Re., 75, Judge Frazier, of the Noble county common pleas, sustained a demurrer to an indictment for setting fire to a house insured in the Melville Mutual Marine and Fire Insurance Company, because the indictment did not allege that the building burned was insured against loss or damage by fire. See also *Martin & Flynn v. State*, 29 Ala., 30. And in *Ellars v. State*, 25 Ohio St., 385, the Supreme Court held, "In the act of February 21, 1873, making it an offense to procure by any false pretense or pretenses the signature of a person to a promissory note, as the maker thereof, the words 'as the maker' constitute a material part of the description of the offense and must be averred in the indictment."

It is true that the indictment followed the form given in the second edition of Wilson's Ohio Criminal Code, but Judge Wilson in the third edition of his valuable work, has changed the form to conform with the language in the statute and the several decisions. Motion in arrest of judgment granted.

Frank Seinsheimer and Max B. May, for the motion.  
Prosecuting Attorney, *contra*.

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## JUDICIAL POWERS.

[Superior Court of Cincinnati.]

## \*IN RE BOARD OF REVIEW.

1. The General Assembly has no power to compel the courts to exercise political powers entirely unjudicial in their character.
2. The Superior Court of Cincinnati should refuse to appoint a Board of Review for that city.

\*Subsequently a large number of prominent citizens and taxpayers in that city petitioned the majority of the court to recede from its former action. The majority authorized the following statement of its position to be made public. It not only refused to recede from its former position as to the particular appointments in question, but announced its determination to refuse hereafter to make any political appointments.

The position of the majority of the court, (Smith and Moore, JJ.,) is stated as follows:

At the time the bill creating a board of review was before the general assembly, the court publicly protested against that feature of it which imposed the appointing power upon this court. The protest, however, was not heeded, and in the closing days of the session the bill was passed vesting the appointing power in this court.

In view of the fact that it was altogether improbable that the general assembly would remain in session a sufficient length of time in which to change the appointing power in case the court refused to exercise it, the court reluctantly assumed it. Since then the tendency to impose all manner of political appointments upon this court has been steadily and rapidly increasing.

Upon two occasions since the original appointment of the members of the board of review were made, the court has publicly declared its unalterably fixed intention to discontinue the exercise of such appointing power.

The grounds of its refusal may be summarized as follows:

First—The exercise of political powers by a court is not an act judicial in its nature, and the constitution of the state forbids the general assembly from imposing such powers upon a court. What the constitution forbids, we do not think it becoming in a court to indirectly do.

Second—A court which would assume political powers, and the making of political appointments, would inevitably become a political court. The evils



MOORE and SMITH, JJ.

On the twenty-sixth of March, 1891, the general assembly of Ohio, passed an act entitled, "An act supplementary to and amendatory of title 12 of the Revised Statutes of Ohio," but more commonly known as the new charter of Cincinnati.

By sections 2 and 3 of this act the decennial and annual boards of equalization and the boards of tax commissioners and revision in said city are abolished; and the duties theretofore conferred on such boards, together with the power of hearing charges preferred against certain officers, the power of appointing assessors and the assistants, and the power of appointing "such other officers and employees as it may deem necessary for the efficient discharge of its duties," and fixing their salaries and terms of office, are conferred upon a board to be known as the board of review.

The appointment of this board of review is provided for as follows:

"Section 2. In cities of the first grade of the first class there shall be a board of review, consisting of six members, electors of such city, to be appointed by the superior court thereof, if there be one in such city, and if there be none, then by the court of common pleas of the county in which such city is located. The superior court; if there be one in such city, and if there be none, then the court of common pleas of the county in which such city is located, shall appoint as members of said board six citizens, electors of said city, well known for their intelligence and integrity, not more than three of whom shall be of the same political party, two of whom, of different political parties, shall be designated in their appointment to serve for one year; two others, also of different political parties, shall be designated in their appointment to serve for two years; and the remaining two, also of different political parties, shall be designated in their appointment to serve for three years; and thereafter at the expiration of such terms the superior court, if there be one in such city, and if there be none, then the court of common pleas of the county in which such city is located, shall appoint two members of said board, of different political parties, to serve for three years.

From the nature of the duties of the board it is apparent that the board is required to discharge a large number of important duties incumbent upon a municipal corporation; that the appointment of its members is entirely non-judicial in its character and is exclusively a political and administrative act; and it is also apparent, from its power to appoint all assessors and their assistants and "such other officers and employees as it may deem necessary for the efficient discharge of its duties," and to

which would be inflicted upon a community by such a court need not be detailed. They are obvious.

Third—A court cannot assume political powers in one instance, and refuse to assume them in another. For courts proceed in their actions upon fixed principles of law; and a failure to apply such principles in special cases, is necessarily an abandonment of the principles themselves.

While it is true that in the early days of the court it consented to appoint trustees who should have the charge and direction of certain public property and trusts; and while in deference to such long settled action of our predecessors it may be our duty to continue to make such appointments; yet, it may be said of them, (1), That the question is not entirely free from doubt, as to whether such appointments do not fall within the equity jurisdiction of the court, and (2) That there is no political patronage connected with them. But even, if political in their nature, nevertheless, the court having in view the best interests of the judiciary, has gone as far in that direction as it intends to go.—(Editorial.)

fix their salaries and their terms of office, it is clothed with a power of patronage possessed by but few other boards in this state.

In view of these facts this court, at the time the bill was pending in the general assembly, addressed a communication to that body calling attention to what seemed to the court the manifest impropriety of imposing upon it the power of appointment to this board, and respectfully protesting against the same.

In conformity, however, with what appeared, at that time, to be the popular desire that the new character should be passed in the form in which it had been prepared by the commercial bodies of this city, the general assembly was unwilling to change this feature of it, and accordingly the bill with this feature included, passed both houses with the support of all political parties.

Even then the court hesitated to assume the appointing power thus conferred upon it; but in view of the fact that but a short time was to intervene before the adjournment of the general assembly, and that it seemed improbable, in case the court refused to make the appointment, that sufficient time would remain in which to provide another appointing power, in which event the municipal government would be seriously crippled by being unable to discharge many of its most important functions, the court reluctantly concluded to make the appointments.

Accordingly as was provided by law, two members were appointed for three years, two for two years, and two for one year.

The latter appointments have expired, and the question is now presented to the court whether it shall continue or decline to further exercise this appointing power.

The embarrassment in which the court found itself at the time the original appointments were made, viz.: that a failure to appoint was to leave the city government entirely unable to discharge certain important functions of government, no longer exists; because the members of the board having once been appointed, serve until their successors are appointed or elected. Rev. Stat., sec. 8.

In view of this fact, and the further fact that there seems to be a growing tendency to constantly urge upon the general assembly the passage of laws imposing political appointments upon the court, we are of the opinion that the action of the court at this time in reference to the appointment of the members of this board may well be regarded as decisive of the question whether the court in the future is to confine itself solely to the exercise of judicial powers, or whether it is also to assume the exercise of political powers whenever the general assembly shall see fit to impose them upon it.

We have reached, therefore, a critical period in the history of the court.

In April, 1883, this court refused to appoint a health commissioner for the city of Cincinnati under an act commanding such appointment to be made. The decision of the court is not reported, but it was based upon the ground that even if a court might at the request of the legislature exercise non-judicial duties, yet it could not be compelled to exercise such duties; and that upon its refusal so to act it was necessary for the legislature to provide another appointing power.

In that case the court distinguished, as we may in this case, the appointments which it refused to make from those which it had previously made and continued to make, viz.: those in which, by the statute, a trust was imposed upon certain municipal funds, or property, and the

court was charged with the appointment of trustees. Such appointments are of that character which are entirely familiar to courts of equity, and are in no way the exercise of political powers.

Without now entering into an examination of the provisions of the constitution and the authorities bearing upon this question, it is sufficient for the purposes of this matter to merely state, as our conclusion, that we are clearly of the opinion that the legislature cannot compel this court to exercise political powers, entirely non-judicial in their character, and as the appointing of this board is a political and not a judicial act, we are clearly of the opinion that we cannot be compelled to exercise it.

In the light of these legal principles and the practical experience we have had with reference to these appointments, we are also clearly and firmly of the opinion that it is our duty to refuse to continue to make them. If we consent now, by appointing this board, to appoint boards of equalization and a board of revision for the city, we are unable to see with what consistency we can refuse, in the event that we are requested, to make appointments in any other department of the city government; to appoint a fire board, a police board, and to appoint generally for the entire city government; to supervise the conduct of such officials when appointed, to remove them when necessary, and to enter upon the management and control of the municipality. Hence the importance of these first appointments. They constitute, in our opinion, the entering wedge which might finally burst asunder the judicial structure.

Aside from the objection that the imposition of these foreign duties upon the court would take from it the time which belongs rightfully to the discharge of its duties proper, the evils of such a system are too manifest to the bar and bench, as well as any intelligent observer in the community, to require any especial mention from us. It may, however, be observed that it is not for a moment to be doubted that although a court may in the first instance make political appointments with their numerous subordinates, it is only a question of time when such political appointees will constitute the most important and powerful element in the community in making the court.

And it may further be observed that when the courts, become the head and center of any or all of the political departments of the government, they will necessarily conform their conduct in such matters to the political policies of the prevailing party, and it will become exceedingly difficult to convince the public that when they enter upon their judicial duties they change their character as a political body and discharge their duties free from political motives or influence. When such a judicial system obtains, the public confidence in the integrity and impartiality of the bench is at an end, and the very foundation of our system of government is threatened.

While we recognize the fact that in conferring this power of appointment upon us the framers of the law and the members of the legislature desired only the welfare of the city; and while we are not unmindful of the confidence in this court which such action implies; and while it might be of temporary advantage to the city for us to make these appointments, yet we are firmly convinced that such action upon our part would be wrong in principle, and could not but ultimately lead to the demoralization and destruction of the court.

We stand upon the principle so well expressed by Chief Justice Taney in *Gordon v. United States*, reported in 117 U. S., 697, 703.

"It is the duty of the court to maintain it (the judiciary) unimpaired as far as it may have the power. And while it executes firmly all the judicial powers intrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the constitution."

Judge Hunt announced that he could not follow his brethren in the position they had taken at this time in the matter of the appointment of members of the board of review. The terms of services of two members originally appointed by the court had expired, and the law provided that the appointing power should be exercised by the court. The legislature is not in session, and to hesitate in any action at this juncture might lead to much confusion and embarrassment.

No one can doubt that it is the duty of our courts to maintain themselves unimpaired so far as they may have the power, and to carefully abstain from exercising powers not strictly judicial in their character. When the charter bill was pending in the general assembly, he united with his colleagues on the bench in protesting against the imposition of duties of an extra-judicial character on this court, and united again in a protest against the appointment of members of the water works commission. Such legislation, if continued, could not but greatly impair the efficiency of the court and weaken its usefulness.

The Charter Bill was believed by all the commercial bodies of Cincinnati, and the citizens generally, to be in the interest of good government, and consequently received almost the unanimous vote of both political parties in the legislature.

In response to what seemed a patriotic duty, and to aid all the agencies for good invoked by our people to make effective this work of reform in municipal matters, this court named all the appointments for the board of review. There is committed to that board a most important public trust—a trust which involves the proper adjustment of our entire tax system, and necessarily affects the entire property of the city. This board has all the powers and performs all the duties heretofore conferred upon or required of the board of tax commissioners, the board of revision, the annual board of equalization, and the decennial board of equalization in cities of the first grade of the first class, and may proceed to hear and examine charges made against municipal officers. The duty devolved upon the board of review is a supreme duty.

This court might well hesitate if this were an original question, and the general assembly were in session to afford a remedy by appropriate legislation. The power has been exercised and the members appointed, and their terms designated in strict requirement of the act itself. The whole machinery of the board is in operation, and it has begotten public confidence by a conscientious effort to discharge that duty. To hesitate to follow the law at this time would only lead to embarrassment in the discharge of a great public trust, and there should not be the delay of a moment in assuming a responsibility urged by the highest considerations of public policy, and demanded for the very best interests of the city of Cincinnati.

## BUILDING AND LOAN ASSOCIATIONS.

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[Superior Court of Cincinnati, General Term, March, 1892.]

## J. M. MUELLER V. A. M. COHEN, REC'R.

The constitution of a building association provided that "All money must be collected and paid out in legal money. It is the duty of every member to hand to the board of directors the exact amount in their receipt book. The company is not responsible for any money paid to an officer of the company except paid during the regular office hours and to the authorized officers of the company;" and also provided that "all the money which is paid to the company must be received by the board of directors in the presence of the first secretary, and the directors shall be responsible for the exactness of the same and shall deliver it immediately on receipt to the treasurer." *Held:*

1. Payments of dues must be made in cash and, the giving of checks is not payment within the meaning of the constitution of the association, and in receiving the checks of a member for the purpose of collecting them and applying the proceeds to the payment of his dues, the directors were acting as the agent of the member, and not as the agent of the corporation, and if one of them collects the check, appropriates the proceeds and fails to turn it over to the treasurer of the corporation, the loss falls upon the member, and not upon the corporation.
2. It is immaterial that the directors, on various occasions both prior and subsequent to the alleged payments in controversy, without the knowledge of the shareholders, had accepted checks of the member in payment of his dues, which checks were paid and the money on the same turned over to the treasurer, for the directors have only the powers delegated to them by the constitution; beyond these their acts as regards such members of the association, are unofficial and do not affect the corporation.

## SMITH, J.

The plaintiff was a member of the Duckworth Building Association and Loan Company, and claims that during the months of June, July, August, September, October and December, 1884, he paid \$300.00 in dues to the company, by six checks of \$50.00 each, payable to the Duckworth Building Association and Loan Company, which payments the receiver refuses to recognize as valid payments, and he therefore asks for judgment for this amount, and that the receiver be ordered to credit him with such payments on the books of the company.

It appears that frequently the plaintiff found it inconvenient to visit the association for the payment of his dues, and he accordingly fell into the habit of paying them monthly by sending a check to the association for the amount due during the month. The checks were not delivered by the plaintiff personally to the officers of the association, but were left by him at a store in the neighborhood of the place where the association met, and he relied upon a friend in the store to see that the checks were delivered to the association and that a receipt for his dues was upon each occasion duly indorsed in his pass book.

The amounts of the checks in controversy appear credited in his pass book with the receipt of the first secretary opposite them.

Some time after the plaintiff had drawn these checks it was discovered that the first secretary was a defaulter, and had defrauded the association and many of its members. It was then discovered that the treasurer of the association had never received any money on these checks, but that the first secretary had indorsed them in the name of the association and had appropriated the money collected on them to his own use.

The question in the case is, upon whom does the loss fall—upon the Building Association or upon the plaintiff. The court below found that the loss fell upon the plaintiff, and aside from the question argued before us, we think the judgment should be affirmed because the testimony is conflicting as to whether the checks ever reached the association, and there is testimony which might warrant a finding that they never did. A majority of the court are also of the opinion that the proceedings in error were not begun in time to enable the court to hear the case.

But as the case is one of importance to building associations and their members, we have thought it advisable to pass upon the legal questions argued before us.

As the association is a mutual one in which the members sign a constitution which constitutes the contract between them, it is necessary to a proper decision of the case to examine the provisions of the constitution with reference to the payment of dues.

Art. 11, sec. 2, of the constitution, prescribes the mode of payment, and is as follows: "All money must be collected and paid out in legal money. It is the duty of every member to hand to the board of directors the exact amount in their receipt book. The company is not responsible for any money paid to an officer of the company except paid during the regular office hours and to the authorized officers of the company;" and art. 7 prescribes the mode in which the association shall receive the money. The article is as follows: "It is the duty of the first secretary to keep the minutes of the proceedings of the company and of the board of directors, and to keep an accurate account with all its members. All the money which is paid to the company must be received by the board of directors in the presence of the first secretary, and the directors shall be responsible for the exactness of the same, and shall deliver it immediately on receipt to the treasurer. At every meeting he shall inform the company how much money has been received and how much has been paid out, and he shall sign all bills in connection with the president proceeding from the board of directors."

The time for receiving payment of dues is designated in article VIII, which provides that,

"The directors shall, in conjunction with the other officers of the company, form a board of administration which shall be called the board of directors. The duties of the board of directors are, that they assemble every Tuesday evening in the hall of the company, in order to transact the business of the company, and to collect the regular installments in the presence of the secretary."

The most favorable view of the evidence, so far as the claim of plaintiff is concerned, is that the directors received the checks in payment of dues, and the first secretary receipted for the money which they called for, but that he afterwards purloined them from the directors, cashed them and appropriated the proceeds to his individual use.

The requirement of the constitution that "all money must be collected and paid out in legal money," clearly intended that no dues were to be paid except in cash; and the other articles and sections of the constitution which we have referred to, also make clear the intention of the corporation, that the payments for dues must be in cash, because they provide that at the close of every meeting the directors shall at once turn over the money received to the treasurer, who shall thereupon immediately give his receipt to the board for the same, and the work of the meeting, so far as the collection of dues is concerned, is at an end. Nothing

in the constitution gives any countenance to the claim of plaintiff that the officers of the association may accept promissory notes, bills of exchange, or checks in place of cash, and that the association is to be responsible for their failure, after they have collected the money on such paper, to turn it over to the treasurer.

If, therefore, a member saw fit to undertake to pay his dues by a check drawn to the order of the association and deposited with the directors, and the first secretary cashes the check, but never turns the money over to the treasurer, the loss clearly falls upon the member who has constituted these officers his agents to collect the money, and not upon the association which by the provisions of its constitution, which are well known to the member, has distinctly declared that so far as it is concerned they shall have no such power.

That the deposit of a check by a member with the directors was not a payment is apparent, if we bear in mind that under the constitution they had the right, and it was their duty to refuse anything but cash in payment. The tender of a check for the money would not have been a good tender.

The proposition, too, that a check is not cash or money is, we think, beyond dispute in this state. In *Stewart v. Smith*, 17 Ohio St. 85, it is said, "In the case of a check the drawer is treated as in some sort the principal debtor; his position is assimilated to that of the maker of a promissory note payable at a particular place;" and inasmuch as a check is similar in character to a promissory note, the contention of the plaintiff that he had the right to pay his dues by check might well lead to the conclusion that he had a right to pay them by a note. This contention, therefore, leads to a manifestly unsound conclusion.

But it is contended by plaintiff that even if the directors were by the constitution, only authorized to receive cash in payment of dues, nevertheless, as they had on various occasions, both prior and subsequent to the payments in controversy here, accepted checks of the plaintiff in payment of his dues, which checks were honored when presented, and the money turned over to the treasurer, that the corporation has thereby waived this provision of the constitution, with reference to this plaintiff, and is now estopped to set it up as a defense to this action.

But it must be remembered that this is not an action against the directors, but against the corporation.

Where a person becomes a member of a mutual association, and signs its constitution, a contract is necessarily entered into between the member and the association, the terms of which are to be found in the constitution itself, and these terms cannot be changed without the consent of the contracting parties. Its directors and managers are merely agents with special powers, whose limitations are well known to the members.

The plaintiff, in this case, therefore, well knew that when the directors or an officer undertook to receive checks from him in payment of his dues, such acts were beyond the power delegated to them by the corporation.

Nor do the previous and subsequent acts of the officers in receiving checks amount to a waiver upon the part of the corporation of the provisions of the constitution, or a ratification of the unauthorized acts of its agents; because there is no evidence before me that the shareholders were aware of such unauthorized acts of the directors in receiving checks in place of cash, in payment of dues; and the mere fact that an agent

persists in a course of unauthorized conduct, does not, necessarily, in the absence of knowledge upon the part of the shareholders of the corporation, make such action legal and binding upon it.

A case in point is that of *The Peoples' Building & Loan Association of Camden, New Jersey v. Wroth et al.*, 13 *Vroom*, New Jersey, page 76, where it was held that:

"The monthly dues and fines of a building and loan association being payable in cash, the presence and acquiescence of the executive officers when promises to pay are given by members, or others for them, and accepted by the treasurer, will not discharge sureties on a sufficient bond for liability for every credit thus given, of loss." In that case it is said in the opinion:

"The monthly dues and fines payable by the members of the association were by the constitution and by-laws to be paid to the treasurer in cash. It was a breach of the duty appertaining to the office of treasurer of the association for him to accept the promise or voucher of any member or officers of the association in place of cash. And if therefore, the executive officers of the association were present, and by their silence, or by their participation acquiesced in the regular accounting for dues and fines by any arrangement between its treasurer and individual members, their acts were unofficial, outside of their duties, and do not affect the corporation."

For the reasons above stated, we are of the opinion that the loss in this case should fall upon the plaintiff, and not upon the defendant, and that the judgment of the court below should be affirmed.

HUNT, J. and MOORE, J., concur.

Tugman & Baker, for plaintiff.

Alfred M. Cohen, for defendant.

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## BUILDING AND LOAN ASSOCIATIONS.

[Hamilton Common Pleas, 1892.]

## TURNER BAU-VEREIN NO. 3 V. ROBERT WOODBURN ET AL.

Defendant subscribed for eighteen shares in plaintiff building association, and received advanced loans of \$9,000, and executed mortgages in 1884 to secure the payment of stated weekly dues, etc. In June, 1886, he paid back \$7,000, and obtained credit therefor on his dues account, and continued thereafter to pay his regular weekly dues. There was no provision in the constitution for payment of dividends on dues paid in advance (and on an issue of fact the court held there was an agreement when the \$7,000 was paid and was received, that advance dues should receive no dividends, but that interest should be rebated at once and before the annual time for rebate.) *Held*:

1. That under the law in force when said mortgage contracts were made, and said shares advanced to defendant, there was no power or duty on the part of the association to pay, nor right in the defendant to receive or be credited with dividends on said \$7,000 paid in advance as dues, but that dividends could be rightfully credited only on the regular stated (weekly) dues, and this irrespective of any agreement not to pay dividends thereon.
2. *Quære*, whether a building association under the law as now amended, with a constitution providing therefor, can enter into an agreement binding it to pay dividends on advance dues, or dues other than the regular stated dues?

BUCHWALTER, J.

The plaintiff's petition sets out two causes of action in foreclosure, on two mortgage claims, averring that Robert Woodburn became one of its members and subscribed to nine shares of its capital stock August,



1884, and received an advance thereon of \$4,500.00, the estimated value thereof; and at the time said Woodburn and wife executed and delivered a mortgage to secure the payment of the dues, interest, premium, etc., as fully set out in the conditional clause thereof; and that in October, 1884, said Robert Woodburn likewise subscribed for and obtained a like advance on nine other shares of stock, and executed and delivered a like conditioned mortgage to plaintiff, making a total advanced loan on eighteen shares of stock of \$9,000.

It is further averred that the defendant became in default at certain times, and did not pay as he had agreed to do, and foreclosure is prayed for.

The defendant answers and claims that on said shares he made payment every six months in advance, paying dues and having them credited to his dues account, and likewise as to interest and premium accounts, until June 28, 1887, when he paid plaintiff and had credited on his dues account by its special assent, \$3,500.00 on book No. 155, representing nine shares, and \$3,500.00 on book No. 274, representing his other nine shares, and his account thereon with plaintiff. That at that time his total credit for dues and dividends paid on book No. 155, was \$4,184.19, and on book No. 274, was \$3,712.70.

He further claims that at each fiscal six months statement said money was credited to dues account, but that it refused to credit him with dividends on said advance payments of dues, and that by reason thereof, \$456.49 is due him not credited as dividends. He also avers error in over charging interest against him of \$37.74, which, when all duly credited, would make his said mortgage shares overpaid and satisfied in the sum of \$107.26.

He asks an accounting, for recovery of amount due him, and for cancellation of his mortgages.

The plaintiff's reply admits said repayment of \$7,000.00 in advance of the contract times for paying the stated dues, but avers a special agreement, that if it received it and then rebated the interest, that said Woodburn should not claim, and it would not pay any dividends on the advance dues, and that it has kept its account with Woodburn in accordance with said agreement.

On the trial there has been controversy of fact as to what agreement there was if any, specially made between Woodburn and the Building Association at the time of the payment of the \$7,000.00.

I am convinced that the testimony fairly establishes the agreement as claimed by the association.

The consideration on the association's part is in the receipt and safe keeping of the money, crediting to the mortgage account, and in rebating \$48.42 of interest which, under the law, according to its constitutional and mortgage contract, it was not bound to do, nor to make any rebate of interest prior to the end of the year, on rebate day.

But this question is too frequently recurring in the management of such associations, and it is too important to be determined upon the special ground of the agreement set up by the association in its proof; and I therefore must consider the claim made by the defendant.

The legal proposition submitted by counsel for Mr. Woodburn is that the association, having accepted the \$7,000.00 in advance and credited it to his account of dues, as evidenced by his pass books, became indebted for dividends thereon in the sum of \$456.49, irrespective of whether there was or was not an agreement as claimed by the association.

These mortgage contracts were made as to nine shares in August, 1884, and as to the other nine shares in October, 1884, the advance payment of dues was made June 28, 1886. These shares were advanced as a loan, and the mortgage contracts were made under the law as amended in 1880. In the original charter provisions as well as in the amended acts, there is the broad underlying purpose to authorize persons to associate together to mutually aid each other in the ways and means to raise money to be loaned among themselves, to buy lots, repair and build houses (that is, to procure homes), but the method of raising money from members is only by rates of stated dues, fines, interest and premium on loans, etc.

The extraordinary power given to assess fines and collect premiums as well as interest, without being usurious, was not intended for the capitalist or larger investor, for it limited his number of shares; nor is it to build up banking business. The theory is that all members are mutually aiding each other to at some time during their membership, obtain money on their shares to invest in real property by buying, building or repairing.

Whenever the special legislative purpose of such mutual aid is subverted, then the extraordinary privilege based thereon as to usury ought reasonably to be repealed. In the early period of building associations, under their laws, the earnings, or profits were not divided until the stated dues paid and such earnings equalled the par value of the share. In the later periods of building associations under amendment of sec. 3335, the earnings of shares of members are semi-annually or annually estimated, and either credited or paid as dividends; but through all the amendments has continued that primal power given (in sec. 3833) "to levy, assess and collect from its members such sums of money, by rates of stated dues," etc.

The only method pointed out in the law in force when these mortgage contracts were made, for collecting dues from members, was by rates of stated dues, and the association was not empowered to declare dividends on any other than stated dues so received and credited.

I am aware that for many years sec. 3834, has given a power to receive general deposits and loan them to members, but these general deposits may be made by non-members without subscribing for shares, and in such unlimited amount as the association may determine; but such depositors are not shareholders or members, and can not be fined, or share in the dividends, or receive interest or earnings in excess of legal rates.

The amendment to sec. 3833 by act of May 8, 1886, which inserts the words, "or may otherwise raise money as the corporation by its constitution and its by-laws may provide," does not affect the issue in this case, for two reasons. First, because the amendment took effect after the mortgage contracts were made; Second, because the constitution and by-laws have never provided for the payment of dividends on dues paid in advance of their stated accruing periods.

It is unnecessary to further consider or construe the meaning of these amendatory words for the determination of the issues of this case.

I hold that under these two mortgage and membership contracts, in which are embodied the constitutional, statutory and charter powers of the building association, the defendant Woodburn is not entitled to dividends on his advance payment, or any dues, except such as had accrued as stated dues at the several times for semi-annual dividends; and this I hold irrespective of whether he had verbally agreed to waive dividends thereon. It is immaterial except as it affects charges and payment of premium on shares advanced, whether such payment of \$7,000.00 be treated as a credit

on his loan with interest rebated, or as a cancellation of a certain number of his shares, or if it be considered as a non-member deposit loan, under sec. 3834, drawing the legal rate of six per cent. interest, for the result is the same by either method (the association having refunded him interest thereon up to rebate day).

In this conclusion I have not failed to carefully study and keep within the rule of the Seibel case (43 O. S., 371), but have kept in mind that the only question raised by the statement of fact in that case was whether borrowing members should under the statute then in force, receive or be credited with a dividend calculated on all the stated dues paid and other credits made, the same as non-borrowing members, or only on the dues paid during the current year.

The defendant Woodburn is entitled to credit on his premium, however, in so far as his \$7,000.00 payment would have cancelled his loan, to-wit: The premium on fourteen shares, exclusive of any error in credit or charges of his interest, on which I understand counsel can agree.

Merrill & Kuehnert, attorneys for plaintiff.

J. J. Glidden, attorney for defendant.

## MUNICIPAL CORPORATIONS—LIGHTING.

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[Superior Court of Cincinnati, General Term, June, 1892.]

### \*BRUSH ELECTRIC LIGHT CO. V. CINCINNATI (CITY) ET AL.

1. That when a corporation formally rejects a proposal for lighting its streets in accordance with certain plans and specifications, it cannot afterwards revive such proposal unless by the consent of the party making the original offer; nor will a certificate of deposit, conditioned that such other party will enter into a contract within thirty days from the award, pass to or become the property of such municipal corporation, on failure of such other party to enter into such a contract after such proposal has been once rejected by the municipal corporation.
2. That the principle of equity jurisprudence which is not merely remedial but preventative of injustice, may be invoked to prevent the transfer or payment of any such certificate of deposit at the suit of a party who claims to be the owner, or to have an interest in the same.

HUNT, J.

This case comes into court, on reservation, on the evidence from the special term.

The purpose of the action is to enjoin the city of Cincinnati and its clerk from drawing or disposing of a written certificate of deposit, for \$50,000 and to enjoin the Ohio Valley National Bank, or the defendants, from its payment or recognizing its transfer. The following is a copy of the certificate of deposit which was deposited by the Brush Electric Light Company.

"Ohio Valley National Bank,

Cincinnati, O., Dec. 13, 1889.

"The Brush Electric Light Company has deposited in this Bank fifty thousand dollars to the credit of the city clerk for the use and

\*Motion for leave to file petition in error was refused by the Supreme Court, thus affirming this decision; unreported, June 21, 1892.

benefit of the city of Cincinnati, and payable to the order of the city clerk for the use and benefit of the city of Cincinnati, in current funds, on return of this certificate properly indorsed."

(Duly signed by the bank.)

A temporary restraining order was granted at the commencement of this action, and is still in force. The common council of Cincinnati undertook in 1889, to provide for the lighting of the city by electricity instead of gas. A committee of that body was appointed to formulate specifications, which they did, and the common council, by resolution or ordinance duly passed by both bodies, directed that committee to advertise for thirty days for proposals to so light the city according to these specifications. Advertisements were made accordingly. One of the terms of the specifications required every corporation desiring to bid to deposit with the city clerk two days before the day named in the advertisement for the receipt of the proposals, a certificate of deposit in favor of the city clerk of the city of Cincinnati for the sum of fifty thousand dollars. Such a deposit was a condition precedent to the opening of any proposal for electric lighting under the specifications, and "should be made with the distinct understanding and agreement that, in case the party so depositing should be awarded a contract in strict accordance with the provisions of these specifications, when all is executed by said bidder, then, in such case, said deposit or certificate shall be returned to him; but in case such award is made to the party so depositing, and he for a period of thirty days neglects or refuses to enter into a contract on the basis of these specifications, then, in such case, the money thus deposited shall pass to and become the property of the city of Cincinnati, not by way of penalty, but in consideration for the loss of time and expense incurred by the city in consequence of such failure to consummate and execute the contract thus awarded. Such contract shall be for the term of ten years from the date of execution of same." The plaintiff here did so deposit such certificate, the bids were opened by the committee which ascertained the plaintiff's bid to be the lowest, and thereupon the committee reported to the council an ordinance accepting the bid of the plaintiff, and directed that a contract be entered into in conformity therewith. The ordinance passed the board of council and was transmitted to the board of aldermen.

Pending the ordinance for accepting the bid, another ordinance was introduced as a substitute for that, directing the city authorities to substitute a contract with the Brush Electric Light Company, and undertaking to change the specifications in certain particulars, and make them more definite and certain. This substitute passed one body, but not the other. The original ordinance came up to the board of aldermen on the twenty-eighth day of February, 1890, and by a vote by yeas and nays it was indefinitely postponed, which, by the express rule of the body, was equivalent to its defeat.

Thereupon a motion was made to reconsider the vote, which motion was put and declared by the chair to be lost, and the board of aldermen then adjourned.

On March 5, 1890, the board of aldermen met pursuant to a special call, and thereupon a majority of the board present changed the minutes of the meeting of February 28, 1890, by striking out therefrom so much thereof as related to the consideration of the vote whereby the ordinance

was indefinitely postponed, on the ground that there was not a quorum present when said motion was put and voted upon and decided lost.

It will appear from the minutes that a portion of rule 32, which provides that a motion to reconsider having once been made and lost, shall not be renewed, was suspended, and therefore the vote by which the ordinance accepting the bid of the Brush Electric Light Company was indefinitely postponed was reconsidered, and the ordinance finally adopted by a vote of nineteen yeas to five nays.

The board of aldermen at the same meeting passed a resolution after this action, providing for the appointment of a committee to formulate specifications and plans according to which the Brush Electric Light Company and the Cincinnati Electric Light Company, should be required to lay all wires under ground.

Counsel for plaintiff have invoked the equitable interference of the court on the following grounds:

1. Because the advertisement for bids was insufficient.
2. Because the restrictions and requirements imposed by the specifications were such as to absolutely prevent full, free and fair competitive bidding.
3. Because the ordinance accepting the bid and authorizing a contract was necessarily a "grant of the use" of the streets and highways of the city, and therefore had to be first recommended to the board of public affairs under sec. 2227 of the Rev. Stat., of Ohio.
4. Because the ordinance accepting the bid and authorizing a contract would have been void if passed, because of the legislation under sections 2699 and 2702 known as the "Worthington" and "Burns" laws.
5. Because the stipulation for the city retaining the fifty thousand dollars is merely a penalty against which, under the circumstances shown, the plaintiff is entitled to be relieved by paying the amount really due the city, if any, by reason of plaintiff's default, if it were bound in law to sign the contract presented by it. And,
6. Because on the well recognized principles of contract the pending negotiations between the plaintiff and the city of Cincinnati were terminated by the defeat of the ordinance accepting the bid by the board of aldermen at the meeting of February 28, 1890.

It may be true that a person in dealing with a legislative body, must subject himself to the parliamentary rules which govern its action. It seems too clear, however, for more than a mere statement of the proposition, that whatever the right of the city council to set aside its rules or reconsider its action in matters purely legislative, it cannot, without the express assent of the other party, set on foot contractual action once terminated by the rejection of a proposal under its recognized and established rules of precedence. No contract is complete without the mutual assent of the parties, and it is elementary that a refusal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiations unless the party who made the original offer renews it, or assents to the modification suggested. In the case of the Minneapolis & St. Louis Railway Company v. Columbus Rolling Mill, 119 U. S., 148, the court lays down the rule that when the other party has once rejected the offer it can not afterwards be revived by the mere tender of an acceptance of it. The same principle is also decided in *Eliason et al. v. Henshaw*, 4 Wheat., 225:

*Carr v. Duval*, 14 Pet. 77 Hall, where *Eliason v. Henshaw*, 4 Wheat., 225, is cited and the principle of the decision is reaffirmed.

4. When a number of persons conspire to do an unlawful act, all are responsible for whatever any one of the conspirators may do in furtherance of the purpose of the conspiracy. But where a number of persons agree to do a lawful act, in a lawful manner, and one of them for the purpose of accomplishing the concerted purpose does an unlawful act, the offending individual is alone responsible.
5. The jurisdiction of a court of equity is exercised to protect property, and it will interfere with injunction to stay any proceedings whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property.

SMITH, J.

The claim of plaintiffs is clearly and succinctly stated in the petition, which is as follows:

"Plaintiff is a partnership formed for the purpose of doing business in Ohio, and is engaged in the manufacture and sale of saddles and harness. It has a large capital invested in said business, and the successful operation thereof requires it to employ, and it does employ therein a large number of workmen.

Many of its employees are now out on a strike, and refuse to perform their accustomed work without any just cause or reason therefor.

The defendants have conspired with each other and with divers persons unknown to plaintiff (who it prays may be made defendants herein on discovery of their names), to embarrass and annoy plaintiff in its said business and the conduct thereof, and to stop and destroy the same, and deprive it of its employees. They are actively seeking to accomplish the same, and embarrassing and threatening said employees to force them to abandon their work, and to prevent them and others from remaining in, or entering plaintiff's employment, and have assaulted and beaten some of said employees.

Said employees are frightened and intimidated by said acts and threats, and by reason thereof some of them have been prevented from entering said employment and plaintiff's business will be hampered and stopped unless defendants are restrained.

By reason whereof plaintiff is unable properly to conduct its business, is deprived of the profits thereof, is unable to fill contracts undertaken by it, and will suffer irreparable loss and injury and damage which it will be impossible to measure or assess.

Defendants are without property, and unable to respond to any judgment, and plaintiff will be and is without any remedy except by injunction.

And plaintiff asks that defendants and each of them be restrained from in any way harrassing or embarrassing plaintiff in its said business, from harrassing or threatening or frightening those desiring to enter plaintiff's employment or those now in its said employment, or assaulting them or inducing others to attempt to do the same; and for a decree for perpetual injunction to the same effect, and granting such other relief as may be just and equitable, and for a judgment for costs."

Immediately upon the filing of the petition accompanied by an affidavit that its statements were true, application was made to me for a temporary restraining order against the defendants restraining them as prayed for in the petition until further order, and the same was granted.

Since then the defendants have filed a motion to dissolve such temporary order, and the motion has been heard upon oral testimony.

The number of witnesses called by each side has been so great, the examinations of counsel have been so extended, and the testimony upon

almost every question of fact is so conflicting, that it would be impracticable and unprofitable for me in this opinion to go into an examination in detail of this testimony, and thus to give my reasons for the conclusions of fact at which I have arrived. I must content myself therefore with a general statement of these conclusions.

As appears from the evidence, the journeymen harness and saddlery workers in this city, as is the case with journeymen in other trades, have a union, the object of which is to maintain their wages at such a figure as they regard as properly compensatory for their work.

About three months ago the manufacturers of harness and saddlery, by reason of new machinery, molds, and other appliances in the trade, which enabled workmen in one of their departments to accomplish more in the way of piece work in one day, than they had formerly been able to accomplish, announced a change in the schedule of prices for such work. This change, it is contended by the manufacturers, does not decrease the daily earning capacity of the workmen; while it is contended by the workmen that it does not affect a material reduction in such earning capacity.

A controversy thus grew up between the workmen and the manufacturers, which terminated in a strike.

The union requested the plaintiffs to meet with a committee from the union, for the purpose of adjusting these differences; but the plaintiffs refused to meet such committee, upon the ground that the union contained men who were not employed in their shops, and that to meet with such committee would be to recognize the right of outsiders to interfere in the management of their business. They expressed, however, a willingness to meet with a committee of workmen from their own shop.

A similar request for a conference was made by the union upon all of the other manufacturers in this city; and the same course adopted by plaintiffs was followed by the other manufacturer.

Accordingly the union, by a unanimous vote of its 285 members, resolved upon a strike until the old schedule of wages should be restored; and a shop committee consisting of three members, was selected and directed to daily visit the neighborhood of the shops of the manufacturers for the purpose of learning the number of men employed by the manufacturers, and thus to inform themselves as to the prospect of the success of the strike.

I am satisfied from the testimony before me that the sole purpose of the strike is to compel the manufacturers to reinstate the old schedule of wages, and that it is not the purpose of the union to compel the manufacturers to discharge non-union men and to employ only union men.

I am led to this conclusion from the fact that every one of the large number of strikers who has testified, has said that such was the sole purpose of the strike; such purpose too, was the only one that was mentioned in the resolution to strike; and the circumstance that there were non-union men working in the shops with the union men at the time of the strike, and that no complaint was made by the striking workmen of that fact strongly corroborates the testimony of the strikers.

It is true that the striking workmen have frequently said that they asked that "the union should be recognized," but they explain that this "recognition of the union" would be accomplished, by an assent of the manufacturers to their demand for higher wages. They contend that these phrases have no other meaning.

It is, however, also true that after this strike was ordered on, an officer of the National Union appeared in Cincinnati, and waited upon plaintiffs, and stated that the strikers demanded not only an increase in wages, but also that the plaintiffs should make their shop a "union shop."

But the local officers of the union testify that these statements of such National officer were made without authority, and I am satisfied from the evidence that his conduct and statements were entirely unauthorized, and that they have been most potent causes in continuing the misunderstanding between the parties, and postponing a satisfactory adjustment of their differences.

Having determined the purpose for which the union is formed, and which it is now endeavoring to accomplish, the first legal question that presents itself is this: Is a combination of workmen illegal, whose purpose is to secure increased wages by agreeing among themselves that no one of them shall work for their employers unless the latter shall agree to pay the increased wages previously determined upon by the union?

It is contended by counsel for plaintiff that it is.

The early common law, it is true, looked with disfavor upon all forms of combinations, and this hostility is evidenced in the "remarkable and expansive growth of the crime of conspiracy which finally was held by the courts to embrace every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general." *State v. Buchanan*, 5 *Harris & Johnston*, (Md.), 317, and as the courts reserved to themselves the right to say what was an "unlawful act," or what was "an illegal, fraudulent, malicious or corrupt purpose," or what purpose had "a tendency to prejudice the public in general," it is evident that in the early growth of the common law, when the courts were in control of the judges who derived their authority from the crown, that the tendency was to make many combinations unlawful which today would be regarded as lawful. And "because a combination of workmen to raise their wages was deemed in the middle of the fourteenth century unlawful, as proving itself to result injuriously to classes of the community in England, it does not follow that it will be equally unlawful here, where we have no class legislation, and where our free institutions invite all who, as citizens, stand on a common level—to unite and associate themselves together for the purpose of bettering their condition in every respect—moral, social or financial." *Ray on Contractual Limitations*, 378.

"In determining, therefore, what the common law of this country is as to organizations of working men and organizations of employees, whose result is to influence compensation to be paid for labor, we have simply to assume primarily that all and each of such organizations for mutual benefit and advancement are lawful, and that all means used to promote their objects are lawful until it is shown that the practical result of the association is, taking the good and evil together, injurious to the public or the parties, or to portions of the community, or to the rights of the individual. It is simply a question of fact which cannot be determined by English precedents made under different conditions." *Ray on Contractual Limitations*, 378, and cases cited.

For the reasons above given many of the early English and American decisions which followed English precedents, are not authority today on the question as to what constitutes an association of workmen unlawful.



Nor is the common law crime of conspiracy known in this state, where we have no common law crimes, and where no act is criminal except that which is made so by the statute. *Mitchell v. State*, 42 Ohio St., 385.

So that no principles declared in the early decisions of criminal conspiracies are of any weight in our courts of equity, unless we find that such principles have been adopted by the courts of chancery, and are in keeping with the spirit of our institutions.

But even the law of criminal conspiracy is not so severe as it once was, and certainly in America, is not so strict as to include a combination of workmen whose object is to secure by lawful means an advance in their wages. Thus, in the work entitled "The Law of Criminal Conspiracies and Agreements as Found in the American Cases," by Carson, and which is printed in connection with another work on the same subject, by Wright, with reference to the English cases, it is said, "The result of all the cases ignoring matters of detail or special circumstances, appear to be as follows: Workmen may combine lawfully for their own protection and common benefit, for the advancement of their own interests, for the development of skill in their trade, or to prevent overcrowding therein, or to encourage those belonging to their trade to enter their guild for the purpose of raising their wages, or to secure a benefit which they can claim by law. The moment, however, that they proceed by threats, intimidation, violence, obstruction, or molestation in order to secure their ends; or where their object be to impoverish third persons, or to extort money from their employers, or to ruin their business, or to encourage strikes or breaches of contract among others, or to restrict the freedom of others for the purpose of compelling employees to conform to their views, or to attempt to enforce rules upon those not members of their association, they render themselves liable to indictment." "The rights of workmen are conceded, but the exercise of free will, and freedom of action within the limits of the law, is also secured equally to the masters." *Reg. v. Rowlands*, 17 A. & E. (N. S.), 671.

And in *Ray on Contractual Limitations*, page 338, after an examination of the authorities upon the question, the law is stated to be as follows:

"The law is now well settled that workmen have a right to combine for their own protection, and to obtain such wages as they may themselves, after consideration, agree to insist upon receiving for their work; and while they are perfectly free from engagement, and at liberty to exercise the option of entering into employ or not, they have a right to agree among themselves not to accept any employ unless they can secure a certain rate of wages."

And in *Farrer v. Close*, L. R., 4 Q. B., 612, *Hannen, J.*, said, "strikes are not necessarily illegal." A strike is properly defined as "a simultaneous cessation of work on the part of the workmen, and its legality or illegality must depend upon the means by which it is enforced, and on its objects. No doubt the trade of the employer is restrained when workmen decline to take the wages which he is willing to give; but it must be remembered that the men are contractors as well as the employers, and it would be an odd way of promoting the freedom of trade to hold it an illegal purpose on their part to endeavor out of their own savings to put themselves in a better position to get what they think is a fair price for their labor."

And in *Greenhood on Public Policy*, after an examination of the authorities on this subject the author states the law upon the subject to be that: "The law is clear that workmen have a right to combine for their own protection for the advancement of their own interests, for the promotion of skill in their own trade, and for the obtainment of such wages as they may choose to agree to demand when the purpose of the combination is to obtain a benefit which by law they can claim." See also *Wood on Master and Servant*, sec. 241.

Doubtless a more detailed and extended examination of the authorities upon the question whether combinations of workmen to advance wages are legal would be interesting; but the citations made establish so conclusively the proposition that such combinations are legal that a further statement of the examination of the authorities that I have made, would not be profitable at this time, in view of the press of other business which constantly demands attention in a *Nisi Prius* Court.

The combination being legal, the next question to determine is whether the means used to effect its purpose were also lawful. As I have previously stated, it appears from the evidence before me that the union appointed a shop committee consisting of three members, to daily visit the neighborhood of each shop and report to the union the number of men which each shop was able to secure, for the purpose of keeping the union informed as to the probable success of the strike.

It also appears that on different occasions a large number of the striking workmen have congregated in such neighborhoods, and that many of them have accosted the workmen now in the employ of the plaintiff, and have requested them to desist in their work, as such continuance was against the interests of all workingmen. There is also evidence of individual instances of violence toward the present employees of plaintiff.

It is not difficult to determine from the authorities or from the fundamental principles which must necessarily govern the relations between men, what the law is, which, so far as the present case is concerned, must determine the legality of the means used by the workmen.

The right which the striking workman claims for himself, and to which he is justly entitled viz. to work for whom he pleases and to ask for his work such wages as he shall deem proper, is also a right which he must accord to every other workman in the community; and while the law permits him to endeavor, by reasonable argument and persuasion, to induce another to adopt his views and to cease work and join him in his demand for higher wages; yet he has no right by threats, intimidation, molestation, or by any form of coercion or compulsion to interfere with the exercise of the free will of a fellow workman. Such interference is an invasion of the very right of free labor, for which the striking workman is himself contending.

The system of sending a committee to the neighborhood of a factory, as was done in this case, is one that has frequently been adopted before in cases of strikes, and may be legal or illegal according as it is an interference or not, with the right of labor as I have defined it.

In *Ray on Contractual Limitations*, it is said:

"Even 'picketing,' which means watching and speaking to the workmen as they go to or return from their employment, to induce them to leave the service, is not necessarily unlawful; nor is it unlawful to use terms of persuasion toward them to accomplish that object, but if

the besetting and watching is carried to such an extent that it occasions a dread of loss, it is unlawful."

In a case arising in New York City, and reported in 18 Cent. Law Journal 200, the action was for illegal arrest in causing the arrest of a striking cigar maker who was doing picket duty, and who was charged with intimidating another cigar maker from going to work. In charging the jury Chief Justice McAdam said that "the plaintiff had the legal right to decline to work for his employer unless the latter consented to pay the wages the former demanded; that he had the right to invite others to join him in the course he had determined to pursue; to accost workmen in the street or elsewhere, and invite them to follow his example or join the union, and if in the exercise of these rights he was wrongfully assaulted and maltreated by the defendant he is entitled to a verdict in such sum as will compensate him for the wrong done. But if he undertook to enforce his rights in an illegal manner, used violence or threatened workmen who declined to think and act as he did, the defendant had the right, as a police officer, by arrest, to protect the workmen so threatened."

The most concise and comprehensive statement that I have been able to find upon this subject is that of Lord Bramwell, reported in 16 Law Times Reports, N. S. "He was of opinion that if picketing could be done in a way which excited no reasonable alarm or did not coerce or annoy those who were the subjects of it, it would be no offense in law. It was perfectly lawful to endeavor to persuade persons who had not hitherto acted with them to do so, provided that persuasion did not take the shape of compulsion or coercion. What was the object of this picketing? Was it that the names and addresses of the nonstriking workmen might be found out, with the view of their being addressed by reasonable argument and persuasion, or was it for the purpose of coercion and intimidation."

In the course of his charge he further said:

"Generally speaking the way in which people had endeavored to control the operation of the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body;" but "if any set of men agreed among themselves to coerce the liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offense."

As to the general principles which are to determine the legality of the action of strikers, see *U. S. v. Kane et al.*, 23 Federal Rep., 748, *New York, Lake Erie & Western R. Co. v. Wenger*, 9 Dec. Re., 815, and an interesting case on the kindred subject of boycotting, *Moore & Company v. The Bricklayers' Union No. 1, et al.*, 23 ante 665.

Applying the principles laid down in the foregoing authorities it is very clear from the evidence before me that the members of this union could not be enjoined merely because of membership in the union; nor for voting to establish a "picket" system about the factories by stationing men in the neighborhood whose sole purpose was to report the number of men who were employed in the factories, because such action upon the part of the union was not necessarily unlawful, and did not necessarily violate the rights of any one. Nor could all the members of the union be enjoined because certain members of the union may have gone to such neighborhood, and by threats or intimidation, or by coercion, brought about by the appearance of a large number of men, have driven

off workmen from the employ of plaintiff, because so far as the evidence shows they were not authorized by the union so to act; and the principle of law is well settled that although where a number of persons conspire to do an unlawful act, all are responsible for whatever any one of the conspirators may do in furtherance of the purpose of the conspiracy, yet, where a number of persons agree to do a lawful act, and one of them for the purpose of accomplishing the concerted purpose does an unlawful act, they are not all responsible for such unlawful act. In the latter case the offending individual is alone responsible. *U. S. v. Kane et al.*, 23 Fed. Rep., 748.

The inquiry in the present case, therefore, comes to this—which of the defendants, if any, have been guilty of repeated acts the tendency of which is to intimidate and drive off the present workmen of plaintiff, and thus to interfere with the right of the workmen to labor without molestation, and the right of the plaintiff to carry on their business without hinderance.

The hearing before me is not a final one, but is upon a motion to dissolve the temporary restraining order heretofore issued, and I am satisfied from the evidence that so far as Lanahan, Boverly and Roettinger are concerned, the motion to dissolve such temporary order should be overruled, but that as to all the other defendants it should be granted.

That a court of equity has power to enjoin persons from repeated interferences, with a business by the commission of acts, the natural result of which is to drive the workmen away from the employ of such business, there is no longer any doubt.

A leading case upon this subject is that of Springhead Spinning Co. v. Riley, 6 Equity Cases, 557, where it was held that notwithstanding the fact that the acts of the striking workmen might be punishable by the criminal law, yet, inasmuch as they tended to the destruction of property, a court of equity would restrain them. In the course of his decision in that case Mallins, V. C., said:

“The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate destruction of property, or to make it less valuable or comfortable for use or occupation.”

“In the present case the acts complained of are illegal and criminal by the act of Geo. 4, and it is admitted by the demurrers that they were designedly done as part of a scheme, by threats and intimidation to prevent persons from accepting work from the plaintiffs, and as a consequence to destroy the value of the plaintiffs' property. It is in my opinion within the jurisdiction of this court to prevent such or any other mode of destroying property, and the demurrers must therefore be overruled.”

The temporary restraining orders issued against Lanahan, Boverly and Roettinger will be continued; as to all the others, they will be dissolved.

Thornton M. Hinkle, for plaintiff.

Amos Dye, for defendant.

## INTOXICATING LIQUORS.

66

[Montgomery Common Pleas, 1892.]

ROLLINS V. STATE OF OHIO.

The act passed by the General Assembly of the state of Ohio, April 12, 1892, vol. 89 O. L., p. 254, entitled an act to amend supplementary sec. 6946c of the Rev. Stat. of Ohio, passed April 12, 1888, in so far as it makes it a crime to sell or give away intoxicating liquors within one mile outside of the boundary line of the land belonging to the National Home for Disabled Volunteer Soldiers, located near Dayton, Ohio, in contravention of art. 2, sec. 26 of the constitution of the state of Ohio, and is void.

This case comes into this court on petition in error from the police court of the city of Dayton.

DWYER, J.

On the record presented it appears that an information was filed in said police court charging plaintiff in error with unlawfully selling liquor within one mile outside the boundary lines of the lands belonging to the National Home for Disabled Volunteer Soldiers, located near Dayton, Ohio, and within four miles of the city of Dayton. The information was framed on sec. 6946a of the Rev. Stat. of this state, passed April 12, 1892, O. L., vol. 89, p. 254, which provides as follows:

"Whoever sells or gives away intoxicating liquors \* \* \* within one mile outside of the boundary line of the land belonging to the National Home for Disabled Volunteer Soldiers, located near Dayton, Ohio, shall be fined not more than one hundred (\$100) dollars and not less than twenty-five (\$25) dollars and imprisoned thirty days, and on conviction of the owner or keeper thereof, the place wherein such intoxicating liquors are sold, may, by the order of the court, be shut up and abated as a nuisance."

A motion to quash and a general demurrer to the information were filed in, and overruled by the police court, and a jury being then waived, and a trial had, the plaintiff in error was found guilty as charged.

Motions for a new trial and in arrest of judgment were made and overruled by the court, and the plaintiff was assessed to pay a fine of one hundred dollars and the costs of prosecution, and to be imprisoned in the workhouse of the city of Dayton for thirty days and until the fine and costs were paid, or he be discharged by due course of law.

Two principal objections are made by plaintiff in error to the sufficiency of the proceedings before the police court and upon which he relies, namely:

First—That the law under which he was charged, tried and convicted in the police court is unconstitutional.

Second—That the place where the offense charged as having been committed, being outside of the limits of the city of Dayton, the police court of said city of Dayton had no jurisdiction to hear and determine the case.

To pass upon the constitutionality of an act of the legislature is to use the language of Judge Brinkerhoff in the case of the State ex rel, the Attorney General v. The City of Cincinnati, 29 Ohio St., 33, a burden and a responsibility not to be desired. The task, the judge says, is in every way an unwelcome one, yet one that cannot be avoided without an abdication of official duty. Being fully aware of the rule that an act of

the legislative body, passed in due form, is not to be held invalid by reason of its being supposed to be in contravention of the provisions of the constitution in a merely doubtful case, as in such case the doubt should turn the scale in favor of the validity of the enactment, yet where a legislative enactment is clearly unwarranted by, or is repugnant to the constitution, it will be so declared. Otherwise a court would not be obeying the paramount obligation of upholding the constitution, which, in its terms is alike binding on the legislature, the court and the citizen. Is the law then, under which the plaintiff in error was tried and convicted in the police court, in contravention of sec. 26 of art. 2 of the constitution of this state, which ordains that all laws of a general nature shall have uniform operation throughout the state. I think it is settled in this state that the traffic in intoxicating liquors is a subject that concerns all the citizens of the state and has been so regarded and treated, both by the legislature from time to time in its several enactments and by the submission of the question at various times to the people of the entire state for action.

It is true that power has been conferred by the legislature on cities and villages of the state, by classification, to regulate the traffic within their borders which did not apply to portions of the state outside their limits, but on that the Supreme Court has frequently held that a general law which operates by a reasonable classification is valid and does not violate sec. 26 of art. 2, of the constitution. The reason for this is well stated by the Supreme Court of New Jersey in the case of the *State v. Parsons et al.*, 40 N. J. Law, 123, wherein it is laid down that a law framed in general terms restricted to no locality and operating equally upon all of a group of objects which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special but a general law. Perhaps the language of Judge Okey in delivering the opinion of the court in *Falk Exp.*, 42 Ohio St., 644, is liable to be misunderstood, wherein he says: "On the other hand a statute general in form prohibiting the sale of liquors in the immediate vicinity of any college would perhaps be regarded as a general, and, therefore, valid enactment in force throughout the state, although every county does not contain a college." I suppose from the language used and from what preceded it in Judge Okey's opinion, that he meant to be understood as saying that a law which prohibited the sale of liquor in the vicinity of any college in any county of the state, where a college is located, would by classification as equally applying to all the colleges of the state be a general law, and consequently valid. In that view Judge Okey's language is in harmony with all the decisions of the Supreme Court on the subject. Assuming then that the traffic in intoxicating liquors in this state can only be acted on by a law of a general nature, the question arises, is the law under which the plaintiff in error was prosecuted and convicted a law of a general nature either in its operation, on the whole people of the state, or by classification as before herein defined.

As reflecting on the case before the court I find that on the twelfth of April, 1876, O. L., vol. 73, page 321, an act was passed as follows: "That it shall be unlawful for any person to sell or otherwise dispose of any intoxicating liquor on or within a distance of two miles of Chippewa lake in the county of Medina."

This law came up for consideration in the Circuit Court of Medina county in the case of *John Nye v. State of Ohio*, 1 Circ. Dec., 198, and

was very fully considered and all the authorities on the subject cited and commented on by the court, and as the syllabus of the case contains all that is necessary for presentation here, I will quote it:

"The act passed by the general assembly of the state of Ohio, April 12, 1876, vol. 73 O. L., p. 321, entitled an act to prevent gambling and the sale of intoxicating liquors at a place named, is in violation of art. 2, sec. 26 of the constitution of this state, and is void."

The same law came under review in the Supreme Court of this state in the case of the State of Ohio v. Richard Winch, 45 Ohio St., 663, and in the briefest possible manner was disposed of, the court using the following language: "An act passed April 12, 1876, 75 Ohio Laws, p. 321, to prevent gambling and the sale of intoxicating liquors on or within a distance of two miles of Chippewa lake, in the county of Medina, is in contravention of sec. 26, art. 2, of the constitution of the state, which ordains that all laws of a general nature shall have a uniform operation throughout the state, and is consequently void."

If then, from all that has been said and cited, the law under which plaintiff in error was convicted and sentenced in the police court is not a law of a general nature, it is in contravention of sec. 26, art. 2, of the constitution. The offense as defined by law is the selling or giving away of intoxicating liquors within one mile outside of the boundary line of the lands belonging to the National Home for Disabled Volunteer Soldiers, located near Dayton, O. It is evident, I think, from its language and meaning, that the law either by present or future application cannot embrace or include any other place but the National Soldiers' Home in this county, and as such, is strictly local, and therefore is in contravention of sec. 26, art. 2, of the constitution, which requires all laws of a general nature to have a uniform operation throughout the state, and is consequently void. As the assignment of error that I have been considering disposed of the case, the other errors assigned will not be considered at this time. The judgment of the police court of Dayton, therefore, for the reasons stated, will be reversed.

Munger & Kennedy, attorneys for plaintiff in error.

B. F. McCann, prosecuting attorney police court, and John M. Sprigg, attorneys for defendant in error.

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## BOARDS OF EQUALIZATION.

67

[Superior Court of Cincinnati, General Term, 1892.]

NOVA CEASAREA HARMONY LODGE NO. 2 v. JOHN HAGERTY ET AL.

1. The members of the board of review in cities of the first grade of the first class are required to take and subscribe to an oath before entering upon their duties, which oath is filed with the clerk of the court appointing the board. No further oath is required of the members to enable them to discharge any of the duties of their office.
2. The members of such board, in acting as a decennial board of equalization, are not required to see the property, or to enter into it or upon it. They may form their opinion in such manner as seems to them advisable. The only requirement of the law is that the valuations when fixed shall represent the opinion of the board.

3. The board of review when acting as a decennial board of equalization lawfully, made an addition to the value of a piece of real estate as such value was returned by the assessor. Afterwards the board made a percentage reduction from the valuation of all the realty within its jurisdiction, as such valuation had been previously fixed by the board.
4. That even if such reduction were made at a time after the right of the board had ceased, nevertheless, the owner of the property was not for that reason entitled to have his property valued as the assessor returned it.

SMITH, J.

This case has been reserved upon the demurrer of the defendants to the first cause of action, and a motion to make more definite and certain as to the second cause of action. The petition, so far as it relates to these causes of action, is as follows:

"Plaintiffs are an incorporated company under the laws of Ohio, and John Hagerty and Reuben B. Brooks are respectively county auditor and county treasurer of Hamilton county, Ohio.

"Plaintiffs are the owners of inlot No. 135 at the northeast corner of Third and Walnut streets in the Eighth ward of Cincinnati, said property with the building thereon being known as the "Masonic Temple." "Plaintiffs further say that in the year 1890 the district assessor of real estate for the Eighth ward of said city valued said lot at \$89,700.00, and the building thereon at \$40,000.00; total, \$129,700.00, and made official return of said valuation to the auditor of said county.

"Plaintiffs further say that the board of review of said city, acting as the board of equalization of the real estate of said city for the decennial period beginning in 1891, on the thirty-first day of October, 1891, caused to be delivered their certified report to the said auditor of the equalization of real estate in said city for said decennial period, and reported an increased valuation of the said property of plaintiffs as follows:

"Lot increased to \$110,950.00, and building increased to \$65,620.00, making the increased valuation, \$176,570.00, and being an increase in value over and above the total fixed by said assessor of \$46,870.00.

"Plaintiffs further say that John Hagerty, as auditor of said county, has received and accepted said report as the correct valuation of the property of plaintiffs for said decennial period, and intends to place the same upon his duplicate at said value of \$176,570.00, and intends to charge taxes thereon upon said basis at the rate of \$2.8416 per hundred dollars, and to deliver his duplicate so made up to the said treasurer for collection, and that the taxes on said increase of \$46,870.00 as the same will be charged on the duplicate of 1891 will be \$1,331.86, of which \$665.93 will be due on or before December 20, 1891, and \$665.93 on or before June 20, 1892.

"Plaintiffs say that said increase of \$46,870.00 and the taxes charged thereon are unauthorized and illegal for the reasons set forth in the following causes of action:

"First cause.—Plaintiffs for a first cause of action say that said board of review in valuing the property of plaintiffs on June 1, 1891, took the following action upon a report of a committee of three of its members, which report was as follows:

"Having been appointed a committee to review real estate in the Eighth ward for the purpose of equalizing values, we hereby report that



we have examined the whole ward and returned all plats with the valuations thereon.

J. M. Doherty,  
J. L. Foley,  
Lewis Krohn,"

and that on the same day and before transacting any other business said board received and adopted said report in the following words:

"On motion the report was received and adopted by the following vote:—Ayes—Doherty, Foley, Hemmelgarn, Krohn, Lange, and the president:—Six affirmative votes;—Said persons, with Richard Smith as president, being then and there the members of said board of review."

"Plaintiffs say that neither said board of review, nor any of its members, nor said committee or any of its members, in fixing, ascertaining, assessing and equalizing the value of said property of plaintiffs or the real estate of said Eighth ward, ever reviewed or attempted to review, ever entered into or attempted to enter into the property of plaintiffs, or the real estate of said Eighth ward for the purpose of said assessment, valuation and equalization, but that said assessment, valuation and equalization, both as to plaintiffs' property and the real estate of said Eighth ward, was made by expert clerks—so called, hired by said board, for said purpose, to whom said job of valuation, assessment and equalization was sub-let by said board of review; and that said committee of three based its report upon and accepted the valuation, assessment and equalization of said clerks as to the real estate of said Eighth ward without any personal view on the part of said committee of the several tracts and lots in said ward numbering many hundreds of pieces.

"Plaintiffs further say, that said board of review, in adopting the report of said committee, then and there knew that the property of the plaintiffs and the real estate of said Eighth ward had not been valued, assessed or equalized by said committee, but on the contrary, knew that the valuation, assessment and equalization reported was the work of said clerks, and not the personal work of said committee or any members thereof, and plaintiffs say that the valuation of their property as thus ascertained, reported and adopted by said board, was \$201,800.00.

"Plaintiffs further say that afterwards, on October 13, 1891, all of the real estate of said city having meanwhile been valued, assessed and equalized by said board of review, said board of review made a reduction of a uniform per cent. applying to the entire real estate of the said city, not for the purpose of equalizing, assessing or valuing the same at its true value, but solely and only for the purpose of bringing down the aggregate of value already adopted by said board for the entire city to or nearly to the aggregate of values as returned by the district assessors of said city, and resulting in a valuation of plaintiffs' property at \$176,570, as certified to the county auditor.

"Plaintiffs further say that said board of review in finally fixing the valuation of plaintiffs' property and of the real estate in said Eighth ward for taxation, did not aim to ascertain or assess its true value, or to equalize its true value, and did not in fact ascertain the true value of the same, and that the values as returned to the auditor of the county are not, in fact, the true values of said property, nor the act or judgment of or based upon the opinion of said board of review or of a majority of its members, and plaintiffs further say that none of the members of said board ever took the official oath prescribed by secs. 2813 and 2815 of the

Rev. Stat., to faithfully and impartially equalize the value of real estate within said city of Cincinnati.

"Second cause.—Plaintiffs further say that said increase of \$46,-870.00 complained of was made upon the property of plaintiffs without any notice of any kind to plaintiffs, their officers or agents, of any intention or purpose on the part of said board of review to make said increase or any increase, and without any hearing or opportunity to be heard upon the part of plaintiffs as to said increase, and without the knowledge or sanction of plaintiffs, and plaintiffs say that the business of said board was so conducted and carried on and the orders of said board were such as to secrecy in its proceedings during the process of equalization and valuation as to prevent and make it impossible under its rules, for plaintiffs, their officers and agents, to find out whether or not said board contemplated an increase in the valuation of plaintiffs' property, or what in amount such increase proposed was, if any was in contemplation or was suggested, and plaintiffs were unable to find out and did not know whether, in fact, any increase of valuation was contemplated, and so plaintiffs were deprived of an opportunity to be heard for the purpose of showing cause why said increase or any proposed increase, should not be made, and plaintiffs say they knew nothing of said increase or of any proposed increase or of any action of said board in that behalf until after the final action of said board on October 13, 1891, already referred to, and plaintiffs further say that the sessions of said board on June 1, 1891, and on October 13, 1891, when action was taken on plaintiffs' property, were not held in the auditor's office of said county, nor in the court house of said county, but in another and separate building wholly disconnected from said court house building."

The plaintiffs, by this action, seek upon several grounds to overthrow and have declared invalid the work of the board of review of this city in equalizing the values of the several pieces of real estate in said city as they were returned by the district assessors for the decennial period of 1890; and the decision of the case necessarily involves an examination of many of the fundamental rights, powers and duties of such board when engaged upon such work.

The board of review was created by what is popularly known in this city as "The New Charter;" but which more properly speaking is "an act supplementary to and amendatory of title 12 of the Rev. Stat. of Ohio, passed March 26, 1891, and found in 88 O. L., page 222. This act consisted for the most part of amendments to various sections of the Rev. Stat., but included also additional legislation to which no sectional numbers of the Rev. Stat. were given. Although applicable only to the city of Cincinnati at the time of its passage, the act is nevertheless general in its form, applying to all cities of the first class, and its constitutionality has recently been sustained by our Supreme Court in the cases entitled *State of Ohio ex rel. v. Thomas W. Graydon et al.*, and *State of Ohio ex rel. v. Richard Smith et al.*, decided February 23, 1892; unreported. See 3 Circ. Dec., 515; *Ib.*, 621.

The part of the act which creates the board of review is entitled section 2, and is as follows:

### "THE BOARD OF REVIEW.

"Section 2. In cities of the first grade of the first class there shall be a board of review, consisting of six members, electors of such city, to be appointed by the superior court thereof, if there be one in such city, and if there be none, then by the court of common pleas of the county in which such city is located. The superior court, if there be one in such city, and if there be none, the court of common pleas of the county in which such city is located, shall appoint as members of said board six citizens, electors of said city, well known for their intelligence and integrity, not more than three of whom shall be of the same political party, two of whom, of different political parties, shall be designated in their appointment to serve for one year, two others, also of different political parties, shall be designated in their appointment to serve for two years, and the remaining two, also of different political parties, shall be designated in their appointment to serve for three years, and thereafter at the expiration of such terms the superior court, if there be one in such city, and if there be none, then the court of common pleas of the county in which such city is located, shall appoint two members of said board, of different political parties, to serve for three years. For neglect of duty or misconduct in office the superior court, if there be one, and if there be none, then the court of common pleas of the county in which such city is located, may remove any member of said board; and all vacancies therein by death, resignation, removal or otherwise, shall be filled by the superior court if there be one, and if there be none, then by the common pleas court of the county in which such city is located for the unexpired term; and all vacancies shall be so filled that no more than three are of the same political party. The members of said board before entering upon their said duties shall take and subscribe to an oath to be filed and kept by the clerk of the court making the appointment, to support the constitution of the United States and of the state of Ohio, to obey the laws and in all their official actions and judgments to aim only to secure and maintain an honest and efficient management of their department free from partisan dictation and control. The members of said board shall each receive an annual compensation of twenty-five hundred dollars, (\$2,500.00), and give bond conditioned for the faithful performance of his duties in the sum of \$10,000.00, with sureties to the satisfaction of said court. Said board shall have power to employ a secretary, and to appoint such other officers and employees as it may deem necessary for the efficient execution of its duties, and to fix their salaries and their terms of office. Said board of review shall have all the powers and perform all the duties heretofore conferred upon or required of the board of tax commissioners, and the board of revision, and the annual board of equalization, and the decennial board of equalization in cities of the first grade of the first class by any law now in force; and said board of review shall, in all respects, be considered the successor of the said board of tax commissioners, and said board of revision, and said annual board of equalization, and said decennial board of equalization in such cities, which boards are, upon the appointment and qualification of said board of review, hereby abolished. Said board shall fix the compensation of assessors and assistants, and other officers, and agents, and employees appointed by said board, and shall frame appropriate rules governing them in the discharge of their respective duties."

Section 3 of said act provides that the board in certain contingencies shall have the power to remove the members of the board of administration and the members of the board of fire trustees whose appointment is provided for in said act, and sec. 5 provides that "any and all sections or portions of said Rev. Stat. in so far as the same are inconsistent with any of the provisions of this act are hereby repealed."

The first cause of action presents three questions:

First:—Are the members of the board of review, in addition to the oath prescribed in sec. 2 of the act of March 26, 1891, (which oath it is admitted in argument by counsel for plaintiff was taken as required) also required to take a special oath in order to qualify them to decennially equalize the value of the real estate of the city?

Second:—Was the method adopted by the board for determining the values of real estate as set out in the petition a sufficient compliance with the requirements of the law so as to make their work legal and valid?

Third:—Was the action of the board on October 13, 1891, making a percentage deduction of real estate of the city invalid, and did it render their previous work of June 1, invalid?

The argument of plaintiffs on the necessity of taking an additional oath may be summarized as follows: They contend that this oath designated in the board of review, law is not sufficient to entitle the board to decennially equalize the values of the different pieces of real estate in said city, but that such oath must be further supplemented with another oath, such as is required by sec. 2813 Rev. Stat., which provides for the organization of a decennial board of equalization. That the only original power conferred on the board of review is that of hearing charges, when preferred against certain municipal officers, and the appointment of assessors; and that all the other powers which it exercises are exercised merely ex officio, that the board is merely ex officio a tax commission; ex officio an annual board of equalization; and ex officio a decennial board of equalization; that these four boards are not abolished except in personnel, the members of the board of review being the substituted personnel; and that therefore when the board undertakes to exercise the powers or discharge the duties conferred on such boards, its members must take the separate oath which the members of such boards are required to take.

In our opinion the argument of plaintiffs is based upon an entirely erroneous view as to the nature and powers of this board. It is not true that its only original powers are those of hearing charges in certain cases and of appointing assessors; and that these are the sole original powers that it discharges as a board of review, its other duties being performed in another character, viz: as a board of tax commission, a board of revision, an annual board of equalization and a decennial board of equalization.

It is true that before the new charter act no such board as a board of review was known to the law, and that when it was created it was given certain powers that no board had previously had, viz: The power to remove certain officers, and the power to appoint assessors. As to its other powers which have previously been exercised by other boards the law distinctly says that although the "board of review shall have all the powers and perform all the duties heretofore conferred upon or required of the board of tax commissioners, and the board of revision and the annual board of equalization and decennial board of equalization, in cities of the first grade of the first class by any law now in force;" and

that "said board of review shall in all respects be considered the successor of said boards;" yet it further declares that "upon the appointment and qualification of said board of review said boards are abolished."

In place of these various boards appointed by different authorities with widely different duties and widely varying terms of office, there is substituted in cities of the first class of the first grade, one board whose existence shall be continuous, and who shall exercise all the powers that the different boards have previously exercised. The law says: "The members of said board before entering upon their said duties shall take and subscribe to an oath to be filed and kept by the clerk of the court making the appointment to support the constitution of the United States and of the state of Ohio, to obey the laws, and in all their official actions and judgments to aim only to secure and maintain an honest and efficient management of their department free from partisan dictation and control."

It will be observed that the only requirement of the law with reference to an oath is that before entering upon their duties the members shall take and subscribe to an oath which shall be filed with the clerk. This language is not susceptible of any other construction than that only one oath is required. If more than one were required, we should find some provision for the taking of them and for their filing with the clerk of the court or some other officer of the law.

To require the board to be continually taking an oath would be an absurd and utterly purposeless provision, and the presumption is that it was not within the legislative intent. *Moore v. Given*, 39 Ohio St., 661.

This oath is broad in its language, and in view of the nature of the board was clearly intended to embrace all of its duties.

We proceed next to inquire as to the second question presented by the first cause of action, viz: Was the method adopted by the board for determining the values of real estate a sufficient compliance with the requirements of the law?

The allegations upon this point are, in substance, that the members of the board did not personally view the property; that the experts reported their valuations to a committee of three members of the board; that the committee reported the same to the whole board, who thereupon adopted it as their decennial valuation of said property.

This action is complained of as in direct violation of the law which it is contended requires that the board shall in its work in decennially equalizing the value of property go upon and into the property and makes such view of it an essential precedent step to the formation of an opinion as to its value.

The powers of the board of review in the decennial equalization of real estate are defined as follows:

"The board of review shall have all the powers and perform all the duties heretofore conferred upon or required of the decennial board of equalization in cities of the first grade and first class by any law now in force." And it is further provided that said board of review shall in all respects be considered the successor of said board.

The powers of the decennial board are defined in sec. 2816, Rev. Stat., which says:

"The said board shall as to the real estate within such city have the same powers, perform the same duties and be governed by the same rules, provisions and limitations as to the decennial county board."

These rules, provisions and limitations as to the county board, and which by sec. 2816 are made applicable to the city board, are found in sec. 2814, Rev. Stat., which reads as follows:

Section 2814: "The auditor shall lay before the board the returns made by the district assessors, with the additions which he shall have made thereto, and they shall then immediately proceed to equalize such valuation, so that each tract or lot shall be entered on the tax list at its true value, and for this purpose they shall observe the following rules: First. They shall raise the valuation of such tracts and lots of real property as, in their opinion, have been returned below their true value to such price or sum as they may believe to be the true value thereof, agreeably to the rules prescribed by this title for the valuation thereof. Second. They shall reduce the valuation of such tracts and lots, as, in their opinion, have been returned above their true value, as compared with the average valuation of the real property of such county, having due regard to their relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot. Third. They shall not reduce the aggregate value of the real property of the county below the aggregate value thereof, as returned by the assessors, with the addition made thereto by the auditor as hereinbefore stated."

The contention of plaintiffs that an actual entry into and upon and an actual view of the premises is necessary is based upon the requirement of the statute that in raising the valuation of a piece of real estate, it must be done "agreeably to the rules prescribed by this title for the valuation thereof." It is necessary therefore that we should determine precisely what meaning the legislature intended to give to that phrase.

The word "title" refers of course to title 13 of the Rev. Stat.; and the argument of counsel for plaintiffs therefore is that every rule found in that title relating to the valuation of real estate is applicable to the decennial board; and that among these rules are those which relating to the work of the district assessor require an "actual view" of the premises. Sec. 2790 R. S.; and an entry into and a full examination of all buildings and structures which are liable to or exempt from taxation. Sec. 2793 R. S.

But in the construction of sections of the Rev. Stat. we must necessarily bear in mind the fact that such statutes are primarily considered merely a revision and consolidation of the general statutes of the state, and are not intended as the enactment of new legislation, and that "where all the general statutes of a state or all on a particular subject are revised and consolidated, there is a strong presumption that the same construction which the statutes received, or, if their interpretations had been called for, would certainly have received before revision and consolidation should be applied to the enactment in its revised and consolidated form although the language may have been changed. *Allen v. Russell*, 39 O. S., 337; that "where there is a substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information."

*United States v. Bowen*, 100 U. S., 58; and that "such a doubt is resolved in favor of the law as it existed prior to the revision unless a contrary intention plainly appears."

*The State ex rel. Pugh, Prosecuting Attorney, v. Brewster, Auditor*, 44 O. S., 252. *State ex rel. Baumgartner v. Stocklev*. 45 O. S., 308-9.

Bearing in mind these principles of law, we think there is very little difficulty in determining the meaning of the phrase "agreeably to the rules prescribed by this title for the valuation thereof."

Section 2814 of the Rev. Stat., was formerly sec. 39 of the great act of April 5, 1859, (56 V. I., 75), which defined the system of taxation in this state, and which under the heading of "Taxation" constitutes the basis of all the legislation of the Rev. Stat. found in chapter 13 of the Rev. Stat. Sec. 2814 is found to correspond precisely with said sec. 39, except that the language of sec. 39 is "agreeably to the rules prescribed by this act for the valuation thereof." Whereas, the language of sec. 2814 is "agreeably to the rules prescribed by this title for the valuation thereof."

Now, an examination of that act will show that by the "rules prescribed" by that act is not meant every provision of law relating to every officer or board who may have reason to value property; but that it has a definite and fixed meaning as shown by the act.

The act is entitled: "An act for the assessment and taxation of all property in this state and for levying taxes thereon according to its true value in money." It embraces one hundred and eleven sections, and covers forty-three pages of the annual volume. The first three sections contain general provisions upon the subject of taxation, and the remainder of the act is subdivided into different heads entitled respectively:

By whom, where and in what manner property shall be listed.

Rules for valuing property."

Of listing and valuing the property of merchants and manufacturers, and of bankers, exchange brokers, and stock jobbers and so forth.

District assessors.

Duties of county auditor.

County boards for the equalization of real property.

State board of equalization.

Annual county board of equalization.

Duty of county auditors as to making tax lists and duplicates and assessing taxes.

Banks and banking companies.

Miscellaneous.

Non-resident personal tax.

Redemption of land sold at delinquent sale.

Sale of forfeited lands.

Now, when, in the thirty-ninth section it was provided that the county board of equalization should equalize the valuation of the property "agreeably to the rules prescribed by this act for the valuation thereof," it was not intended that every provision in that act that related to valuing property, whether by an assessor or a board, and whether relating to real or personal property, bank stocks or whatever property is liable to valuation, was to be applicable to this board; but it had reference to the provisions of sections 9 and 10 of the act which fall under the subdivision "rules for valuing property." And the change of the word "act" to that of "title" in the Rev. Stat. was made necessary merely to meet the changed form of publication of the statute. The word "act" in such a connection would have been inappropriate. No change was affected in the meaning of the law, and none was intended.

Examining these "Rules for valuing property," we shall see that the contention of plaintiffs that the board must view the real estate, and

make an entry upon it falls to the ground. The rules are as follows: Sec. 9, vol. 56, 180.

"Each separate parcel of real property shall be valued at its true value in money, excluding the value of the crops growing thereon; but the price for which such real property would sell at auction, or at a forced sale shall not be taken as the criterion of such true value. Each tract or lot of real property belonging to this state, or to any county, city or charitable institution, whether incorporated or unincorporated, and school or ministerial lands held under lease for a term exceeding five years, shall be valued at such price as the assessor believes could be obtained at private sale, for such leasehold estate. Personal property of every description shall be valued at the usual selling-price of similar property at the time of listing, and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it shall be to fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place. Investments in bonds, stocks, stock companies; or otherwise, shall be valued at the true value thereof, in money. Money, whether in possession or on deposit, shall be entered in the statement at the full amount thereof, provided that depreciated bank notes shall be entered at their current value. Every credit for a sum certain, payable either in money, property of any kind, labor or services, shall be valued at the full price of the sum so payable; if for a specific article, or for a specified number or quantity of any article or articles of property, or for a certain amount of labor, or for services of any kind, it shall be valued at the current price of such property, or of such labor or service, at the place where payable. Annuities or moneys receivable at stated periods, shall be valued at the price which the person listing the same, believes them to be worth.

"Where the fee of the soil of any tract, parcel or lot of land is in any person or persons, natural or artificial, and the right to any minerals therein, in another or others, the same shall be valued and listed agreeably to such ownership, in separate entries, and taxed to the parties owning the same, respectively."

Section 10. "No person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation of any kind, given to any mutual insurance company, nor on account of any unpaid subscription to any religious, literary, scientific or charitable institution or society; nor on account of any subscription to, or installment payable on the capital stock of any company, whether incorporated or unincorporated."

It is true that these sections do not appear bodily in any two sections of the Rev. Stat.; that their provisions are found scattered through various sections in the title on taxation in the Rev. Stat.; that some of the provisions are changed and some omitted from the Rev. Stat., the chief rule as to valuing real property being found in sec. 2792 Rev. Stat. But that the phrase, "agreeably to the rules prescribed by this act," refers to such rules and that in the Rev. Stat. the words, "agreeably to the rules prescribed by this title," refer to such rules or modifications as appear there, is beyond intelligent dispute.

It thus appears that the decennial board is not required to actually view the property or to enter upon or into the same, and that it may form its opinion as to valuation by any means that to it seems proper and desirable; and if it sees fit it may advise with experts in real estate, to assist it in forming its opinion. We see no legal objection to a valua-



tion which has been fixed by experts, who report the same to the board as a whole, and which report the board, after considering the same, adopts, provided that when adopted it really represents the opinion of the board.

Aside, too, from the legal objections to plaintiff's claim, it would be practically impossible for a board in a city of the first class of the first grade, to personally view and enter upon every piece of real estate and complete its work in time for the December collection of taxes of the following year; and it is not lightly to be presumed that the legislature ever intended that the board should be required to do an impossible thing. "It is the duty of courts, in the interpretation of statutes, unless restrained by the letter, to adopt that view which will avoid absurd contingencies, injustice or great inconvenience, as none of these can be presumed to have been within the legislative intent. *Moore v. Given*, 39 Ohio St., 661.

As the statute therefore, does not require that the opinion of the board shall be formed in any specific manner, but only requires that the valuation, when finally fixed, shall represent the opinion of the board, it was perfectly legal for the board to send expert clerks to examine the property, and then, after consultation upon their report, to fix the valuation.

It will be observed, however, that the minutes of the board, which are set out in the petition, do not disclose the fact that the board appointed experts, and it might become a question, if such fact were important, to what extent that fact, in the face of the minutes, could be shown. But, as we have found the fact itself to be unimportant, we have not found it necessary to consider that question.

If the allegations of the petition, however, were such as to charge that this board had turned over the discharge of its duties to expert clerks and had abdicated its functions in favor of such experts, it is probably true that such action of the board would be a fraud upon the public, and that a court of equity would grant relief upon the ground of fraud, *Fratz v. Mueller*, 35 Ohio St., 404, provided such fraud did not appear from the minutes themselves, in which case a serious question would arise as to whether the only mode of relief was not by proceedings in error from the action of the board, and not by a suit in equity. Sec. 6708 Rev. Stat.: *Lewis et al. v. Laylin et al.*, 46 O. S., 676.

But we are unable to find that the allegations of this petition are such as to make a case of fraud. The fair construction of the language of the pleader is that the board did not equalize or assess the valuation, because no member of the board saw the property, and that they relied upon the report of the experts who had seen it.

The concluding statement of the first cause of action is that "Plaintiffs further say that said board of review in finally fixing the valuation of plaintiffs' property and of the real estate in said Eighth ward for taxation, did not aim to ascertain or assess its true value, or to equalize its true value, and did not in fact ascertain the true value of the same, and that the values, as returned to the auditor, are not in fact the true values of said property, nor the act or judgment of or based upon the opinion of said board of review, or a majority of its members."

There are several reasons why, even against a demurrer, no force can be given to these statements.

First—If they are to be regarded as statements of fact, nevertheless, they are entirely inconsistent with the statement in the first part of the

cause of action that the board formed its opinion after receiving the report of a committee who had conferred with experts; an entirely legal mode of forming an opinion. And the rule in pleading is well established, that a pleading which contains inconsistent statements should be construed against the pleader. *Mechanics' Savings and Building Loan Association v. Connors*, 29 O. S., 654.

Second—In view of the preceding statement in the petition, these allegations must be taken to be merely argumentative and therefore of no force as statements of fact.

Third—They are complete contradictions to the written minutes of the board without showing any fraud or mistake which would authorize a court to look behind the minutes. *Fratz v. Mueller*, 35 Ohio St., 404.

Fourth—The allegations that the value fixed is not the true value of the property are of no force. It is not alleged that the value fixed is in excess of the true value; and if it were, it could not for that reason merely be corrected by a court of equity. The courts do not sit as boards of equalization. *Wagner v. Loomis*, 37 Ohio St., 571.

The third ground of complaint which is embraced in the first cause of action, and to which we have previously referred, is that after the board on the first of June, had fixed the true value of the property at \$201,800,000, it subsequently, on the thirteenth of October, made a uniform percentage "reduction applying to the entire real estate of the city, not for the purpose of equalizing, assessing or valuing the same at its true value, but solely and only for the purpose of bringing down the aggregate of values already adopted by said board for the entire city or nearly to the aggregate value as returned by the district assessors of said city, and resulting in a valuation of plaintiff's property at \$176,570, as certified to the county auditor," and that said action was illegal for the reason stated, and for the further reason that the law required the board to complete its session by October 1st, and any action by it after that date, is illegal and void.

Without entering into an examination of the claim of the plaintiff that the board has no right to continue its sessions beyond October 1st, or the other question as to the right of the board to make a uniform percentage reduction in values for the purpose of bringing down the aggregate values to the aggregate value as returned by the district assessors, it is sufficient for the purposes of this action to say that the act of the board of October 13th did not increase, but decreased the value as fixed on June 1st, and that such action was therefore not an injury, but a benefit to plaintiff, and he has, therefore, no ground of complaint. If this were an action in mandamus against the county authorities by one authorized to proceed against them, to compel the restoration of this deduction upon the ground that it was illegal, it would be necessary to inquire into its legality, but the action has no such purpose in view. *State ex rel. Poe v. Raine*, 47 O. S., 447.

It is not necessary to notice at length the further claim of plaintiff that as the value was fixed in October, and as the action was void, there is no action by the board, and therefore the value of the property must necessarily be that fixed in the assessor's return. The fallacy of this claim, we think, is readily apparent. Because, even if it be conceded, for the sake of argument, that the action of October 13th is void, we are remitted, not to the assessor's return for value, but to the action of the board of June 1st, and as this value is greater than that of October 12th, we are of the opinion, for the reasons stated, that the plaintiff, having

been benefited and not injured by the acts of the county officials in accepting the value of October 13th as the true one, can not be heard to complain.

We are of the opinion that the demurrer to the first cause of action should be sustained.

The motion to make more definite and certain the allegations of the petition as to the second cause of action is based upon two grounds:

First—That it does not appear in what manner the plaintiff was deprived of an opportunity to be heard; and

Second—That it does not appear where the sessions of the board were held.

We are of the opinion that the allegations upon the subjects of the want of opportunity to be heard, and the place in which the sessions were held, are so vague and indefinite that the defendant is entitled to have his motion granted.

Moore and Hunt, JJ., concur.

Wm. M. Ampt and John E. Bruce, for plaintiffs.

Spiegel & Bromwell, county solicitors, for defendants.

### BOUNDARY LINE—STREAM.

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[Hamilton Common Pleas, January Term, 1892.]

ISAAC B. WILLEY V. MARTIN J. LEWIS ET AL.

1. The thread of a stream is the middle line of the channel; that is of the hollow bed of running water, when the water is at its ordinary stage.
2. Where a running stream, which is a boundary, changes its channel by a gradual and progressive washing away of one of its banks, the boundary follows the thread of the stream, although the change is caused by instantaneous and obvious dropping into the river of quite large portions of the bank, when such portions are not carried down the stream or lodged on the opposite shore in solid and compact masses, but disintegrate and separate into particles of earth borne onward by the flowing water.
3. When such a stream from any cause abandons its old, and seeks a new, bed, by rapid and sudden, as distinguished from such gradual and progressive, change, such change of channel works no change of boundary.

SAYLER, J.

The plaintiff, Israel B. Willey, is an owner of lands bounding on the west bank of the Great Miami river at a place where the river ran in the shape of a horseshoe, and on the outside of the bend; the defendants, Martin J. Lewis and others, are the owners of the lands bounding on the river opposite the plaintiff, and on the inside of the bend.

Prior to 1868 the water had washed away eight or ten rods of the west bank, and the channel had moved over to the west on the plaintiff's lands, and in the years 1868 to 1872 the river cut a new channel across the open end of the horseshoe, and left the channel between the lands of the parties dry.

The petition is filed for the purpose of having the boundary line established between the lands in the old channel.

The plaintiff claims the line to be the middle line between the banks which enclosed the water at high stage, as the banks stood before his bank was washed away; the defendants claim the line to be the middle

of the small stream of water left running in the old channel after the new channel was cut through and just before the water dried up in the old channel, and which was close to the west bank.

Prior to the time the new channel was cut through, the water, at an ordinary stage, ran in the old channel, without the current tending, to any great extent, towards either shore. At Willey's north line there was a bar on the west of fifty feet, and on the east of eighty-five feet, and the water was 350 feet wide. At a point some 300 feet south and just below the section line, the water ran close to the west bank; on the east bank there was a bar 290 feet wide, and the water was 200 feet wide. At a point 400 feet south of the section line, not far from the old Post Rail fence, there was a bar on the west bank fifty feet wide; on the east the water ran near to the bank, and the water was 360 feet wide. At the south line of Willey's land the water was 335 feet wide, and ran from bank to bank.

At high water, the current ran east of an island lying north of the bend, striking the lands on the east side of the river; then it turned towards the west bank and struck it a short distance south of Willey's north line, and thence it ran south bearing on the west bank till near the old Post Rail fence, where it ran towards the east bank. On a rise of four feet the water ran from bank to bank.

At high water the current, striking the west bank, wore away and carried away portions thereof, between the north line of the Willey's land and a point some distance below the old Post Rail fence; the place where the greatest wear was made was about 100 feet south of the section line near the riffle where from eight to ten rods of bank has been carried away after 1858; this decreased towards the north till at the north line of Willey's land not more than two or three rods were taken; and towards the south line of his lands, where there was no wear of the bank.

It appears from the evidence that since 1814 the west bank has receded five rods at Willey's north line; thirteen rods at the section line; twelve rods at a point about 300 feet south of the section line, and nothing at Willey's south line. It will be seen therefore, that the greatest part of wash has changed from a point at the section line to a point about 100 feet south of the section line, and it will be further noticed that the bank has receded at a greater speed since 1858 than before.

I think the evidence shows that in 1858 the water ran close to the west bank; since that time from two to three rods of the bank on Willey's north line, and from eight to ten rods of the bank south of the section line have washed away; yet in 1868-70 the water still ran in about the same relative position to the west bank, remaining about the same in width, being perhaps a rod or so wider at a stone bar near the old Post Rail fence. It seems to me, therefore, to be evident that the body of the water moved west as the bank receded, and the bar on the east became wider, but not much higher.

There was no wash on the east bank, and that bank—that is, the bank to which the water ran on a rise of four feet, remained stationary.

The first washout was made in the new channel in 1866; as soon as the water subsided, the whole current returned to the old channel. In 1868 a further wash was made, and after the river receded a small part of the water ran through the new channel, but the great part returned to the old channel. By the freshets between 1868 and 1872 the new channel was cut through; in 1870 two-thirds or three-fourths of the water

went through it, and in 1872 only a small portion ran through the old channel, and before 1874 no water ran from the river through the old channel. After that time the water in the old channel came from springs and water seeping through the gravel, excepting on a rise in the river of three or four feet, when the water flowed over the bar formed at the head of the old channel. With the water at an ordinary stage, the old channel after 1874 was an abandoned channel.

In 1870, when two-thirds or three-fourths of the water ran in the new channel, so much of the water as still ran in the old channel, ran in a depression along the west bank, which at Willey's north line extended east about two hundred feet, its center and deepest depression being about one hundred feet from the bank; at the section line it extended about one hundred and fifty feet east, and its deepest depression being seventy-five feet from the bank; at a point one hundred feet below the Post Rail fence it extended two hundred feet east, and its deepest depression was divided; and at the south line of Willey's land the depression was near the middle of the old bed. The water continued to run in this depression so long as it ran from the river.

For a space of three hundred or four hundred feet in front of Willey's lands, this deepest depression is well defined, being from fifteen to twenty feet wide, with trees on both sides; and below this it divides with trees in the center, and it would appear that the water finally dried up in this space.

The testimony shows that the washing of the west bank took place when the river was high, overflowing the banks, and at times twenty to thirty feet would cave in. It appears, however, that only about one hundred and sixty feet caved in after 1858, and as the bank was washed away at almost every freshet, it is probable that it was seldom that so much as twenty feet caved in at a time. The earth washed from the bank was not deposited on the bar on the east side of the river, but seems to have been disintegrated, and to a great extent carried back over the fields.

The location of the banks, bars and water being thus determined, the location of the boundary line between the lands on the west and the lands on the east, prior to the new channel, is to be determined.

In the case of *Adm'r of Gavit v. Chambers et al.*, 3 Ohio, 496, the court on p. 498 says, the rule of the common law is the law of Ohio, as follows: *Ib.*, 498. "He who owns the lands upon both banks owns the entire river, subject only to the easement of navigation, and who owns the land upon one bank only, owns to the middle of the river, subject to the same easement." And this is cited with approval in 11 Ohio 315, the court in 11 Ohio, 315, also approving the doctrine laid down in 6 Ohio, 504 that by a call for a stream not navigable, the boundary is in the middle of the stream. And in *Walker v. Board of Public Works*, 16 Ohio, 540 the court say, on p. 544, that "he who owns the land upon one bank only, owns to the middle of the main channel," subject to the easement of navigation, and in the case of *June v. Purcell*, 36 O. S., 396, the court say, "that the owners of the lands situate on banks of navigable streams running through the state are also owners of the beds of the rivers to the middle of the stream, as at common law," and in the case of *Day v. Railroad Co.*, 44 O. S., 406, the court say, "a deed of premises lying on the bank of a river conveys the grantor's rights to the center of the stream bounding the property." In the case of *Lembeck v. Nye*, 47

O. S., 336, in applying principles to a non-navigable lake, it is said, p. 349, "but, be that as it may, no solid ground is readily perceived for limiting in that case (non-navigable lake) the deed to the water's edge, and in the case of a running stream, extending its operations to the center or thread thereof; and in this state, where the rule is so firmly established that a boundary on a running stream carries the land to the middle, or thread thereof, principles of analogy afford strong grounds for applying it to non-navigable lakes;" and in this case the court says the main reason for the rule is to prevent disputes from arising in regard to the strips or gores of land along streams, etc. The waters themselves constitute the boundary, 140 U. S., 380; where streams are called for as boundaries, the real line between the opposite shore owners, is the thread of the current. *Ib.*, 397. In the case of *Nebraska v. Iowa*, 143 U. S., 359, the court say the boundary line is the center of the channel.

Now, it will be noticed that in each of these cases the court refers to the "middle of the river," "middle of the stream," "middle of the main channel," "center of the stream," and "of a running stream;" "the waters themselves constitute the boundary line," "the thread of the current," "center of the channel." The banks which retain the water when high, but not overflowing, do not seem to be considered in determining the boundary.

In the case of *Halsey v. McCormick*, 13 N. Y., 296, the deed called for a course to the bank of a creek; the court held that it went to low water mark, and the argument of the court is, that the bank is that part which touches the water at low water mark. In the case of *Benner's Lessee v. Plattes*, 6 Ohio, 504, the court referring to the case of *McCulloch's Lessee v. Aten*, 2 Ohio, 309, in which the court had held that whenever the stream is made the boundary, it is then the water, and not the center of its channel that is referred to, say: "Establishing the water's edge as the boundary, instead of the channel, gave to the plaintiff in the case before the court all he sought for in that case, a salt well. The land lying between the edge of the water and the channel was not in contest. We do not think the court intended to decide that a boundary upon an unnavigable stream, called only to the edge of low water." In the case of *Howard v. Ingersoll*, 13 How., U. S., 381, the syllabus reads: "The river flows in a channel, between two banks from fifteen to twenty feet high, between the bottom of which and the water, when the river is at a low stage, there are shelving shores from thirty to sixty yards each in width," thereby clearly distinguishing between the shelving shores and the channel.

In 17 Alabama, 780, the court say: "The bank of a river is that space of rising ground above low water mark, which is usually covered by high water, and the term, when used to designate a precise line is vague and indefinite."

In the case of *Houghton v. The C. D. & M. R. Co.*, 47 Iowa, 370, the court hold that the riparian proprietor on the Mississippi river owns to the ordinary high water mark, and that the banks confine the river at high water; but in Ohio the rule is different; as in 11 Ohio, 311, the court fixes the boundary at low water mark, and I hardly think the reasoning of the court in 47 Iowa, as to the banks, will apply in Ohio.

Gould on Water Courses, sec. 198, says that "The thread of a private stream is the line midway between the banks at the ordinary state of the water, without regard to the channel of the lowest and deepest part of the stream," and to the same effect is Angell on Water Courses,

sec. 101a. I think the meaning of these authors is fully exemplified by what the court say in case of *Trustees of Hopkins Academy v. Dickinson*, 63 Mass., 552. "In ascertaining the thread of the river, it will be proper to take the middle line between the shores upon each side, without regard to the channel, or lowest and deepest part of the stream." But the court adds, "and in ascertaining the shores or water lines on each side, to measure, it will be proper to find what those lines are when the water is in its natural and ordinary stage at a medium height, neither swollen by freshets or shrunk by draught."

The court in the case of *Nebraska v. Iowa*, *supra*, places the line in the center of the channel. What is the channel? Webster says a channel is "the bed of a stream of water; especially the deeper part of a river or bay, where the main channel flows." Worcester says a channel is "the hollow bed of running water, as the channel of a river." The *Century Dictionary* gives channel as "the bed of a stream of water, the hollow or course in which a stream flows."

I think that the weight of authority is that the thread of the stream is the middle line of the channel; that is, the hollow bed of running water, when the water is at its ordinary stage.

In the case of *Neihaus v. Sheppard*, 26 Ohio St., 40, the court says on page 45: "We regard the principle of law to be well settled that where by a gradual and imperceptible process of wearing away the land upon one side, and depositing soil upon the other, the thread of a stream, whether navigable or not, forming the boundary line between adjacent owners, is changed, the boundary line changes with it, since it is the thread of the stream, for the time being, and not the one existing at the time the adjacent owners acquired their titles, which forms the boundary line between their estates;" and to same effect in case of *St. Louis v. Rutz*, 138 U. S., 226, adding that if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally.

It appears in the case at bar that the west bank caved off in a manner that could be seen, in blocks five, ten and sometimes more feet, in depth. But these blocks so washed off went to pieces, and the earth carried off in the stream or deposited on the fields to the west.

In the case of *Nebraska v. Iowa*, *supra*, in which the court found that frequently the washing caused an instantaneous fall of quite a length and breadth of the soil of the river; "so that it may, in one sense of the term, be said, that the diminution of the banks is not gradual and imperceptible, but sudden and visible," the court say, "that while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water—there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible accretion of a bank on that shore;" and the court held that notwithstanding the rapidity of the changes, the law of accretion controlled, and that the boundary line was a varying one. *Ib.*, 369.

I think, therefore, in the case at bar, the boundary line followed the middle of the channel as it moved west. Therefore, prior to the new channel being cut through, the boundary line was the middle line of the running water as above located.

In the case of *Nebraska v. Iowa*, *supra*, the court say, *Ib.*, 361: "It is equally well settled, that where a stream, which is a boundary, from any cause, suddenly abandons its old and seeks a new bed, such change

of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion."

In the case at bar, till the new channel was cut through, the water ran in the old channel as above located. When the new channel was cut through, the river ran through that, and the old channel became an abandoned channel. The change was a sudden and rapid change—was avulsion—as distinguished from an imperceptible change—accretion. A change of channel could not in the nature of things be instantaneous, it must require a certain time; but if it is rapid, sudden, as distinguished from an imperceptible change, I think under this late case, it must be controlled by the law of avulsion. I see no middle course; it must be either accretion or avulsion.

I do not think it is an answer to say that some water still ran in the old channel till it finally dried up; that must necessarily be the case in every change of channel; and if it were an answer, then the proposition that the boundary remains as it was, would be a mythe.

I am of opinion, therefore, that the boundary line remains where it was before the new channel cut through.

Following the ruling of the circuit court in Butler county in the case of *Martindell v. Hueston*, and of the case of *Nebraska v. Iowa*, each party will pay his own costs.

Foraker, Black & Bosworth, P. W. Francis, Morey, Andrews & Morey, for plaintiff.

Milton Sater, Follett & Kelley, for defendants.

## 107

## PEDDLER'S LICENSES.

[Madison Common Pleas.]

## W. H. RADEBAUGH V. PLAIN CITY (VILLAGE).

1. A village ordinance which imposes a license fee upon persons who are non-residents of said village only, for the privilege of selling goods therein, by taking orders, and afterward, transporting said goods into said village, is illegal as discriminating against such non-residents, and in restraint of trade.
2. A non-resident merchant tailor exhibiting samples of cloth and taking orders for suits of clothing to be made and delivered afterwards, is not a peddler or hawker within the meaning of sec. 2669, Rev. Stat., Ohio.
3. Such a tailor is a manufacturer and entitled to the exemptions from license under said sec. 2669.

ABERNATHY, J.

This case comes into this court on error, from the docket of the mayor of Plain City, Ohio.

An ordinance of that village provided, among other things, as follows:

"That any person or persons, itinerant peddler or auctioneer, being non-residents of said village of Plain City, Ohio, either in person or by agent, said agent being a non-resident of Plain City, Ohio, offering for sale any goods, wares or merchandise, by selling upon orders and delivering, or otherwise offering for sale at auction any articles or goods transported into the incorporated limits of said village, to be sold, shall



be required to pay to the mayor, and in the absence of the mayor, to the clerk of said village, a license fee not exceeding twenty dollars (\$20.00) per day, \* \* provided that nothing in this ordinance shall be construed to prohibit any person or persons from selling their own production, or articles manufactured from their own material, produced within the state of Ohio."

On or about the first day of April, 1892, one W. H. Radebaugh, a merchant tailor, with place of business at Lancaster, Ohio, entered said village of Plain City, and exhibited samples of cloth, and took orders for suits of clothing, to be made by him and delivered at a future time. He refused to take out a license under said ordinance, was arrested and fined, and by his bill of exceptions, setting forth the above facts, he brings his case in error to this court.

The first question arising is, was the plaintiff in error a peddler, as understood in the statute above referred to? We think he is not, and in this we are fully sustained by the authorities. Nor is he a peddler in the ordinary meaning of the term.

But even if a peddler, he is a manufacturer of the goods he sold, and therefore exempt by the statute and the ordinance itself. One need not manufacture every portion of the material used, and construct from the original material in order to be a manufacturer. When, by the application of skill and labor, an article or articles are so transformed as to become a different article, of increased value, such article may generally be classed as a "manufactured article."

Aside from these features, the ordinance expressly places this burden on non-residents of the village. There can be no restraint of trade of this character. Burdens of this kind must not discriminate against one class, (i. e. non-residents), in favor of another class, (i. e. residents), and the ordinance is therefore illegal from a constitutional standpoint.

The judgment is therefore reversed.

Edmond B. Dillon, for plaintiff in error.

Howard C. Black, for defendant in error.

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## STREET ASSESSMENTS.

III

[Superior Court of Cincinnati, August 15, 1892.]

LEWIS BUSE V. CINCINNATI (CITY).

1. One occupying property under a mere license which may be revoked at any time is not an owner of the same within the meaning of the street assessment laws.
2. The occupancy of property under such a license in connection with adjoining property of which the licensee is the owner, but which adjoining property is separated from a street by the property which is occupied under the license, does not make such adjoining property subject to an assessment for the establishment and construction of such a street.

SMITH, J.

The plaintiff seeks to enjoin the city authorities from charging against his property on George street, an assessment for improving Jane street.

His claim is that his property does not abut on Jane street, and is therefore not assessable for any expenses incurred in its extension and improvement.

There is very little, if any dispute as to the material facts of the case. Prior to the opening of Jane street, Herman Buse, the brother of the plaintiff was the owner of a lot fronting twelve and one-half feet on the south side of George street, and running back 90 feet, more or less. Adjoining this lot on the east was that of the plaintiff of the same width and depth. The city condemned of Herman Buse's lot 11 feet by 90 feet, leaving a strip one and one-half feet fronting on George street by a depth of 90 feet. This strip left was off the east side of his lot, and was immediately adjoining on the west the property of plaintiff.

Shortly after the condemnation Herman Buse wrote the following letter to his brother, the plaintiff:

"Cincinnati, March 10, 1891.

"Lewis Buse, Esq., City.

"Dear Brother: Understanding that you will be forced to make some alterations in your building 339 George (Kenyon Ave.) St., on account of the city bringing Jane street through to above named street (or avenue), and I having a strip to the west of your building one and one-half feet in width which I cannot use, you may use said one and one-half feet of ground in any shape or form to suit your building.

"Yours,

"Herman H. Buse."

Acting upon this letter the plaintiff began, and is now using the greater part of this strip of ground in connection with his own, although he has no permanent improvements upon it. Herman Buse, however, has continued to pay the taxes on it.

The city claims that the occupancy and use by plaintiff of this one and one-half feet strip in connection with the twelve and one-half feet lot makes the two lots one piece of property, and that therefore the assessment for the improvement of Jane street for street paving and sidewalk should fall upon all of the 14 feet.

This claim of the city is based upon the decisions of this court in the cases of *Matthews v. The City of Cincinnati*, 9 Dec. Re., 673, and *Gibson v. The City of Cincinnati*, *ante* 456.

In these cases it was held that where one owns two adjoining lots, and uses and occupies them as one, he cannot set up a line which may divide them upon a plat of a subdivision, to defeat the charge of an assessment upon the whole property.

But there is a radical and manifest distinction between the principle of those cases and this case.

In this case the plaintiff is not the owner of the one and one-half feet strip. He is merely a licensee without consideration (33 O. St., 145; 13 Am. & Eng. Ency. License); and no acts have been performed upon his part of such a character as would prevent a revocation of the license and create an estoppel against Herman Buse.

The plaintiff, therefore, by reason of the intervention of the one and one-half feet strip between him and Jane street, is not an abutting owner, and his lot cannot be assessed for its improvement.

Decree granted for perpetual injunction.

• Ferris Morrow & Oldham, for plaintiff.

Horstman, Galvin, Whitaker & O'Connell, for defendant.

**KEEPER'S LIEN—CHATTEL MORTGAGES.****112**

[Franklin Common Pleas, 1892.]

**MONYPENY, HAMMOND & CO. V. ORANGE SELLS ET AL.**

A chattel mortgage on two horses was duly executed and filed in the recorder's office; afterwards and before the mortgage matured, a creditor of the mortgagor had an attachment levied on them by a constable; without the knowledge or consent of the mortgagees, the constable hired a livery stable keeper to feed and care for the horses for nearly two months; within two days of the maturity of the mortgage the mortgagees took possession of the horses under a writ of replevin issued in this case; the mortgage had the usual terms and conditions; the livery stable keeper asserts that his lien is superior to that of the chattel mortgage—*Held*: that the chattel mortgage is paramount.

**PUGH, J.**

On the twenty-seventh day of July, 1891, A. H. Harmon executed and delivered to the plaintiffs a chattel mortgage on two horses belonging to him, to secure the payment of \$38.27. The debt became due September 27, 1891. The mortgage was filed in the recorder's office, as the law required, the day it was executed.

On the first day of August, 1891, Armour & Co. brought suit, before a justice of the peace, against A. H. Harmon, in which an attachment was sued out, and by the constable levied on the said horses. At the instance of the constable, Orange Sells, a defendant herein, and a keeper of a livery stable, fed and cared for said horses from the first day of August, 1891, until they were taken from him in this case.

On the twenty-second day of September, 1891, the plaintiffs demanded possession of the horses of Sells, who refused to surrender them, the demand being made in virtue of the terms and conditions of the chattel mortgage which had been broken by Harmon. The chattel mortgage contained the stereotyped condition that the plaintiffs could take possession of the horses before the debt matured, if they were seized on mesne or final process.

The agreement of Sells with the constable to feed and care for the horses, was made without the knowledge or consent of the plaintiffs. In this action, by virtue of a writ of replevin, Sells was dispossessed of the horses.

By his answer, Sells insists that he has a lien on the horses for \$78, the price of their food and care, which is paramount to the chattel mortgage lien of the plaintiffs. To this answer, plaintiffs demurred. The question, therefore, is, which lien is superior?

By sec. 3212, of the Rev. Stat. it is declared: "A person who feeds or furnishes food and care, or either of them, for any horse \* \* \* \* by virtue of any contract or agreement with the owner thereof, expressed or implied, shall have a lien therefor, to secure the payment of the same, upon such animal."

The constable, having a special property in the horses under the attachment, may be regarded as the owner, in the sense of the statute, at the time he made the agreement with Sells.

There are these considerations in favor of the claim of Sells: The lien is created by statute, and not by contract; the possession of the horses by him was lawful and rightful; the food and care for them which he furnished were the occasion for the creation of the lien; the interests of plaintiffs, Harmon and Armour & Co., were subserved by his furnishing the food and care; the lives of the horses were thereby preserved and their value continued; by not taking possession of the horses, as they had a legal right to do under their mortgage, the plaintiffs tacitly con-

sented to the creation of the lien for any expenditure "necessary for the preservation" of the horses. *Smith v. Stevens*, 31 N. W. R., 55; *Case v. Allen*, 21 Kansas, 217.

These reasons are epitomized from the cases cited.

A rule which would give such a lien priority over a chattel mortgage lien, prior in time, and duly recorded, would, probably, in most cases, do no substantial wrong to the chattel mortgagees; because the expenditure for board and care would be trivial when compared with the value of the property.

But there are more cogent reasons why such a lien should not be paramount to the mortgage lien.

The filing of the chattel mortgage in the recorder's office was constructive notice of the right, title and interest of the plaintiffs to Sells. The very design of the statute allowing it to be thus filed was to furnish Sells an accurate and complete transcript and exhibition of the title, interests, claims, incumbrances and charges in and upon the horses. As was said in one case, the constructive notice given by the filing of the mortgage, was just as effectual for the protection of the plaintiffs, as if the notice had been placarded on the horses. If the property could be incumbered to its full value for the benefit of the livery stable keeper, after the mortgage had been filed, it would as completely defeat the prior lien, and the policy of the recording statute, as if the mortgagor were allowed to sell the horses to one who was, in fact, ignorant of the mortgage.

There is no power, except that of the legislature, which can exempt the livery stable keeper from the consequences which would befall any other person who might, as a purchaser or mortgagee, deal with the property, the title to which, and the incumbrances on which, were matters of record.

There are precisely the same reasons why he should be charged with the same notice by the record as exist in the cases of a subsequent purchaser or mortgagee. The language of the statute does not warrant any other conclusion. It does not declare, either expressly or by implication, that the livery stable keeper's lien shall be superior to that of a chattel mortgage, which is prior in time and duly registered. The court has no right to assume that the legislature, by enacting the statute, intended to violate fundamental rights of property, by putting it in the power of the mortgagor, or of one who acquires an attachment lien, to create a livery stable keeper's lien on the property, without the consent of the plaintiffs, when neither the mortgagor nor the person in possession could confer any rights against them by a sale of the horses, said the Supreme Court of Nebraska. 33 N. W. R., 282. See, also, *McGhee v. Edwards*, 11 S. W. R., 316; *Eng. and Am. Ency. of Law*, 593.

Sells has a lien, but it is only on whatever interest Harmon had in the horses at the time; it did not attach to the interest of the plaintiffs, between whom and Sells there was no privity of contract.

Neither Harmon nor the constable was the agent of the plaintiffs. The statute did not permit either of them to subordinate the interests and rights of the plaintiffs to the lien of Sells, without their knowledge and consent. The answer does not aver that the lien was created with their consent or knowledge.

(Demurrer sustained).

Rankin, Thrailkill & Ricketts, for plaintiffs.

J. S. Walker, for defendant.

## MUTUAL INSURANCE.

113

[Hamilton Common Pleas, 1892]

## MANSFIELD AND HAHN, TRUSTEES, V. CINCINNATI ICE CO.

## SAME V. RANDALL &amp; CO.

Defendant held policies containing contingent liability clauses issued by a mutual fire insurance company.

Plaintiffs, as trustees of said insurance company, it having been ousted by *quo warranto* of its franchises, having levied assessments to pay losses and expenses of winding up, payments of the assessments being refused, sued to recover same.

Defendant answering, plead that the authorized agent of the company solicited the insurance and untruthfully represented that the company was solvent and was doing business upon the same basis as stock companies, and was receiving cash premiums for its policies, and there would be no further liability than there would be incurred by taking a policy in a stock company.

Defendant held said policies for a period of eighteen months, and until after proceedings in *quo warranto* had been commenced in the Supreme Court of the state, under which plaintiffs were appointed trustees, when at the request of the defendant they were cancelled and the unearned premiums returned by the company.

On motion to strike from the answer all allegations as to representations made by said agent as immaterial and irrelevant, *Held:*

1. None of the allegations constitute a defense to plaintiff's action at law on the assessments all prior agreements having been merged in the policy.
2. Rights of innocent parties having intervened, contracts otherwise voidable by reason of fraud must be upheld particularly where the defendant has slept on his rights for so long a period, and where, as in this case, no reformation of contract is sought: at all, but the defense of fraud and misrepresentation is interposed only to defeat action by receiver for benefit of creditors to recover assessments on policies.

## BUCHWALTER, J.

The plaintiffs ask a personal judgment in eight several causes of action in the total sum of \$670.22 for assessments made by the trustees of plaintiff's company against the defendant on its eight policies of insurance on the expressed mutual plan in accordance with the clauses therein creating a contingent liability to pay losses incurred by fire to the insured property of members of such company. These policies were issued in 1889, 1890 and 1891. The defendant sets out the defense, that the authorized agent of the Insurance Co. made false statements to it, which induced it to take the policies sued on, and but for which, it would not have accepted the same or become insured in the plaintiff company.

The false statements in substance were, that the Insurance Company was then solvent, when in fact it was then insolvent. That it was authorized and empowered to transact business on a cash stock company basis; that it had abandoned the mutual plan of insurance; that on paying the cash premium, no further liability attached; that the policy holder need not give any premium notes liable to assessment for future losses; that the company would issue policies to which no liability would attach on the part of the assured; that the company was doing business upon the same basis as stock companies, receiving cash premiums without any further liability to the insured; that the defendant stated by its officers that it had had previous experience in mutual companies and would not take any policies in such a company, and relying on the com-

pany's agent, had accepted the several policies and had paid a premium equal to the ordinary cash premiums in stock plan insurance; that the said policies contained in force until January 17, 1891, when at the request of the insured they were cancelled and the unearned part of the premium was returned to it. (From the dates averred in the petition, it appears that the policies were cancelled at the instance of the insured while proceedings in quo warranto were pending in the Supreme Court by which plaintiff trustees were appointed and empowered to sue as herein.)

The plaintiffs move to strike all these averments of defense from the answer, the motion being in the nature of a demurrer to the same.

These matters of defense are pleaded to defeat plaintiff's action at law. Necessary averments are not made, nor does defendant pray for relief or reformation of the policies of insurance—on the contrary, it appears that at its instance the contract of insurance was cancelled without any attempt at reformation.

The false statements complained of are both as to facts and as to the legal effect of the terms of the contract intermingled. These facts are, as to the solvency of the insurance company, that it would issue policies to the defendant which would be on the non-assessable stock plan. That it had abandoned the mutual plan and adopted the stock or cash premium plan of insurance.

The misstatement as to the legal effect and status of the contract and the insurance company's plan of business was, that under such policies and contracts the assured could not be assessed; that there would be no further liability, etc., after payment of the cash premium. I assume that as to all such misstatements of the law by the insurance agent, it will not be seriously contended that the insured can make any defense. As to the effect of the false statements of fact, much controversy has been made in the argument of counsel, and reasonably may be made. Let us look at them as separately stated, first as to solvency. As I understand, from the statutory provisions and the pleadings, the mutual plan of insurance, claim for the assessments herein made, it is that such assessments are made and can only be made for losses occurring during the membership founded on policies then in life and that the claim for assessments against defendant is founded on losses occurring during its membership on policies then in force and not to pay any previous loss or to redeem any insolvency theretofore existing.

But such false statement, if it induced insurance, would make the policy voidable only, and a reasonable time having elapsed with full opportunity to the member to discover the fraud, the defense ought not now to prevail as against losses to innocent members relying on the defendant's various policies being satisfactory to it. As to the false statement of fact about the character of policies to be issued to the defendant, the abandonment of the mutual plan and the adoption of the cash stock non-assessable plan, what I have before said as to nature of this action is pertinent, viz: "That it is not to reform a contract induced by fraud, but is to defeat plaintiff's action at law because of false statement by the agent which is not embodied in the contract and contrary to the terms of the policy, and on that issue it appears by the facts pleaded that the defendant company accepted policies with the words "Mutual" in the face of the policy and on each renewal receipt, and with contingent liability clause for assessment for losses, and without any statement thereon that it was a stock insurance policy. That some of these poli-

cies remained in its possession from the time it took insurance in July, 1889, until January, 1891, when the insolvency proceedings in the Supreme Court were pending. Sec. 3653 of the Rev. Stat., makes it obligatory on the insurance company to in that manner advise the policy holder of the character of the insurance issued, and of this requirement it was the duty of the defendant to take notice. See 115 Mass., 343; 31 Mo. App., 467; 15 Am. Repts., 401.

Each member of a mutual company bears a dual relation thereto, that of insurer and insured. He is entitled to have his losses paid by the contribution of his fellow members, and it is his duty as such member to help pay the losses of such other members. When one holds a policy and contract of insurance, expressed as on the mutual plan, he is presumed to know its contents, and likewise are the other members who have contracted with him through the officers and agents of their associates or company.

And therefore when the defendant company holding policies of the character sued upon for so long a time as from July, 1889, without disclaiming the express terms thereof, or seeking any relief therefrom, it has permitted the rights of innocent parties to intervene. It has held out to other policy holders and members, that the contracts of insurance in question were either true and correct, or acquiesced in by the defendant. On the facts pleaded it does not appear that the agent did or said anything to prevent the defendant from examining the policies and terms of the written contracts. No excuse whatever appears for such neglect by the defendant's officers.

And, therefore, the defendant company having slept so long on their rights for reformation of these policies, thereby inducing other members to rely on them as correctly stating the several contracts of insurance, it is too late to maintain a defense against an assessment for losses by fire to such other mutual policy holders. See Swank case, 102 Pa. St., 17.

The policy issued by the company and accepted by the assured, must, in a court of law, be taken as expressing the final agreement of the parties, and as merging all previous verbal stipulations. Insurance Co. v. Mowry, 96 U. S., 544.

All previous verbal arrangements were merged in the written agreement. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertance or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company. The previous representation of the agent could in no respect operate as an estoppel against the company. The doctrine of estoppel has no place for application when the statement or representation relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. *Ib.*, 547-8. The court in the Mowry case says with reference to

the conduct of the agent: "In representing himself as an agent, he only solicited an application by the assured to the company for a policy. That instrument was to be drawn and issued by the company, and it shows on its face that the authority to the agent was limited to counter-signing it before delivery and to receiving premiums. But even if the agent had possessed authority to make an insurance for the company, and he made the agreement pretended, still the assured was bound by the terms of the policy subsequently executed and accepted by him." *Ib.*, 548-9. It is to be noticed that the Mowry case was between the company and the assured. The case at bar is between the trustees of the company (now representing creditors of the company) and the assured, and rights of innocent parties have intervened.

The conclusions arrived at in this opinion are sustained by the weight of the authorities. *Sawyer v. Hoag*, 17 Wall., 610-624; *Tremper v. Barton*, 18 Ohio, 418; *Rouse v. Bank*, 46 Ohio St., 493; *Upton v. Bank*, 91 U. S., 56, 60; *Upton v. Triblicock*, *Ib.*, 45, 47; *Ogilvie v. Knox*, 22 How., 380; 12 Johns, 427; *Smith's case*, L. R., 2 Ch. App., 613; L. R., 2 Eq., 352; L. R., 2 Ch. Div., 663; *Upton v. Hansborough*, 3 Bissell, 417; *New Orleans C. & Bk. Co. v. Montgomery*, 95 U. S., 16; *Chubb v. Upton, Assignee*, *Ib.*, 665; *DeCamp v. Hamma, Ex.*, 29 Ohio St., 467-471; *Ross v. Doland*, 29 Ohio St., 473; *May on Insurance*, 891, sec. 586; *Ib.*, 1257, sec., 553; *Ib.*, sec. 593, p. 1343; 10 *Cushing*, 433; 32 *Pa. St.*, 75; 2 *Biss.*, 244; *Guff v. Summers*, 58 Ills., 440; *Northrop v. Bushnell*, 38 Conn., 498; *Farmers' M. Fire Ins. Co. v. Marshall*, 29 Vt., 23.

\*The late case of *Dettra, Receiver, v. Kestner*, decided by the Supreme Court of Pennsylvania, March, 1892, is conclusive upon the questions made upon this motion.

In that case it was defended that the company's agent had represented that the company was solvent, and that it had a large number of policy holders, all of which was untrue. The court found that the representations had been made, but found also that other persons had taken policies relying upon the fact that the defendant held policies in the company, and that therefore the fraud complained of could not avail the defendant, to the injury of the rights of the innocent third parties holding policies; and in that case, even in equity, the court says the contract should be sustained. The syllabus reads: "Where the rights of innocent third parties have intervened, and it is essential to their protection that a contract otherwise vitiated by fraud, and therefore voidable, should be sustained, equity requires that such contract be upheld." 23 *Atl. Rep.*, 889.

The plaintiff's motion to strike from the answer all of the allegations relating to the fraud of the agent and his misrepresentations will be granted.

Porter & Rendigs and Skiles & Skiles, for plaintiffs.

Paxton & Warrington, for defendant.

In the *Randall* case, defendant for a first defense alleged that the policy sued on, being dated September 4, 1890, for \$1,000, was taken by them, being induced thereto by reason of certain false and fraudulent representations made to them by said insurance company, and but for which they would not have received or accepted same. These representations were that said company issued two kinds of policies, one a contingent liability policy, being one providing for assessments upon its holders to pay losses and expenses; the other termed a straight insurance policy.



being a policy not subject to assessments, but one of absolute insurance for which a cash premium for full period of policy was charged and received by said company. Defendants informed insurance company that they would under no circumstances accept a contingent liability policy issued by it or any other company. Insurance company thereupon represented to defendants that for a certain premium to be paid cash, it would issue and deliver to defendants its straight insurance policy, and upon such representations defendants agreed to accept such straight policy and no other. In pursuance of such agreement said company delivered to defendant its insurance policy, and then and there stated to defendant that it was a straight insurance policy and not a contingent liability policy. Defendants took said policy into their possession relying upon the truth of said statements. Defendants allege that the statement of said company as to its issuing two kinds of policies was false and fraudulent and known by said company to be so at the time it was made, and was made falsely and fraudulently for the purpose of inducing defendants to insure with said company. That said insurance company did not then and never did issue two kinds of policies. The statement that the policy delivered was a straight policy, was false and fraudulent, and known by said company to be false and fraudulent, and was made by the company falsely and fraudulently to induce defendants to accept said policy. In truth, the policy was a contingent liability policy, which fact was unknown to defendants at the time of the delivery of said policy to them, and which fact was not discovered by defendants until after suit had been brought by plaintiffs upon the contingent liability clause in said policy.

Plaintiffs demur to this defense.

The cause was originally submitted to Judge Evans, and was handed by him to me in view of the fact that I had the Ice Company case under consideration. He requests that I announce the opinion.

From the conclusions arrived at in the Ice Company case, it follows that the demurrer herein should be sustained, and it is so ordered.

JUDGE EVANS concurs in this opinion.

Porter & Rendigs, and Skiles & Skiles, for plaintiffs.

Swing & Morse, for defendants.

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\*The following is the Dettra case relied upon in the foregoing opinion.

Opinion of G. A. Endlich, Judge of Berks county, Pa., common pleas court. Dettra, Receiver Standard Mutual Live Stock Insurance Company v. George L. Kestner.

This is an action brought by the receiver of a Mutual Insurance Company to recover from the defendant the amount of an assessment levied by him under an order of this court in equity upon certificates or policies held by defendant in said company for his pro rata share of losses remaining unpaid by said company. The cause was submitted to the court without the intervention of a jury, and the following facts, among others, were found:

The Berks County Mutual Live Stock Insurance Company was incorporated in 1886 to make insurance upon the mutual plan and principle on horses, colts and mules against death or theft under act of May 1, 1886, P. L., 53.

By amendment approved March 16, 1888, duly certified and recorded under act June 13, 1883, P. L., 122, the name of said corporation was changed to the Standard Mutual Live Stock Insurance Company of Reading, Pennsylvania.

Upon his application defendant obtained from said company a certificate of membership therein, dated September 9, 1887, insuring a mare, the property of the defendant, for \$128.00; one of the conditions of which is that "the holder of this certificate by accepting the same binds himself or heirs to pay the annual dues and assessments on this policy as the same may be in force; not more than four assessments annually shall be made, which shall be the policy holder's pro rata share of

the losses sustained by the company." On same day another policy was issued defendant upon a horse, the property of defendant.

April 11, 1888, defendant obtained a third policy insuring a horse for \$180.00.

January 7, 1889, defendant obtained a fourth policy upon another horse.

On March 8, 1889, defendant obtained a fifth policy from the Insurance Company upon a horse; amount, \$128.00.

All the applications above mentioned were made by the defendant upon the faith of and in reliance upon the statements made in certain circulars from time to time issued by said company or its general manager, with its approval, and by it or him placed in defendant's hands, holding out to the public the advantages of membership and insurance in said company, inviting the same, stating the names of persons to whom losses had been paid—the number of certificates or policies issued up to certain dates, the total amount of insurance written up to said dates, etc.

The circulars just mentioned were untrue, and were known to the company and its authorized agent to be untrue, in this, that 998 certificates or policies claimed by them to have been issued and representing \$200,000 of insurance, to-wit: In Division "A," certificates Nos. 1 to 500, and in Division "B" certificates Nos. 1 to 498, were never issued by said company, but were fraudulently entered and carried along on its books without payment of fees or assessments thereon, until shortly before the company ceased to do business, when by a vote of the board of directors they were ordered to be cancelled for non-payment of dues.

Large sums of money, viz.: about \$5,000, received by said company during the year, 1888, as assessments, were diverted by the order of the board of directors from the legitimate purpose of paying losses and proper expenses, and appropriated to the payment of increased salaries and back pay to officers, or have disappeared and remain unaccounted for upon the books of the company.

The defendant had no knowledge of the untruth of the statements made in the circulars concerning the number of policies issued and the aggregate of insurance written, nor of the illegal acts of the directors in the disposition of moneys collected by the company until after the appointment of the receiver.

During the operation of the company something over two hundred losses were paid by the company, among which was one for a horse insured by the company to defendant.

Upon a bill filed on thirtieth of July, 1889, Peter W. Fisher was appointed receiver. He afterwards resigned and the plaintiff was appointed to succeed him.

On January 11, 1892, the court ordered said receiver to levy an assessment for the purpose of paying losses incurred by said company, which he did, and the defendant thereunder was assessed the sum of \$103.23 upon his several policies.

Upon the foregoing findings of fact, the court made the following conclusions of law:

1. Under the terms of the policies or certificates held by the defendant, aside from any question of fraudulent practices by the company, or its agents, or officers, the defendant is liable for a proportionate amount of the losses occurring to other members of, and insured in said company, and which became claims against the latter before the date of its suspension and the appointment of a receiver and during a period when the said certificates were in force, and for the purposes of this case, the assessments levied by the receiver upon the several policies or certificates, held by the defendant, represent the proportionate amounts due by him.

2. The fraud or misrepresentations practised upon the defendant by means of the misstatements of the company and its agent in the circulars given to the defendant, concerning the number of policies issued and the aggregate of insurance written, though it was the inducing circumstances that led defendant to apply for and accept the certificates held by him, and though he had no knowledge of the falsity of said statements until after the appointment of a receiver, cannot avail him as a defense in this suit.

3. The illegal and fraudulent acts of the board of directors in misapplying or wasting moneys collected by way of assessment to pay losses, and in failing to keep proper accounts thereof, though unknown to the defendant until after the appointment of the receiver, cannot be set up by him as a defense in this suit.

4. The plaintiff in this suit is entitled to judgment against the defendant for the whole amount of his claim, \$103.23.

Thereupon, in accordance with the practice, the defendant's counsel filed their exceptions to the second, third and fourth conclusions of law as given by the court, and thereupon the court announced the following opinion overruling the exceptions, adhering to the first opinion and sustaining same by numerous citations:

There are four exceptions by defendant upon this record.

The first was taken at the trial to the ruling of the court upon his offer to show fraud on the part of the corporators of the insurance company in obtaining their charter of incorporation. The others relate to the second, third and fourth conclusions of law as stated in the decision filed. The statutory allowance of thirty days is waived by counsel.

1. I take it to be a very clear proposition that one who has agreed to become a member of a corporation and has enjoyed the benefits and privileges of membership, cannot when called upon to perform the obligations of his contract set up as a defense that the corporation is not legally organized. 2 Morawetz Priv. Corp., sec. 743. The fraud that was offered to be shown was a fraud upon the commonwealth, but it is argued that it constitutes at the same time a fraud upon every person subsequently entering the corporation, because he has the right to assume that the statutory prerequisites in order to legal incorporation have been complied with; that he must be presumed to have entered upon the strength of that assumption, the falsity of which in itself is presumptively a fraud upon him, vitiating his contract of membership. That it can only be presumptively a fraud upon him is clear from the fact that it may be rebutted by evidence of knowledge by the member of the true state of facts. Morrison, Receiver v. Dorsey, 48 Md., 461, apart from the objection that defendant's argument would thus require us to countenance a presumption of fact raised upon another mere presumption as its basis which is not permissible. Douglass v. Mitchell, 35 Pa., 430, 433; Phila. C. Pass. Co. v. Henrice, 92 Pa., 431, 434.

It appears subversive of the rule that the validity of a charter cannot be collaterally inquired into. A rule too well settled to require citation of authorities. There can be no substantial distinction between a collateral impeachment of the existence *de jure* of a corporation on the ground of fraud in the procurement of its charter and the attempt to avoid the obligation of a contract made with the corporation on the ground of such fraud. If the one cannot be done, and of that there is no doubt, the other cannot be done. It is true that in Lycoming Fire Insurance Co. v. Woodworth, 83 Pa., 223, a feigned issue to try the question of fraud in procuring the insured to enter into his contract, the company submitted the following point: "A member of a mutual insurance company who has contracted with it as a valid corporation is not in a position to object to the regularity of the incorporation or formation of the company." The court below answered it as follows: "This point we cannot affirm—if you find there was fraud practiced upon them in procuring their assent to take the policy. The verdict was for the insured and judgment was entered upon it. On writ of error, assigning *inter alia*, the answer to the above point, the judgment was affirmed. In the opinion of Mr. Justice Gordon, it is said that certain of the assignments including this one raised the material question in the case, but there is no discussion of this particular assignment. Indeed the material question was that of the applicability of the principle that the company having profited by the fruits of its agent's acts, was bound by his representations. The answer to the point seems to mean and to have been accepted by the Supreme Court as meaning that if there was fraud, the point, whilst abstractly correct, became immaterial. At any rate, I cannot regard that case as upsetting a rule of law recognized by innumerable decisions in this state and elsewhere."

2. Concerning the fraudulent misrepresentations made to the defendant on the subject of the financial condition of the company as an inducement to acquire membership and insurance in it, it may be conceded that as between the company and the insured they would avail the latter as a defense in a suit by the former upon its contract; Sunbury Fire Ins. Co. v. Humble, 100 Pa., 495; 1 Moraw. P. C., secs. 105, 107; but it does not follow that they will do so in this suit. To be sure, Sunbury Fire Ins. Co. v. Humble, *supra*, was an action by a receiver for an assessment levied by him, but the objection here made to the allowance of the defense was not there made, and its merits not passed upon, nor have I been referred to any decision exactly in point. Membership in a mutual company dates from the consummation of the contract by which it was created. Ellenberger v. Ins. Co., 89 Pa. St., 464, 469; hence during the negotiations the relation of the applicant for membership to the mutual company is the same as that of one negotiating to become a member of a stock corporation, to it. *Ibid.* There is, therefore, an analogy between acquisition of membership in a mutual company and a subscription of shares in a stock company. Such a subscription is not only an undertaking to the company, but with all other subscribers. Graff v. R. R. Co., 31 Pa. St., 498; Miller v. R. R. Co., 87 Ib. 95. It is a tri-lateral undertaking, and even if fraudulent as between two of the parties, it is to be enforced for the benefit of the third. Graff v. R. R. Co., *supra*, 498. The third parties may be share-holders. *Ibid.* Miller v. R. R. Co., *supra*; Miner v. Bank, 1 Peters, (U. S.) 66, per Story, J.; or creditors: Turner v. Ins.

Co., 65 Ga., 649; 88 Am. Rep., 801, Taylor Priv. Corp., sec. 744, or both. The receiver is not the mere representative of the corporation, but the custodian of the interests of all the parties who may establish rights in the cause. Booth v. Clark, 17 How. (U. S.) 331, per Wayne, J. As against him, therefore, no defense can be made which could not be made against any of the interests which he represents, hence "when the receiver of an insolvent corporation sues to recover the amount unpaid on a subscription, it is then too late to plead that the subscription was induced by fraudulent misrepresentations." Taylor Priv. Corp., sec. 523. That plea as was said by Chemsford, L. C., in Oakes v. Turquand, L. R., 2 H. L., 325, 344, would have availed in a case between a subscriber and the company in which the latter had sued him for calls on his subscription, but the contract being not void, but only voidable, that plea could not be set up as against the liquidator or receiver. *Ibid.* 352. The decision in this case does not perhaps as clearly as our own recognize the tri-lateral character of the contract of membership, but it gives another reason which is at least cumulative to it and leads to the same result. It is that no matter if there was fraud in the statements made by the prospectus or circular upon the faith of which the relation of membership was assumed, the person who was thus misled into assuming it had, during the continuance of his membership, opportunity of investigating the affairs of the company, of which he was bound to avail himself, and his voluntary ignorance upon the subject until the company broke up, precluded him from raising the objection. *Ibid.* 356. I prefer this reason to that based upon the analogy pointed out by Cairns, L. C., in Tennent v. Glasgow Bank, L. R., 4, App. Cas., 615, 621, between the liabilities in this respect of stockholders and partners, both fraudulently led into a joint enterprise, because this illustration can scarcely be extended beyond the rights of creditors, and is based upon the supposition of fraud on the part of one partner inducing the other to join him; but as was said by Jessel, M. R., in re Hull and County Burgess' case, L. R., 15, Ch. Div., 507, 512, so here the other members are as innocent of this fraud as this defendant. There is no pretense for saying that they authorized a committal of it; on the contrary they themselves were defrauded in like manner, and therefore they acquired rights as innocent parties which would be defeated by a rescission of defendant's contract. In other words the voluntary ignorance of the defendant as to the true condition of the company's financial standing, and his failure to withdraw in season constituted negligence on his part as against others becoming members and insuring after him, and all authorities agree that the right to avoid the contract of membership induced by fraud is barred by laches. 1 Moraw. Priv. Corp., sec. 108; Taylor Priv. C., 524-6; Garrett v. R. R. Co., 78 Pa. St., 465.

There is probably no room for doubt that this company as regards its originators and managers, was conceived in fraud and lived in fraud, but the persons who like the defendant became members, insurers, or creditors of it, are as innocent as he, and so far as his undertaking with the company and his acts and omissions while suffering himself to be held out as a member of it have clothed them with rights upon him, and imposed on him duties and liabilities towards them, the fraud of the company upon him cannot avail him as a defense against their enforcement, and that is this case.

3. The exception to the third conclusion of law stated in the decision, is, I think, disposed of by what was said by Mr. Justice Williams in Kohler v. Beeber, 122 Pa. St., 291, 298. "The defendant in the court below when he took his policy and gave his premium note, became a member of the company. As such he had a right to attend the meetings of its members and to vote at the election of directors. If directors were extravagant, incompetent or careless of their trust, they were nevertheless his representatives in the management of the affairs of the company, and their acts done within the scope of their authority bind him. He should have investigated the situation and the character of the management before giving his note and subjecting himself to contribution towards the payment of salaries that bore no relation to the value of services actually rendered," etc. Moreover, it is a general rule, that illegal acts of a corporation are no defense to the enforcement of obligations incurred towards it by members or others. Hobok, B. A. v. Martin, 2 Beas. (N. J.) 428, as e. g., the misappropriation of corporate funds. Reg. v. D'Eyncourt, 4 B. & S., 820, per Cockburn, C. J.

4. If the second and third conclusions are right, as I think they are, the correctness of the fourth follows as a matter of course.

And now, to-wit, February 6, 1892, the exceptions filed are dismissed, and it is ordered that judgment be entered in favor of plaintiff, and against defendant according to decision previously filed.

The cause was taken to the Supreme Court of Pennsylvania, and was there decided March 21, 1892, (a little over a month from the decision in the common pleas) the court announcing the following opinion. 22 A+1 Pa. 220

[Supreme Court of Pennsylvania, March 21, 1892.]

DETTA V. KESTNER.

RESCISSION OF CONTRACTS—RIGHTS OF THIRD PERSONS.

Where the rights of innocent third persons have intervened, and it is essential to their protection that a contract, otherwise vitiated by fraud, and therefore voidable, should be sustained, equity requires that such contract be upheld.

APPEAL from the court of common pleas, Berks county.

G. A. ENDLICH, J.

Action by B. Frank Dettra, receiver of the Standard Mutual Live Stock Insurance Company, against George L. Kestner. Judgment for plaintiff. Defendant appeals. Affirmed.

Wm. R. Fischer and Ermentrout & Ruhl, for appellant.

Henry C. G. Reber and Cyrus G. Derr, for appellee.

*Per Curiam.* By agreement of parties trial by jury was waived, and the decision of this case was submitted to the court pursuant to provisions of the act of April 22, 1874. It was claimed by defendant that he was induced to apply for and accept membership in the Standard Mutual Live Stock Company (of which plaintiff is receiver) by reason of false and fraudulent representations made to him by the officers of the company as to its financial standing, amount of insurance, etc., and that he had no knowledge of the fraud thus practiced upon him until demand was made by the receiver for payment of the assessment in suit. The facts constituting the alleged fraud were substantially found by the court; but it was also found that the rights of innocent third parties afterwards intervened, and for that reason the learned judge, in his second conclusion of law, held that the fraud practiced on the defendant could not avail him in this suit. Where the rights of innocent third parties have not intervened, the principle contended for by defendant is applicable. In such cases fraud justifies rescission of the vitiated contract, and, as far as possible remits the parties to their former condition; but when, as in this case, the rights of innocent third parties have intervened, and it is essential to their protection that a contract, otherwise vitiated by fraud, and therefore voidable, should be sustained, equity requires that it be upheld. The application of that principle to the facts found by the court practically disposed of the case. There was no error in the ruling complained of in the first specification. Nor was there any error in either of the three conclusions of law recited in the remaining specifications of error. Their correctness is fully vindicated in the opinion of the learned judge who presided at the trial. For reasons more fully given by him, the judgment should be affirmed.

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[Superior Court of Cincinnati, General Term, July, 1892.]

GEORGE HAFFER V. CINCINNATI (CITY).

By reason of various acts, the administrative board of Cincinnati was frequently changed and was called successively the board of public affairs, the board of public improvements, the board of city affairs, the board of public improvements, and the board of administration.

The board of city affairs was declared by the Supreme Court to be an unconstitutional board, and the board of public improvements, which the board of city affairs had succeeded, became in turn, by reason of such decision, the successor of the board of city affairs.

The board of administration upon its creation was declared the successor of the board of public improvements.

During the existence of the board of city affairs an act was passed authorizing said board or their successors in office to issue bonds for the improvement of a certain street in said city; but that board failed to exercise such power. *Held*: That inasmuch as the functions of the various boards remained the same, each of said boards was the successor of the one which preceded it, and the power to issue the bonds passed to the board of administration.

SMITH, J.

This case has been reserved upon a demurrer to the petition.

The petitioner seeks to restrain the Board of Administration of Cincinnati from issuing bonds for the improvement of Montgomery Road in said city, upon the ground that the act of March 25, 1891, which authorized the issuance of such bonds, provided that they should be issued by the Board of City Affairs; and that as the act creating the Board of City Affairs has been declared unconstitutional by the Supreme Court of the state, no power now exists in any board to issue them.

The act authorizing the issue of the bonds is entitled sec. 2293e Revised Statutes. It provides that "In cities of the first grade of the first class the Board of City Affairs of any such city, or their successors in office, shall have authority to cause any of the roads or public highways of said city to be improved with bowlders, according to grade and profile established or to be adopted by the engineer of said city."

After providing for the method of procedure in such cases it provides for the issue of bonds to pay for the work, the sale of the bonds when issued, and the levy of taxes to pay for the same.

The precise language which authorizes the issue of the bonds is as follows:

"In order to provide a fund for carrying on said improvement and paying the cost thereof by the city at large, it shall be lawful for said Board of City Affairs of such city, or their successors in office, to issue bonds in the name of such city, and under the corporate seal thereof, not to exceed the sum of one hundred and fifty thousand dollars."

In the decision of this cause it is important to bear in mind the fact that within the last few years there have been numerous and rapid changes in the personnel, name, number of members and mode of appointment of the administrative board of this city, and that such changes have been the result of legislation, general in its terms, although as a matter of fact, applicable at the time of its passage to the city of Cincinnati alone.

The first board was called the Board of Public Affairs, and the successive boards were named respectively the Board of Public Improvements, the Board of City Affairs, the Board of Public Improvements, and the Board of Administration.

The act creating the Board of City Affairs was declared unconstitutional in *The State ex rel. Reemelin et al. v. Smith et al.* 48 Ohio St., 211, upon the ground that it was a special law conferring corporate powers. But in the same case in which the Board of City Affairs act was held to be unconstitutional, the court held that the part of the law which repealed the act creating the Board of Public Improvements was an essential part of the repealing law, and therefore fell with the law itself. The Board of City Affairs therefore was immediately succeeded by the old Board of Public Improvements, which latter board was afterwards abolished by the new charter, and succeeded by the Board of Administration.

The act of October 24, 1890, (88 O. L., v. 6) which created a Board of City Affairs in cities of the first grade of the first class, also abolished

the Board of Public Improvements in such cities, and further provided that all the powers theretofore conferred upon the Board of Public Improvements should be conferred upon the Board of City Affairs. The act creating the Board of Administration conferred upon that Board with certain exceptions not necessary to be referred to, all powers "heretofore conferred upon the Board of Public Improvements," and declared that the Board of Administration should be the successor of the Board of Public Improvements. And it is contended by plaintiff that inasmuch as the Board of Administration was declared to be the successor of the Board of Public Improvements and not of the Board of City Affairs, and inasmuch as the power to issue these bonds, was only conferred upon the Board of Affairs, and not upon the Board of Public Improvements, that there is now no power in the Board of Administration to issue them.

In *Kirker v. Cincinnati*, 48 Ohio St., 507, the acts of the Board of City Affairs were held to be valid, upon the ground that "members of the Board of City Affairs before the law was declared unconstitutional were *de facto* members of the Administrative Board of Cincinnati, and their acts are valid." In the course of its decision, the court announced the principle which we regard as decisive of this case. Referring to the act creating the Board of City Affairs it said: "The act did not in a legal sense create a new office. The Board of City Affairs was clothed with the same functions as the Board of Public Improvements. If then, as can hardly be questioned, the identity of an office is to be determined by the functions that belong to it, the Board of City Affairs is in law the same as the Board of Public Improvements. For there is nothing in a name by which the essence of things can be changed. The designation, Board of City Affairs, is only another appellation for the administrative functions with which it was clothed, as is also the designation Board of Public Improvements. So that the act of October 24, 1890, held unconstitutional, simply provided a mode of removal of the then members of this administrative board and the appointment of new ones. The persons appointed in pursuance of the provisions of the act were for the time being members *de facto* of this Board; and the acts performed by them as such members before they were ousted by the proceeding in *quo warranto*, are on principles of public policy as valid, as if they had been performed by the *de jure* members of the board."

And again, in the same case, referring to the contention that the Board of City Affairs and the Board of Public Improvements were separate boards, the court said:

"It is argued that the separate character of the two boards is recognized in *Reemelin et al. v. Mosby*, 37 Ohio St., 570. This may seem so from the second clause of the syllabus. But no such question was involved nor considered or necessary to be considered in that case. It is true that the members of the new board are there referred to as members of another board. In one sense this is true, in another it is not; with regard to the personnel a change in the membership makes another board; but with regard to its functions the board remains the same so long as its functions remain the same."

In view of the principle thus announced by the Supreme Court, and the language of the act which authorizes the issue of the bonds, we are of the opinion that the contention of the plaintiffs that the Board of Administration has no power to issue these bonds cannot be successfully maintained.

The functions of the Board of Public Improvements, the Board of City Affairs, and the Board of Administration have always been substantially the same. It has been the administrative board in cities of the first grade of the first class. Each board has been the legal successor of its predecessor, and there has passed to each board the powers and duties of its predecessor.

And whatever doubt there may be as to the one board succeeding to the powers of its predecessor, there can be no such doubt in this case, because the act conferring the power to issue such bonds on the Board of City Affairs distinctly declared that such power was given to the Board of City Affairs and "their successors in office;" and when we have determined that the Board of Administration is the successor in office of the Board of City Affairs, we have necessarily determined that it has power to issue these bonds.

Nor does the circumstance that the act creating the Board of Administration provided that the board should have all the powers conferred upon the Board of Public Improvements, but failed to provide that it should have all the powers conferred upon the Board of City Affairs, affect the conclusions we have reached. Because inasmuch as the functions of the Board of Administration are the same as the Board of City Affairs, first, it necessarily had all the powers conferred on the latter board, unless some exception was made therefrom, and second, the law authorizing the issue "of bonds by the Board of City Affairs declared that its successors in office should have the same powers.

We are of the opinion, therefore, that the Board of Administration has power to issue these bonds, and that the demurrer to the petition should be sustained.

MOORE, J. and HUNT, J., concur.

Ramsey Maxwell & Ramsey, for plaintiff.

Theodore Horstman, Corporation Counsel, for defendant.

[Superior Court of Cincinnati, Special Term, 1892.]

MICHAEL COURTAT V. FREDERICK EHRHARDT.

A sub-contractor or material man loses his right to acquire a mechanic's lien against the property upon which a building is constructed by his head contractor when he omits to take any steps to take out a lien, or to notify the owner of the property that there is money due him until the owner has paid over to such head contractor all that is due from the owner to the head contractor. And this is true, even though such head contractor or material man takes such steps and gives such notice within four months from the time of performing his labor or furnishing his material.

SMITH, J.

The disputed questions in this case are presented upon a motion to distribute the proceeds of the sale of real estate which has been sold under the order of this court, Frederick Ehrhardt, who was the owner of the real estate herein, contracted with J. W. Thornley to build him a house.

Thornley proceeded to construct the house, and while it was under way Ehrhardt mortgaged the property to the Active Building & Loan Co. in



order to raise money to pay for the same. He secured from the Building Association \$1,500, and turned it over to Thornley in four different payments, the first being made on December 9, 1890, and the last February 3, 1891.

Thornley was engaged in the business of a general contractor, and instead of paying the sub-contractors and material men on this particular work with the money he had received from Ehrhardt he used it generally in his business. The result was that when the house of Ehrhardt was completed the sub-contractors and material men were to a large extent unpaid, and they proceeded under the statute to protect themselves by taking out mechanic's liens against the real estate.

The question here is whether such efforts upon their part were successful.

They insist that under secs. 3193, 3195, 3196 and sec. 3202, the right is given to sub-contractors and material men the same as to head contractors to secure mechanic's liens against the real estate of the owner; that such right extends to a period of time four months subsequent to the completion of the work, and that the lien dates back to the time of the first item furnished or the first work done as the case may be; and that as they completed all steps in the way of perfecting their liens before the expiration of the four months subsequent to the completion of the work, and as in each case their work was begun, and the first item of material furnished prior to the making of the mortgage, they are entitled to a priority over the mortgage.

The contention as above stated may be conceded, and yet there is a fact present in this case which is not taken into consideration by the above statement of the law, and which makes it inapplicable to the present case.

By the undisputed testimony in the case that fact is that the owner had paid over to the head contractor all that he owed him before the sub-contractors or material men began to take steps to take out a lien, and before they gave the owner any notice of their claim.

Now, without referring to the specific language of the statutes, it is beyond dispute, I think, that the notice by the sub-contractor or material man to the owner has the effect merely to prevent the owner from making a subsequent payment to the head contractor and requires the owner to make such subsequent payment (which he would, in the absence of such notice, make to the head contractor) to the sub-contractors or material men.

But, if after such notice the owner neglect or refuse to pay the subsequent payments to such sub-contractor or material men, then the latter may file their liens against the property the same as one contracting with the owner may file a lien against the property. Sec. 3202 Rev. Stat.

But if, as in this case, there is no money due from the owner to the head contractor at the time the owner receives notice from the sub-contractor or material man, it necessarily follows that the latter cannot recover anything from the owner or secure a lien upon his property for work and labor for which he has once made payment.

Any other rule would work great hardship to owners of real estate; and would require either that they should wait four months after the house built upon their property is completed, or that they should undertake to find out the names and addresses of all sub-contractors and material men, and to see that they are paid, before they could safely pay to the head

contractor at the time it is due him that which under his contract he is clearly entitled to demand.

The contention of the sub-contractors and material men therefore would place the owner of property in the following dilemma; he must either violate his contract and render himself liable in damages by waiting four months after he was obliged to make payment under the contract; or he must undertake the impracticable and burdensome task of seeing all the sub-contractors and material men, and of knowing that they were paid before he could safely pay the head contractor.

The sympathy of the law as of a court is naturally to extend to workmen every possible means to secure the rewards of their labor; but there are limits beyond which the courts cannot allow themselves to be carried. Those limits are certainly reached when the effort to assist the workmen is found to intrench upon those rights of others which they have acquired in good faith and for valuable consideration. The decree will be in favor of the Building Association.

Geo. A. Turrill, for Caleb, Lingo & Co.

Louis A. Luebbert, for Michael Courtat.

John E. Bruce, for J. L. and N. L. Pierson.

Gustav R. Werner, for the Active Building Association.

Herron, Gatch & Herron, for J. W. Herron and W. H. Fisher, executors of Margaret R. Poor.

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### STREET ASSESSMENTS.

[Hamilton Common Pleas, April Term, 1892.

\*JOSEPH KLINE v. CINCINNATI (CITY).

An assessment by the front foot, at an equal rate, can only be made on the property abutting on the part of the street improved; as to other lands which may be assessed under sec. 2264, it must appear that such steps were taken under sec. 2277 as are necessary to equalize the burden on each lot in proportion to the benefit to that lot.

SAYLER, J.

On January 6, 1888, an ordinance was passed by the common council of Cincinnati, declaring its intention to condemn and appropriate to the public use for street purposes, for the purpose of opening and extending Forest avenue westwardly from Moorman avenue to east line of Madison Pike, and for the purpose of widening Forest avenue from Moorman avenue to Church street, and it thereby condemned and appropriated to such public use for street purposes, for the purpose of opening and extending, and for the purpose of widening Forest avenue, as aforesaid, certain real estate lying west of Church street, and between Church street and Madison Pike; and whereby the solicitor was authorized and instructed to institute the necessary proceedings, and to apply to the court for an inquiry and assessment of the compensation to be paid for such property; and whereby it was ordained that "the amount so found, together with the costs and expenses of said appropriation, and the interest on bonds issued shall be assessed per front foot upon the lots and lands abounding and abutting upon said Forest avenue, opened and extended as aforesaid, between Madison Pike and the intersection of Forest avenue and Woodburn street, the said lots and lands being hereby declared to be the lots and lands which will be specially benefited by such appropriation, according to the laws and ordinances on the subject of assessments."

\* This judgment was affirmed by the circuit court; opinion 4 Circ. Dec., 589. The circuit court was affirmed by the Supreme Court; unreported, 52 O. S., 650.

Woodburn avenue intersects Forest avenue east of Church street, and it will therefore be noticed that the assessment is placed on property abutting on Forest avenue lying east of Church street, as well as on property abutting on Forest avenue between Church street and Madison Pike.

The plaintiff is the owner of three lots of land abutting on Forest avenue east of Church street, but between Woodburn avenue and Madison Pike, and claims that the assessment on these lots is invalid, because the lots do not abut on that part of the street which was widened or opened.

In the case of *Chamberlain v. Cleveland*, 34 Ohio St., 551, the court say on page 561: "The right that gives to municipal corporations the privilege of resorting to this mode of taxation, is not, like the right of general taxation in the state, founded on necessity; on the contrary, the right of a municipal corporation to assess private property to pay for a local public improvement is not founded on necessity, but on a principal of justice, by which the public may take from an individual whose lands, owing to their proximity to it, are specially benefited by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess of the special benefits conferred by the improvement; and this principal of justice, in itself, impliedly furnishes the measure of and limits the extent of the right."

In this case the court construing sec. 539 of the municipal code as amended in 1873, 70 O. L., 26, which provides that the council "shall have power to assess the cost and expense of such improvement upon the property benefited thereby, including lots and lands that are contiguous and adjacent, as well as those that abut on said street," say on page 564, "When construed with reference to the subject, the implication from this language is irresistible, that there can be no assessment where there has been no special benefit conferred, and it is to be implied with equal force, that as such benefits are made the basis of the assessment, it must be limited to the value of the special benefits conferred, and cannot exceed them. That the benefits named must be special benefits is implied from the fact that the assessment must be confined to property that is contiguous and adjacent to, or abutting on the improvement; it is such property only that can be specially benefited, according to all the authorities."

The court proceeding say: "By sec. 584, the assessing board is 'to report to council an estimated assessment of such cost on the lots or lands to be charged therewith, in proportion, as nearly as may be, to the benefits which may result from the improvement to the several lots and parcels of land so assessed.' When this is read in connection with sec. 539, we have the basis of the assessment, which is the value of the special benefits conferred, and in this sec. (584) the rule of apportionment by which the burden is to be equalized among those who have to bear it. The whole amount of the assessment is to be apportioned amongst the several lots specially benefited, in proportion that the special benefits to each lot bears to the whole special benefits conferred by the improvement."

I think it is clear that when sec. 2277, Rev. Stat., is read in connection with sec. 2264, we have the same conclusion.

If, therefore, it appears that this rule of apportionment of the burden is not followed in an assessment, the assessment clearly cannot be enforced as to the lot on which a disproportionate share of the burden is placed; and it is essential to the validity of the assessment that the proceedings by which it is made must show upon their face that the requirements of the law have been substantially complied with. *Ib.* 566.

In the case at bar it does not appear that any proceedings were taken to equalize the burden according to this rule, but the assessment is made at an equal rate by the front foot on all the property abutting on the street, including that lying east of the part improved. It cannot be assumed that each lot so assessed and lying east of the improved part, is equally benefited; as the court say in 1 Ohio St., 132: "Now this street may be a mile or more in length, and the lands upon it at the upper end, instead of being enhanced in value, may be actually depreciated by the increased facilities for business on the part improved."

It seems to me to be a necessary conclusion that an assessment by the front foot at an equal rate, can only be made on the property abutting on the part of the street improved, as the benefit is equal on all such property; and that as to other lands which may be assessed under sec. 2264, it must appear that such steps were taken under sec. 2277 as are necessary to equalize the burden on each lot in proportion to the benefit to that lot.

I am of the opinion, therefore, that the assessments in the case at bar, on the lots set out in the petition as abutting on Forest avenue and lying east of Church street, are invalid, and as to such assessments the injunction will be made perpetual.

F. M. Coppock, attorney for plaintiff; John Galvin, attorney for defendant

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## LIABILITY OF BANK DIRECTORS.

[Superior Court of Cincinnati, Special Term, June, 1892.]

## \*MERCHANTS' NATIONAL BANK V. J. C. THOMS ET AL.

By sec. 5211 U. S. Rev. Stat. it is provided with reference to National Banks that every association shall make not less than five reports during each year according to the form prescribed. In obedience to these requirements the directors of a national bank made reports by which it appeared that the bank was solvent, and in a highly prosperous financial condition, whereas in fact said reports were fraudulently made, said statements were almost entirely false, and the bank was almost totally insolvent. Relying upon the truth of said reports, the plaintiff loaned to a stockholder of the bank, a large amount of money, and received therefor his promissory note with a large number of shares in said bank as collateral security; relying upon the value thereof as the same appeared from the said reports. *Held,*

That the plaintiff is entitled to recover in an action for deceit the amount of his damage from those officers who fraudulently signed said reports.

Whether he has a right of action against the other directors, *quære.*

SMITH, J.

The questions argued in this case arise upon demurrers to the petition by the defendants, Thoms and Breneman, executors of the last will and testament of Briggs Swift, deceased, Edward L. Harper, Albert H. Chatfield and Frederick Gilbert, executors of the last will and testament of William H. Chatfield, deceased; Henry Pogue and Eugene Zimmerman.

The petition is so elaborate and extended in its statement of facts, that it is impossible for me to set out a copy of it in this opinion. Its substantial averments however, are as follows:

That plaintiff is a national bank doing business at Hillsboro, in the county of Highland and state of Ohio.

That all of the defendants, except the executors made defendants, were the directors of the Fidelity National Bank of Cincinnati, and that such executors represent the estate of three directors who have died since the happening of the grievances complained of in the petition.

That on the twenty-third of December, 1886, J. H. Matthews borrowed from plaintiff the sum of ten thousand dollars, giving therefor his promissory note, payable on demand, and one hundred shares of stock of the Fidelity National Bank, pledge as collateral security.

That the interest on said note was duly paid to the fifth day of April, 1887, but that no other sum has been paid thereon, although demand has been made of said J. H. Matthews.

That Matthews is insolvent, and that the stock of the bank is worthless.

That the Fidelity National Bank of Cincinnati, Ohio, became and was incorporated on or about the first day of March, 1886, and the defendants above named were duly elected and qualified as directors of said corporation; the said Briggs Swift as president, the said E. L. Harper as vice-president, the said Ammi Baldwin as cashier, and the said Benjamin Hopkins as assistant cashier of said corporation; and that the said board of directors of said corporation and its officers as aforesaid, had the charge and management of all the property and affairs and business of said cor-

\* For opinion on motion to separately state and number causes of action, and to strike out from petition the circular letter, see 1 Ohio S. & C. P. Dec., 226.

poration at the times hereinafter mentioned, and until possession thereof was taken by the comptroller of the currency of the United States on the twentieth day of June, 1887, and until one David Armstrong was appointed the receiver of said corporation on the twenty-seventh day of June, 1887.

That on the eleventh day of October, 1886, the said corporation professing to comply with the acts of congress requiring reports exhibiting the resources and liabilities of national banking corporations to be made to the comptroller of the currency, did make a report to said comptroller of the resources and liabilities of said corporation, as they existed on the seventh of October, 1886; and that said statement was sworn to by the said Ammi Baldwin as cashier, and was attested as correct by the said E. L. Harper, William H. Chatfield and Henry Pogue.

That on the sixth day of January, 1887, the said corporation made a report of a similar character to the comptroller of the currency of the resources and liabilities of said corporation as they existed on the twenty-eighth day of December, 1886, and that said statement was sworn to and attested as the previous statement, on the eleventh of October, 1886.

That on the seventh day of March, 1887, the said corporation made a report of a similar character to the comptroller of the currency of the resources and liabilities of said corporation as they existed on the fourth day of March, 1887, and the said statement was sworn to and attested as the other preceding statements.

That on the sixth day of May, 1887, the said corporation made a report of a similar character to the comptroller of the currency of the resources and liabilities of said corporation as they existed on the thirteenth day of May, 1887, and the said statement was sworn to and attested as the other preceding statement.

"That said reports were almost totally false."

"That the said false reports, after their return to the comptroller of the currency as aforesaid, were caused by said president and board of directors of said corporation to be published in the daily newspapers in the city of Cincinnati, and plaintiff further avers that said reports were made by said corporation with the knowledge and assent of its said officers and directors, and that said officers had actual knowledge of the falsity thereof, and if such officers and directors did not have actual knowledge of the falsity of said reports, they and each of them were grossly negligent of their duty in the management of the affairs of said corporation."

"That any examination of said reports and the books and accounts of said corporation would have disclosed to said officers and board of directors, that said reports were wholly false, and that its resources at the time therein named, were not such as were stated in said reports, and would have disclosed to said officers and board of directors that the affairs of said bank were being mismanaged, and its moneys and assets misappropriated and squandered, and that said officers and board of directors, in failing to exercise the slightest diligence or make the slightest investigation of the business of said corporation, were grossly negligent of their duties as such officers and directors."

"That on the thirteenth day of June, A. D. 1887, the said corporation caused to be issued and published a certain statement in writing, or circular, and mailed to this plaintiff, among others, a copy thereof, which statement in writing or circular, is as follows:

Briggs Swift,  
President.

F. L. Harper,  
Vice President.

U. S. DEPOSITORY.

THE FIDELITY NATIONAL BANK.

Capital, \$2,000,000.

Surplus, \$400,000.

Cincinnati, June 13, 1887.

Gentlemen:

"Notwithstanding that false anonymous circulars are being sent to our customers, which we believe to emanate from some of our banking competitors, we are doing a larger business than ever, and our deposits have reached this day the highest point in our history.

"We invite reciprocal accounts in all cities. We allow two and a half per cent. on daily balances, calculated monthly, and credit all cash items in surrounding states at par.

"We remit New York or other principal cities from balances as you desire, without charge for exchange. We collect all points and remit every ten days. We collect Ohio, Indiana and Kentucky, and remit weekly. We collect Cincinnati items and remit on day of receipt, less forty cents per thousand for exchange, or twenty cents for 800 or lesser amounts; but you are only allowed to accept one of the above propositions. We re-discount when balances warrant.

"We have the largest capital, the largest surplus and the largest deposit of any national bank in Ohio, and parties doing business with us, will find us most liberal in all transactions.

Respectfully yours,

BRIGGS SWIFT, President.

F. L. HARPER, Vice President.

AMMI BALDWIN, Cashier.

BENJ. E. HOPKINS, Assistant Cashier."

The petition then alleges that the statements contained in the circular were false; that said bank was wholly insolvent, and that the directors either had actual knowledge of the true condition of the bank and the falsity of the statements, or that if they did not have such actual knowledge, it was due entirely to their gross negligence.

The petition then alleges more specifically in what manner the statements contained in the reports and circulars were false. It then alleges:

"That relying upon said reports and statements therein contained, as made and published on said eleventh day of October, A. D. 1886, by the officers and directors of the said Fidelity National Bank of Cincinnati, and believing the statements therein contained to be true, and that the statement of the resources and liabilities as therein set forth, was a true and correct statement of the resources and liabilities of said corporation, the plaintiff accepted the one hundred shares, hereinbefore mentioned, of the capital stock of said corporation, as security for said loan to said J. H. Matthews, and that said loan was made on the credit of said stock, so pledged as security therefor, and upon the value thereof as the same appeared from the said reports of said corporation as made by its officers, and because of no other credit or security.

"That if the said reports had contained a true and correct statement of the resources and liabilities of said corporation at the close of business on the seventh day of October, A. D. 1886, and had not been false, in fact, as hereinbefore set forth, and this plaintiff had not relied upon and been

misled and deceived by the said false and untrue statements therein as hereinbefore alleged, but on the contrary, if this plaintiff had been able from said reports, to learn the true condition of the affairs and business of said corporation, and its resources and liabilities, it would not have made the said loan to the said J. H. Matthews as hereintofore set forth.

"That relying upon the said report and statement therein contained, made on the eleventh day of October, A. D. 1886, and the subsequent reports made on the sixth day of January, A. D. 1887, and the seventh day of March, A. D. 1887, and the fifteenth day of May, A. D. 1887, and the said circular of June 13, 1887, and believing the statements contained in each of said reports and in said circular contained to be true, and that the resources and liabilities therein set forth were true and correct statements of the resources and liabilities of said corporation, it did not make demand of the said J. H. Matthews for the payment of said note until the seventeenth of June, 1887, nor attempt to convert the said one hundred shares of the capital stock of said corporation so held by it as security for said loan into money, as it might have done, but on the contrary relying upon said reports and believing the same to be true, the plaintiff permitted said loan to continue until the said seventeenth day of June, 1887, when by reason of said mismanagement of the affairs of the said corporation, the misappropriation of its means, the unlawful loaning of its moneys as hereinbefore set forth, and the misconduct of its officers and board of directors, the said corporation became insolvent and said stock worthless.

"That by reason of the acts of the defendants herein as such officers and directors of said, The Fidelity National Bank of Cincinnati, Ohio, hereinbefore complained of, the plaintiff has suffered loss and damage in the sum of ten thousand dollars, with interest at five per cent. per annum from April 5, 1887. That it has presented its account for such loss and damage to the executors of the last will and testament of Briggs Swift, deceased; defendants herein, as a valid claim against said estate, and made demand of said defendants, J. C. Thoms and H. L. Breneman, as such executors, that they allow the same as such, and that said defendants have refused to allow said claim against said estate, and have rejected the same; and that it has presented its accounts for such loss and damage to the executors of the last will and testament of W. H. Chatfield, deceased, as a valid claim against said estate, and made demands of said defendants, Albert H. Chatfield and Frederick Gilbert, as such executors, that they allow the same as such, and that said defendants have refused to allow said claim against said estate, and have rejected the same.

"Wherefore plaintiff prays that it may have judgment against said defendants, J. C. Thoms and H. L. Breneman, executors of the last will and testament of Briggs Swift, deceased, Edward L. Harper, Albert H. Chatfield and Frederick Gilbert, executors of the last will and testament of William H. Chatfield, deceased, Henry Pogue, Albert P. Gahr, James R. Matthews and Eugene Zimmerman, for the said sum of ten thousand dollars, with interest at five per cent. per annum from April 5, 1887, and for such other and further relief as may be just and proper.

The executors of Briggs and William H. Chatfield, E. L. Harper and Henry Pogue have filed demurrers to the petition on three grounds:

First—That the plaintiff has no right to maintain an action of this character against the defendants.

Second—That there is a defect of parties defendant, in that the receiver of the Fidelity Bank is not a party.

Third—That the petition does not state facts sufficient to constitute a cause of action.

The first two grounds are based upon the theory that this action is similar in character to actions brought by a creditor or stockholder of a corporation against its directors for negligence or mismanagement by which the assets of the corporation are impaired or wasted. In such cases the courts have uniformly held that the directors hold as trustees the property of the corporation, and that for any wrongful act by which such trust property is injured or destroyed, the right of action is not in the first instance in any one stockholder or creditor, but must be instituted by the corporation itself, or, if in the hands of a receiver, then by the receiver; because any other rule would produce a multiplicity of suits, and would work injustice to other creditors and stockholders by giving a preference in the trust estate to those creditors and stockholders who might first maintain such an action and securing judgment therein, apply part of the property to its payment. In the case of a stockholder it is also held that there is no legal privity between him in his individual capacity and the directors. *Smith v. Hurd*, 3 Metcalf, 371; *Barney v. Howe*, 45 Federal Reporter, 668; *Barnes v. Swift*, ante 321; *Chester v. Halliard*, 34 N. J. Eq., 342.

In such cases, while the creditor and stockholders are interested in a recovery, "they are interested through the corporation which is the entity which represents the interest of all the creditors and stockholders." *Chester v. Halliard*, *supra*; and in such cases it is only when the corporation, or the receiver upon application, has refused to bring the action that the creditor or stockholder may do so.

But the case at bar is not an action against the directors of the bank for negligence or wrongful acts of the directors by which the corporate property has been impaired or wasted. The right to a recovery is not through the corporation as an entity which represents the interest of plaintiff. It is an action of deceit against the directors individually for fraudulent misrepresentations made to plaintiff with intent that plaintiff should rely thereon, and upon which representations plaintiff did rely, and by reason of which reliance he has been damaged. It is an action against the directors for inducing the plaintiff to part with his money by purchasing stock of the bank which was worthless. It is an action for damages for fraudulently inducing plaintiff to become a stockholder, not for damages suffered while a stockholder.

It is not necessary to determine here whether an action would lie against the corporation for such fraudulent misrepresentations by its agents; because, whether it would or not, the agent is personally liable. This principle is declared by our Supreme Court in *Henshaw v. Noble, et al.* 7 Ohio St. 231, where it is said, "We understand the law in regard to the liability of the principal and the agent to the third persons for torts occurring in the course of the agency to be this: The principal is always liable to the third persons for the misfeasance, negligences and omissions of duty of his agent in all cases within the scope of his agency. The agent is also presumably liable to third persons for his own misfeasances and positive wrong. But he is not in general liable to third persons for his own misfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third person. This privity exists only between him and his principal. And hence the general maxim as to



all such negligences and omissions of duty is in cases of private agency, "respondeat superior."

As the fraudulent representations complained of in this case were positive acts of misfeasance, it is clear that the plaintiff who claims to have been misled by such representations, is not compelled to sue the corporation, even if the corporation were liable for such wrongful acts, but may proceed against the directors individually.

The conclusion, therefore, which necessarily follows from the principles referred to, is: That as the plaintiff may maintain an action for deceit against the directors individually, and as it is not necessary in such an action that the corporation or the receiver should be made parties defendant, the demurrer, so far as it rests on the first two grounds, must be overruled.

I come now to consider the third ground, viz.: That the petition does not state facts sufficient to constitute a cause of action.

It has been assumed in argument by both sides that the allegations in the petition that the statements in the published reports and the circular letter were either known by the defendants to be false, or that they were made in ignorance of their falsity by reason of their gross negligence in not informing themselves, are sufficient to constitute them fraudulent representations, and I therefore am not called on to express an opinion upon that question.

Bigelow on Torts, 34; Bigelow on Fraud, 509; Cooley on Torts, 501; Pamille v. Adolph, 28 Ohio St., 10; Derry v. Peck, 14 Appeal Cases, 337.

The sole question argued before me has been as to whether such public reports could be regarded as addressed to the plaintiff, so that if he relied upon them in the manner in which he did, he would be entitled to recover his damages in an action of deceit. And I have, therefore, considered only this question.

The reports containing the statement complained of were made and published in accordance with the provisions of sec. 5211, U. S. Revised Statutes, which reads as follows:

"Sec. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the (associations) (association) at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the same place where such association is established, or, if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition."

The contention of the defendants is that the statements in the reports are addressed only to those doing business with the bank strictly in the line of the banking business; that no others have a right to rely upon the statements as addressed to them; and that if they do so rely, and are misled, they cannot be heard to complain.

It is of course a fundamental rule of the law of deceit that in order to entitle one to a right of action for false representations, such representations must have been made to the person injured, with the intent to induce him to act upon them, and that one who merely stands by and hears these representations to another, is not justified in acting upon them, and if he does so act, and is thereby damaged, he cannot recover therefor. This rule is well illustrated in *Wells v. Cook*, 16 Ohio St., 66, where B made representations to A, as agent for C, for the purpose of inducing C to act. A afterwards acts upon such representations individually, and not as the agent of C. It was held that the representations, not having been made to A, to induce him to act upon them in any matter affecting his own interests, he cannot maintain an action against B for the deceit."

The question in this case then is: Are the statements contained in the reports, in contemplation of law, made to one who loans money on shares of stock in the bank whose resources and liabilities the reports purport to state.

This question can only be answered by determining the purpose which is within the contemplation of the statute in requiring the making and publishing of the reports.

It is evident, upon slight reflection, that the purpose of making the reports is not alone to inform the Comptroller of the Currency of the condition of the bank; because if it were, the requirement that the report shall be published in a newspaper would be entirely unnecessary. Nor do I think the publication is intended merely for those who are stockholders and depositors at the time the report is made; because notice of such condition could be brought home to them if required in a less public manner than by public advertisement. Doubtless the reports are made for the information of the Comptroller and those who are stockholders and depositors at the time of the reports; but it must be evident that they are made for the further purpose of informing those who may contemplate dealings with the bank, or who may be brought into connection with it in any way, in which dealings and connection the financial condition of the bank is a vital consideration.

That the owner of shares of stock in a banking corporation has a connection with the bank of such a nature that the financial condition of the bank is a vital consideration to him, is a proposition that is self-evident; and that one who is about to purchase such shares of stock would wish to be informed of such condition before investing in such stock is also a proposition beyond dispute; because the value of the connection in the former case, and the purchase in the latter, would be entirely dependent upon such financial condition.

Since, then, not only the present owners, but also the future purchasers of stock are so vitally interested in the financial condition of the bank, it is fair to presume that their interests were also in the contemplation of the statute when it required published statements to be periodically made by the bank as to such condition.

But it is argued by defendants that the dealing in the stock of the bank is a transaction between third persons entirely outside of the business of the bank, and one in which the bank has no concern, and from which it derives no profit, and that its published statements ought not to be considered as addressed to transactions that do not concern or benefit it.

There are two vices in this argument:

1st. It is not necessary, to maintain an action of deceit, that the false representations should have been made with the intention or expectation that the person making them should profit thereby. It is sufficient if they are made to mislead, and the party to whom they are addressed acts upon them, and is misled to his damage. 5 Am. & Eng. Ency. Law, 300.

2nd. It is not true that the transfer of the shares of a corporation is a matter of no concern or benefit to it. On the contrary, it is a matter of the greatest interest to the corporation.

In *R. R. Co. v Schuyler, et al.* 34 N. Y., 52, the judge delivering the opinion said:

"I can not subscribe to the idea that the duties of the plaintiff, in respect to their stock, were limited to themselves and existing shareholders. They extend, also, to the commercial community, whose confidence and trade the plaintiff invited, and who, in turn, were entitled, to good faith and fair dealing at the hands of the company; and they sprang into full vigor in behalf of every party who entered upon such dealing."

And in *Bank v. Lanier*, 11 Wall., 377, the Supreme Court of the United States say:

"The power to transfer their stock is one of the most valuable franchises conferred by congress on banking associations. Without this power it can readily be seen the value of the stock would be greatly lessened; and obviously whatever contributes to make the shares of the stock a safe mode of investment and easily convertible, tends to enhance their value. It is no less the interest of the shareholder than the public that the certificate representing his stock should be in form to secure public confidence; for without this he could not negotiate it to any advantage. It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate it as nearly as practicable."

And *In re Bahia and San Francisco Railway Co.*, L. R., 32 B., 594-5.

COCKBURN, C. J., said:

"This power of granting certificates is to give the shareholders the opportunity of more easily dealing with the shares in the market, and to afford facilities to them of selling their shares by at once showing marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is therefore for the benefit of the company in general, and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given and acted upon in the sale and transfer of shares."

It thus appears from undisputed authority that the transferability of shares of stock increases the value of the shares of each stockholder and is for the benefit of the corporation; and that it has been decided by the U. S. Supreme Court, with reference to shares of stock in banking corporations, that "the power to transfer their stock is one of the most valuable franchises conferred by congress on banking associations;" and that certificates are in such form as to invite dealings in them.

Can it be said then that a published statement made by the bank of its resources and liabilities is not addressed to one who purchases the stock

which the corporation in the exercise of one of its franchises, invites him to deal in, and which invitation, when accepted, becomes a valuable or worthless investment, according to the financial condition of the bank, of which, by virtue of the purchase of its stock, he becomes a part owner. Why should the financial condition of a bank be of more importance to one who deals with the bank over the counter in the course of its business, than it is to one who purchasing its stock becomes a very owner of the bank itself?

A case directly in point is that of *Morse v. Swift*, 19 Howards Practice Reports, 275, decided by the Supreme Court of New York. The questions were presented by a demurrer to the petition which "alleged that the defendants, the president and cashier of the bank, in making and publishing the quarterly report of the resources and liabilities of the bank required by statute, made a statement of the condition of the bank on a given day, which statement (under oath) was to their knowledge grossly false—giving the particular items which were untrue; and the plaintiff, upon the faith and relying upon the truth of such statement and report, purchased thirty-six shares of the capital stock of the said bank at the par value thereof, when in truth and in fact the capital of said bank was impaired, and on the day mentioned in said report its stock was worth only about thirty cents on the dollar."

It was held that the defendant president and cashier were liable.

The criticism of this decision made by counsel for the defendants is that it is based solely on the case of *Bedford v. Bagshaw*, 4 H. & N., 538, and that inasmuch as that case has been overruled in *Peek v. Gurney*, 6 Law Reports, 6 Eng. & Irish Appeal Cases, 377, the decision in *Morse v. Swift*, is no longer authority.

It is true that in *Morse v. Swift*, the case of *Bedford v. Bagshaw* is referred to; and that the latter case has since been overruled in *Peek v. Gurney*; but I do not think that the decision in *Morse v. Swift* is based solely upon that of *Bedford v. Bagshaw*, and falls with it. And while the overruling of *Bedford v. Bagshaw* weakens somewhat the force of *Morse v. Swift* as an authority, and while the language of the court may perhaps be thought to extend the liability for false statements to a greater limit than can be upheld by authority, yet there can be no doubt that in view of the language of the petition that case was properly decided; and was decided upon the ground that inasmuch as the statement was false and came properly to the plaintiff's knowledge, and he relying upon it, sustained damage thereby "that he had a right of action against the defendants." This case is cited with approval in *Naugatuck Cutlery Company v. Babcock*, 22 How., 481.

It should also be borne in mind when it is contended that the overruling of *Bedford v. Bagshaw* has weakened the force of *Morse v. Swift* as an authority, that the principle of law laid down in *Bedford v. Bagshaw* is not discarded; but that the reversal is based upon the sole ground that "no representation at all was made which reached either the eyes or the ears of plaintiff. But that from "his knowing the rules of the stock exchange, he assumed that a certain representation had been made, and acted upon it."

The principle which governs the case at bar is well expressed in *Cooley on Torts*, page 493, where it is said: "No one has a right to accept and rely upon the representations of others, but those to influence whose action they were made. \* \* \* But some representations are made for the express purpose of inducing individuals of the public to act

upon them; and whoever in fact does receive, rely and act upon these in the manner intended, has a right to regard them as made to him, and to treat them as frauds upon him, if, in fact, he was deceived to his damage."

This principle was applied by the Court of Appeals of Kentucky, in *Greaves v. The Lebanon National Bank* 10 Bush., 34, to the publication by the bank of a false statement of its resources and liabilities under the following circumstances:

The action was by the bank against sureties on the bond of its cashier for acts of embezzlement occurring subsequent to the execution of the bond. It appeared however that before the bond was executed there had been a false statement published by the bank from which it appeared that the bank was prudently managed; whereas in fact the cashier had been guilty of repeated frauds and embezzlements. The court released the sureties upon the ground that the fraudulent published statement was addressed "to the public," and that those about to go upon the bond of the cashier had a right to rely upon it. The court said:

"It seems therefore that before the delivery and acceptance of the cashier's bond, and before appellants had become guarantors for his diligence, honesty and fidelity, the banking association, pursuant to the provisions of the law to which it owed its existence, published to them and to the world a statement of its condition from which it appeared that its affairs were being prudently and honestly administered, and from which they and the public had the right to believe that the cashier to whom had been entrusted the moneys, notes, and valuables of the bank, had up to that time acted as a trustworthy person."

This case illustrates very clearly the tendency of the courts to hold that the published statement made by the bank is addressed to any one of the public who may be brought into relation or connection with the bank. And if, as held in *Graves v. The Bank*, *supra*, it embraces the past conduct of a cashier, and is addressed to those who may become his bondsmen for future conduct, a *fortiori* does it embrace the actual condition of the bank at the time it is made, and is it addressed to those whose purchase of stock in the bank is valuable or worthless according to the truth of such statement.

The defendants rely very largely, in the way of authority, upon the case of *Peek v. Gurney*, *supra*, and *First National Bank of Plattsburgh v. Sowles et al.*, 46 Fed. Rep., 731.

The first case was one in which the projectors of a corporate undertaking published a prospectus containing misrepresentations calculated to influence others to invest money in their projects. The court held, that, "The proper purpose of a prospectus of an intended company is to invite persons to become allottees of the shares or original share-holders in the company. When it has performed its office it is exhausted;" "and that a person who had not become an allottee, but was only a subsequent purchaser of shares in the market, was not so connected with the prospectus as to render those who had issued it liable to indemnify him against the losses which he had suffered in consequence of his purchase."

In *Peek v. Gurney*, as in many other cases which might be cited of the issue of a false prospectus, it is evident that the sole purpose of the projectors was to secure money from those who subscribed to the stock in the first instance, in which case the money went into the treasury of the company or the hands of the projectors. The subsequent disposition of the stock was of no concern or benefit to them, and was not within the

contemplated purpose of the prospectus. The false statements therefore contained in it were held not to be addressed to such subsequent purchasers. But even in the case of the issue of a prospectus, if those issuing it are shown to have been brought into any communication with subsequent purchasers, the statements of the prospectus are held to apply to such subsequent purchasers; *Scott v. Dickson*, 29 L. T., *Gerhard v. Bates*, 2 El. & Bl., 476, 489.

But the periodical publication of the financial condition of a bank which is required by the statute, is certainly intended to serve a purpose different from that of a prospectus inviting subscriptions to the original shares in a corporation. The prospectus has exhausted its purpose when the original shares are subscribed for; but a national bank can have no resources or liabilities until the original shares are subscribed for and it has entered upon the business of banking; and its published statement of resources and liabilities must therefore necessarily be addressed to those who after the organization of the bank are brought into such a connection with it as a stockholder sustains, in which connection its financial condition is an all important consideration.

In the case of *First National Bank v. Sowles et al. supra*, the decision turned upon the peculiar facts of the case taken in connection with a statute of Vermont, the court saying: "The statute stands squarely in the way of any recovery by the plaintiff, and precludes all necessity for examining cases where no such statute prevails."

It appears in that case, that "The defendants as directors, during a run on their bank, posted conspicuously in the bank a notice signed by them, and addressed to the public, representing the bank to be solvent. Plaintiff saw the notice, and after a consultation with the directors, loaned the bank money which was lost. *Held*, that this notice was an official statement of the defendants as directors on its face, made to the then creditors to inspire confidence, and not therefore being addressed to plaintiff, could not entitle it to recover from the directors."

The court simply held in that case, as appears from the syllabus just given, that under all the circumstances the notice was only addressed to those who were creditors of the bank, and not to those who, after it was posted, made loans to it; but as the circumstances of that case were entirely different from those in this case, it cannot be of any controlling force here on the question as to whether the published financial statement of a bank is addressed to those who purchase its shares.

But it may be said that the discussion thus far has been with reference to the purchasers of stock, and that in this case the plaintiff was only a pledgee of the stock, and never its purchaser or owner, and that therefore the foregoing discussion is not applicable to the present case.

But, "the power to transfer their stock which is one of the most valuable franchises conferred by congress on banking associations," is not a power alone to transfer by way of purchase, but to transfer in any of the forms recognized in the commercial world, among which forms that of transferring by pledge is one of the most common, and therefore as fully within the contemplation of the statute requiring a statement of the financial condition of the bank as a transfer by way of absolute purchase and change of ownership.

But even if the statement should be confined to those who were purchasers of the stock, a pledgee is fairly entitled to be so classed. Because the loaning of money with a certificate of stock as collateral security, gives the pledgee a qualified ownership in the stock, and is a step in the way of

its absolute ownership, entitling him, so far as a statement of the financial condition of the bank is concerned, to the same protection as an absolute owner.

As to the special property right which is acquired by the pledgee of certificates of stock, the U. S. Supreme Court in *Merchants' Bank v. State Bank*, 10 Wallace 643, said: "If the Merchants' Bank held the certificates as a pledge, it had a special property which might be sold and assigned. The assignee in such cases becomes invested with all the legal rights which belonged to the assignor. Such is the rule of the common law, and it has subsisted from an early period.

And that the pledgee acquires the right to become an owner of the stock, and that this is a valuable property right, has been frequently declared by our Supreme Court. Thus in *Dayton National Bank v. Merchants' National Bank*, 37 O. S., 215, it was held that: "Where, as in this case, the pledgor executes an irrevocable power of attorney authorizing a transfer of such shares on the books of the bank issuing the same, the pledgee has the right to demand that such transfer be made."

And in the case of the Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rawson & Sons, decided by the general term of this court, and reported in 9 Dec. Re., 709, the same doctrine was announced, and the decision in that case was subsequently affirmed by our Supreme Court.

A pledgee of stock therefore is entitled to the same protection from false statements by a national bank of its resources and liabilities as a purchaser of stock, and where he has been misled by such statement, is equally entitled to a right of action.

As to whether the directors who did not sign the published statements required by statute, can be held liable under the allegations of this petition, or, if not, whether Swift would nevertheless be liable by reason of the statements contained in the circular letter which was issued after the loan was made, are questions that have not been argued before me, and upon which I shall express no opinion until they have been so argued. The demurrers therefore of Swift and Zimmerman will be continued for further argument. Those of Harper, and Pogue and the Executors of Chatfield will be overruled.

John Follett and C. H. Collins, (of Hillsboro,) for plaintiff.

Ramsey, Maxwell & Ramsey, for the Executors of Briggs Swift and A. H. Chatfield.

H. P. Lloyd, for E. L. Harper.

Herbert Jenney, for Eugene Zimmerman.

Thomas McDougall, for Henry Pogue.

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## STREET RAILWAYS.

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[Franklin Common Pleas, September 19, 1892.]

### EPHRAIM SELLS V. COLUMBUS STREET RY. CO.

1. A street railway, whether operated by electricity or animal power, if duly authorized by the local authorities, is not *per se* an additional servitude on the soil of a public street; and the proposed erection and use of poles and wires, which are accessories of the trolley system, does not entitle an abutting lot-owner to an injunction.

2. The construction of a double track street railway in the middle of a street, so located that the space between the exterior rails and the sidewalk is not sufficient to permit wagons with teams attached to stand transversely between the curb-lines and passing cars, is not *per se* a perversion of the street to private uses, or an unlawful infringement of street easements appurtenant to abutting property.
3. An abutter has no such proprietary interest in the maintenance of a public market in a street in front of his property as will entitle him to enjoin the construction and operation of a duly authorized street railway through the market space, on the ground that by interfering with the market, it will diminish the volume of business transacted on the street, and thereby depreciate the value of his property.

PUGH, J.

"The Columbus Street Railway Company has obtained from the City the franchise to lay out, construct and operate a street railway along the center of Fourth street. It is now engaged in excavating, and laying its tracks in the street. The motive power to propel the cars is to be electricity. I have not seen the ordinance by which the privilege was granted, but am informed that it is not limited to the use of electricity.

Neither the legality of the railway company's creation, nor the legality of the grant made by the city are assailed by the plaintiff.

But he objects to the construction of the railway on other grounds. He is an abutting lot owner. He owns the fee in the street. He has peculiar rights in and to the street—rights which are different from, and independent of, the right which the public has in the street—the right of passage and re-passage. There is the "easement of access, the easement of light and air, the right of passage to and from his lot, and to load and unload goods or merchandise, and to deposit building material on the street, and the right to mine, and to carry water in pipes, under the street, etc. This statement of his rights to the street which are necessary to subserve the reasonable use and enjoyment of his property is not intended to be exhaustive

Constitutionally, these rights can not be appropriated or taken by a corporation for public use without compensation.

One of the contentions of the plaintiff is that the construction of the electric street railway will add a new servitude, a new burden, to the land originally appropriated for the street, and, as his compensation has not been first ascertained and paid, or secured to be paid, the construction of the railway should be enjoined.

If his minor premise is sound, he is entitled to the injunction; for if he has made out such a case, he must find his protection in the courts by injunction.

The exact, sharp and pointed question, whether an electric street railway in a public highway is an additional burden or servitude, has never been passed upon by our Supreme Court as between the street railway company and an abutting property owner. It has decided that an ordinary horse railway is not such a burden *per se*, and in a very recent case, it has touched the main question in this case in such a way that it is obvious that the decision would be that an electric street railway is not, in itself, a new servitude. In that case the controversy was between a telephone company and an electric street railway company, and the court resolved that "new and improved modes of conveyance by street railways, are by law authorized to be constructed." The court expressly declared, however, that it was not "necessary to determine how far an incorporated company making a lawful and careful use of its own prop-



erty, or of a franchise granted to it by the proper municipal authorities, may be held liable for damages incidentally caused to another." *Cincinnati Inclined Plane Ry. Co. v. City and Suburban Telephone*, 48 Ohio St., 390. The principle of the decision rendered in the first case mentioned, *Cincinnati & Spring Grove St. Ry. Co. v. Cummins*, 14 Ohio St., 523, was broad and comprehensive enough to embrace this case. It was Judge Ranney who discovered the principle.

In two circuit court cases, the question has been directly met and decided, the decisions being the same, namely: that an electric street railway is not a new servitude. In one the controversy was between an abutting lot owner and the company; in the other it was between a non-abutting lot owner and the company. *Mt. Adams & Eden Park Inclined Railway Co. v. Winslow*, 2 Circ. Dec., 240; *Simmons v. Toledo*, 3 Circ. Dec., 64. See also *Clements v. Cincinnati*, 9 Dec. Re., 688.

In the common pleas court of Cuyahoga county, a similar conclusion was reached. *Pelton v. East Cleveland Ry. Co.*, 10 Dec. Re., 545. The highest courts of several sister states have also decided that such a railway does not create a new servitude on the street ground. In Booth's "The Law of Street Railways" sec. 83 and notes, there is an exhaustive citation of the authorities.

By authority, then, the question is certainly settled.

The argument for the plaintiff was wholly based on the analogy from the ordinary steam railroads constructed in public highways. The established law is that they create a new servitude; but analogies cannot control when the question may be settled by either direct principle, reason, or direct precedent. One eminent writer, Judge Elliott, has declared, that the doctrine which allows private corporations to use the streets of a city for their own benefit, is indefensible; but he yields the question because it has been settled by authority.

I can see nothing in fact to cause this lamentation. Street railways are a great benefaction to the majority of the people living in a city. Their cars are the carriages of the poor and middle class of citizens; it is the only conveyance some of them can afford.

Matthew Arnold, an acute observer of our national virtues and vices, commenting on our civilization, said: "The public ways are abominably cut up by rails and blocked with horse cars, but the inconvenience is for those who use private carriages and cabs, the convenience is for the bulk of the community who, but for the horse cars, would have to walk." Besides, as to the Columbus Street Railway Company, if it should ever seriously interfere with the public travel on the streets, there is consolation in the fact that it may not be here always. It is not an immortal being, except in the Pickwickian sense; because its charter is limited to a definite period. At the expiration of that period, it will have to either get its charter renewed, or wind up its affairs. It is true the ordinary city council is swift to give away valuable and important privileges to corporations; but it need not be so always.

There is a definite and marked distinction, in principle and reason, between the ordinary steam railroads and street railways, whether propelled by horse, cable or electric power, when laid out and constructed in public highways. The reason why one is, and the other is not, a new servitude, *per se*, exists in the "character and extent of their use of the highway," and in the difference of the effect produced on the highway, and not in the motive power. A public street is for public travel and transportation. The ground on which it is located was

dedicated, or appropriated, to subserve the purposes of public travel and transportation. Street cars, whether moved by horses, cable or electricity, are considered "improved means of travel, in furtherance of the ordinary use of the highway," and not a new and different use. The use is not changed; it is only a different mode for the use. In *Jersey City & Bergen R. R. Co. v. Jersey City & Hoboken Horse R. R. Co.*, 20 N. J., Eq., 91, language was used which is applicable to all street railways: "The cars will stop in front of every door, and carry persons from one point on the line to any other to which they may desire to go, and the great use or advantage of them is to those whose property is taken for the street and whose lands adjoin it. They are but means of using the public streets to a greater advantage for the very purpose for which they were laid out, free and quick transit from one point to another; they are the best and cheapest mode yet devised; and they do not hinder the use of the street for public travel, and hardly, and in a very small degree obstruct travel on the part of the street occupied by the tracks, except the few inches used for the iron rails."

The abutter, at the time the land was dedicated or appropriated, may not have actually anticipated that it was to be used for street cars, especially if the street was old, as the one in question is, but that is no reason for the claim that the ground should be rededicated or reappropriated.

And it is also true that he may not have actually anticipated that the street would be paved with asphalt or blocks of granite. But that would not vindicate a demand that he should be again compensated for the appropriation of the land. There is just as much reasonableness, however, in one claim as in the other that I have hypothesized. In law, both of these events are presumed to have been in the contemplation of the parties.

It has been said that there is no substantial difference between the use of the street by omnibuses and coaches and by horse cars, and it seems true. It is equally true that there is but a slight substantial difference between the use of the streets by horse cars and electric cars. The object and end of their use is identical, namely to facilitate public travel on the street. The electric car does not occupy as much space longitudinally. It can be started sooner, can be moved more rapidly, and be stopped quicker. Booth's Law of Street Railways, sec. 83. That "loud, churning and pulsating noise" and its accompaniment, a "peculiar humming sound" have been reduced to a minimum, so that it is not any worse than a horse car. Its greater danger from the use of electricity has been probably exaggerated.

It was insisted that the wires and poles would impose a new servitude on the street. But they would not. They are no more a new burden than hitching posts, shade trees and lamp posts would be. 3 C. Rep., 428.

In *Halsey v. The Rapid Transit Railway Company*, 20 Atl. Rep., 859, the prevailing notion was thus expressed: "They" (the wires and poles) "form part of the means by which a new power to be used in the place of animal power, is to be supplied for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way, and thus add to its utility and convenience. \* \* \* The whole matter may be summed up in a single sentence: The poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. This being so \* \* \* they do

not impose a new burden on the soil, but must, on the contrary, be regarded, both in law and reason, as legitimate accessories to the use of the land for the very purpose for which it was acquired."

But none of these considerations can be predicated of steam railroads when laid out in a public highway. That is not where such roads are usually constructed. They do not facilitate the kind of public travel and transportation that go to the public streets. The length of their trains, their great noise, the time and space it requires to stop them, tend to drive off of the street public travel by other vehicles and by pedestrians. The two uses of the street cannot be harmonized. It is, therefore, an additional servitude on the location of the street, and before it can be built the public street, or enough of it, must be appropriated by the power of eminent domain, and the constitutional compensation paid, or secured to be paid, to the abutting lot owner when he objects to the use; and he may invoke the aid of equity to stop the construction till that is done.

I may not have marshalled all of the reasons, or stated them as they should be, why street railways, including electric street railways, have been, with one accord, adjudged by the courts not to be *per se* a new servitude on the street.

This disposes of one of the complaints of the plaintiff.

There are some others.

If a street railway of any class is so constructed as to "materially impair the incidental rights of an abutter in the street," some of which have been mentioned, it is an additional burden, and he is entitled to compensation. For illustration, this rule applies when the street has to be altered for the sole and exclusive accommodation of the street railway company, whereby the abutting lot owner's right of access is intercepted or impaired. It was just such cases as these to which the Supreme Court, in the 48th Ohio St., case alluded, when it stated that it would not determine how far a street railway corporation might be required to respond for "damages incidentally caused to another."

The proposition is also sustained by the decision in the 14th Ohio St., case.

The plaintiff attempts to make a case of damage to his incidental rights in Fourth street. A public market, he says, has been carried on there for over forty years; it is now being carried on. The sellers, gardeners and farmers occupy a portion of the street on market mornings. A large business has been built up there. The construction of the street railway will drive that business away. That would diminish the value of his property at least thirty per cent. This complaint suggests the mention of an historical incident. It is said that when Stephenson, who was first in making a successful adaptation of steam engines to railways, was trying to obtain the consent of the British Parliament to establish a railroad, he encountered a great deal of conservatism and prejudice. The Tory Squires were seized with a panic. They fought his measure, and pictured to Parliament how the game would be frightened to death, the coaching inns superseded, and their breed of horses become extinct—all results of the new mode of travel. Then to clinch the argument, they drew a picture of the catastrophe that would follow if a bull should attempt to butt a locomotive off the track.

The complaint of the plaintiff about the market disappearing to the depreciation of property on Fourth street is all prophecy and speculation; it is not proved by the affidavits that it will happen. Besides, if it

did, it would not be a damage to any incidental right in the public street which he possesses. His interest in the continuance of the market at that place, is not one of his incidental rights in the street, which can be, in law, impaired by the construction of the street railway.

The complaint that the portion of the street outside of the street railway tracks would be too narrow to permit marketers to use it, and people to pass and repass on it, was met and answered by the affidavits of the defendant.

It is also charged, in a general way, too general to be good pleading, that this narrowing of the street will deprive him of the easement of access to his property. It was claimed that vehicles could not stand at right angles with the street between the outside rails and the curbing.

The evidence does not sustain this claim, or that it would even interfere with the exercise of that right; but, if it did, the law, as announced by the Pennsylvania Supreme Court, is pertinent. "It is claimed," said the court, "for the plaintiffs, that their right of free passage to their property along High street, is interfered with, because vehicles cannot stand between the railway tracks and the curbing without interfering with the cars. But the right of the property owner in this respect is not at all changed. He has the same right, after the tracks are laid, and the cars running, that he had before. It is a right which must be exercised in reason, whether there are car tracks on the street or not. In no circumstances does it confer the privilege of obstruction by unreasonable exercise. But the reasonable exercise of the right, gives no right to the street car companies to arrest it. If, at any time, the owner has occasion for the presence of vehicles in front of his property on the street, to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purposes; and if, in such exercise of the right, the passage of street cars is impeded, the street cars must wait. Such stoppage of cars is a matter of hourly occurrence in all large towns and cities where street car tracks are laid upon narrow streets." *Rafferty v. Central Traction Co.*, 23 Atl. Rep., 885 (Pa. 1892). The respective rights of the abutter and street railway company can be harmoniously exercised. They must be so exercised.

I think it is a subject matter of pride and congratulation for the local bench and bar, that a member of the latter, Mr. Booth, has written a book which will redound to his honor, the subject being "The Law of Street Railways."

He has drawn out of the wilderness of reported cases an outline of the principles of the law on that subject. The book was written with conscientious care and commendable research. The arrangement of the topics is logical: the style is very clear and precise, and is neither too concise or too diffuse. A legal treatise being "an orderly statement of the principles in which the law consists, whether drawn from the reports of law cases, from natural reason, or from any other source, accompanied by such illustrations and references to authorities as to render them plain in their application, and accurate in outlines, and settle to the inquiring mind the fact that they are truly the law," this book belongs to that category. It will undoubtedly promote the science and practice of law.

For the reasons given in this opinion, the temporary restraining order heretofore granted is vacated, and the plaintiff's motion for an injunction overruled.

Geo. L. Converse and G. J. Marriott, attorneys for plaintiff.  
W. J. Booth and James Caren, attorneys for defendant.

**DOMICILE.****209**

[Defiance Common Pleas, 1892.]

**\*MARTIN B. GORMAN, ADMR., v. B. & O. & C. R. R. Co.**

Where a person is killed while removing from the state, his domicile for the purposes of the appointment of an administrator is the county from which he removed, and not the one in which his death occurred, if a different one.

**SHOCK, J.**

Joyce was a resident of New Straitsville, Perry county, Ohio, and started to emigrate to Lake Crystal, Minnesota, and was in charge of a car containing live stock and household goods, and was killed while in transit, in Defiance county, Ohio. The probate court of that county appointed the administrator, who brought suit against the company for negligence in causing the death of Joyce, who was killed on the twenty-sixth of September, 1890. Upon the trial the point was made that the domicile of the deceased was Perry county, Ohio, and although he had left that county with the intention of never returning, yet that that domicile continued until a new one was obtained. Therefore, at the time of his death he was an inhabitant of Perry county, Ohio, and under sec. 5994 of the Rev. Stat., that county alone had jurisdiction to appoint the administrator, and that the appointment in Defiance county was without jurisdiction and void. After elaborate and extended arguments, the court sustained the point and directed a verdict for the defendant.—[Editorial.]

**MUNICIPAL CORPORATIONS.****223**

[Superior Court of Cincinnati, General Term, June, 1892.]

**ROSS H. FENTON ET AL. v. S. PHELPS CHESELDINE ET AL.**

Jacob Burnet and Rebecca Burnet, his wife, on August 4, 1818, by deed duly executed and recorded, dedicated to the city of Cincinnati, a lot or strip of ground fifty-four (54) feet in width, on Sixth street, extending from Elm street to Western Row, the condition or consideration of such grant being that the city of Cincinnati should establish a market on Sixth street between the two named points. *Held:*

1. That a grant for this establishment of a public market is to be construed as implying everything necessary to its reasonable use and enjoyment, and as against such grant, neither grantor nor his successor in title, an abutting property owner, can acquire any right except by means of an ouster or adverse use, and such adverse use must be a denial of right in the city to use the square so granted for market purposes.
2. That general authority was conferred upon the city of Cincinnati by its special charter to establish and regulate market houses and market places, and the same authority exists under the general municipal corporation act now in force.

**HUNT, J.**

This action comes into this court on error to the special term, and seeks to reverse the judgment of the court below in refusing to restrain the defendants from erecting a permanent iron and glass building for

\*A contrary decision will be found in *Astram v. Ten Eck*, post 665.

the purpose of a flower market on Sixth street, between Elm and Plum streets, in the city of Cincinnati, and in dismissing the petition.

The petition alleges that certain of the plaintiffs are the owners of sundry freehold and leasehold estates in land with buildings thereon erected for business purposes, abutting upon both the north and south sides of Sixth street, between Elm and Plum streets, in the city of Cincinnati; that said Sixth street is a public highway, and that defendants are about to erect, and unless restrained by this court, will erect upon said street in front of the properties of the plaintiffs a permanent iron and glass building some two hundred feet in length, thirty-six and one-half feet in width, and two stories in height; that the occupation of the public street by a building of such dimensions would greatly interfere with the public travel thereon, interfere with and obstruct the egress and ingress to and from the plaintiffs' properties, and render many of plaintiffs' buildings valueless for the business for which they are now occupied and for which they were built, and would greatly depreciate the value of the land upon which they stand, and that such an obstruction of the public street would work great and irreparable damage to said property.

It appears from the answer of the defendants that Mary E. Holroyd died in this county on or about April 8, 1890, leaving a last will and testament which was afterwards duly probated and admitted to record in the probate court of this county, and is still in full force and effect.

The provision which relates to the controversy is as follows:

"Section 30. I love Cincinnati, and, if practicable, I would be glad to leave in it, from me, some memorial to my deceased husband, Jabez Elliott; and as I have always had a tender fondness for flowers and believe that floriculture tends to refine and elevate human nature, and as my attention has frequently been drawn to the unsheltered condition of the flowers and those who have them for sale, exposed to all weathers in an open market place, I would like to erect on Sixth street, or some other place in Cincinnati, which shall seem suitable to my executors, a building to be the Jabez Elliott Flower Market, which shall be ornamental to the city and a protection to the flowers and shrubs which may be brought to the market, and to those who have them for sale.

"I therefore give and bequeath to my executors, S. Phelps Cheseldine and Clifford B. Wright, and to the survivor of them, ten thousand dollars in trust nevertheless for the following purposes, viz.:

"That as soon as may be after my decease they request the proper authorities of the city to furnish a suitable location on Sixth street market space, or elsewhere in said city, for the erection of said flower market. If such location shall be furnished by the city within one year after my decease, then said trustees shall cause plans to be made for a suitable building, to cost when completed not less than ten thousand dollars, which plans shall be submitted to the proper authorities representing the city. And if plans satisfactory to said trustees shall be approved by said city authorities, said trustees shall proceed at once to erect such buildings according to such plans on the location so furnished.

"If ten thousand dollars should be found insufficient to complete said building as desired, then I give and bequeath to said trustees a sufficient sum in addition not exceeding five thousand dollars to complete the same.

"If said city authorities should neglect or refuse for one year after my death to furnish a location for said flower market which shall be acceptable to said trustees, or if said authorities and said trustees should be unable to agree upon a suitable place for said building, then this bequest shall become and be absolutely null and void, and the fund given to said trustees as above shall revert and become a part of the residue of my estate."

There are further provisions as to the custody of the building, the appointment of trustees, and the collection of such rent or license fees from persons who are permitted to use the building for a market place for their flowers, etc., as may be required to maintain said building and keep the same in repair.

It further appears that after the will had been probated, and after the executors had been duly appointed and qualified, they notified the city of Cincinnati of the provisions of the will, and requested the city authorities to furnish a suitable location for the erection of said flower market.

The city of Cincinnati, by its proper officers and agents, accepted the donation of said flower market as proposed, and on the seventh day of November, 1890, said city, by its duly elected, qualified and acting city council, duly and legally passed a certain ordinance numbered seventy(70), where Sixth street market space, in the city of Cincinnati, between Elm and Plum streets, was furnished and designated as the location for the creation of said flower market building in accordance with the terms and conditions of the will.

The second section of the ordinance is in the following words:

Section 2. "The right to erect and forever maintain a flower market at said place is hereby granted to the executors under the said last will and testament of Mary E. Holroyd, deceased, in accordance with the terms and conditions therein set forth."

This ordinance has neither been amended nor repealed, but is now in full force and effect.

It further appears that after the passage of said ordinance, and pursuant to the provisions of the will, the executors caused plans to be made for a flower market building to be erected on said site so designated by the city, which plans were afterwards submitted and approved by the proper authorities of said city.

It is not denied that the executors and trustees, acting under the provisions of the will, have done all things up to this time required of them by said will, and that the city of Cincinnati, on its part, has complied with all the conditions named in said will, precedent to the erection of said flower market building.

It is further claimed by the answer that the said Sixth street, including said Sixth street market place, has been regularly and duly dedicated to the city of Cincinnati for street and market purposes, and that the said city of Cincinnati has the legal right and authority to use said place for the holding of a flower market and for using it as a market for flowers, etc., as provided by said ordinance.

The defendants aver their willingness to proceed, as soon as they shall be in funds, with the erection of said flower market building, substantially according to said plans so as aforesaid approved by said authorities of said city, and on the location designated by the ordinance, and unless restrained by the proper order of this court, they intend to erect said flower building pursuant to the authority and direction of

said will and the authority given them as above stated, by said city, for the use and benefit of the city of Cincinnati as provided by said will.

The city of Cincinnati, having been made a party defendant, by way of answer admits that the plaintiffs are the owners and occupants of the property as set forth in the petition, and admits that it proposes, under and by virtue of a certain ordinance of the board of legislation of the city of Cincinnati, to erect a building of the general character and at the place described in the petition, but says that the expense of the erection of said building is to be borne by the executors of the last will and testament of Mary E. Holroyd, deceased, in accordance with the provision of her will as fully set out in the pleading.

It further denies that the building in question is to be located on the public highway, but claims that Sixth street originally, in the city of Cincinnati, between Elm street and Western Row, now Central avenue, was dedicated sixty-six (66) feet in width, as a public highway, and that on the fourth day of August, 1818, by deed duly executed according to law, Jacob Burnet, and Rebecca Burnet, his wife, dedicated to the city of Cincinnati, a lot or strip of ground fifty-four (54) feet in width, extending from said Elm street to Western Row, now Central avenue, and abutting said street between said points, to a width of one hundred and twenty (120) feet, the condition or consideration of said grant being that the city of Cincinnati should establish and maintain a public market on said Sixth street, between the two above named points, to-wit: Elm street and Western Row, or Central avenue, and that said portion of Sixth street includes the portion of said Sixth street mentioned in the plaintiff's petition, between Elm street and Plum street.

It is further alleged in the answer that in accordance with the terms of said grant the city of Cincinnati did provide for a public market in said street, and has ever since maintained the same; that the public of Cincinnati, as well as the owners and holders and tenants of the property abutting upon said street, including the plaintiffs, have at all times acquiesced in the use of the said street for the purpose above named; that the said public market has been established and maintained in such way as not to interfere or incommode public travel on said street between the said points in this, to-wit: that the said market has been restricted to the central part of said street, leaving a wagon way on either side of the market space; that said wagon way is ample for all the purposes, both to the public in general and to the plaintiffs, and all other abutting property owners and holders and that the building which is proposed to be erected is to be located on said market space, and is to be erected and maintained for the purpose of a flower market.

It is further alleged that the proposed building when erected will not interfere with public travel on said Sixth street, and will not interfere with the use, by plaintiffs, of their property, or do to them in any other manner any injury whatever; that, on the contrary, said building will be located on the property dedicated and set apart for the use for which it is to be subjected by the plaintiffs, by placing thereon said buildings, and that the municipal authorities of the city of Cincinnati have authorized the erection and maintenance thereon of said buildings at said point for said purpose.

The city of Cincinnati joins in the prayer of the executors of the last will and testament of Mary E. Holroyd, deceased, that the restraining order heretofore allowed in the case may be dissolved, and that the petition may be dismissed.



The court in special term dissolved the restraining order and dismissed the petition. A petition in error is now prosecuted to reverse the judgment of the court below.

The plaintiffs claim as a matter of law that the terms of the grant by Jacob Burnet to the city of Cincinnati for a market space was indefinite, and that the city and the abutting property owners, the parties to the grant, are bound by what has been done in defining the grant by actual use. In other words, that since the city has not continuously used all of the space between the tracks of the street railway for market purposes, and that the abutting property owners have had the privilege from time to time of driving across the open space, that the use of the space for market purposes cannot be enlarged beyond the original use. In support of this contention the case of Warner v. Railroad Company, 39 O.S., 70, is cited. The rule laid down by the Supreme Court in that case, is that having ascertained the intent of the parties with reference to a grant, the parties must abide by it. And when the terms of a grant of right of way are general and indefinite, its location and use to the grantee, acquiesced in by the grantor, will have the same legal effect as if it had been fully described in the terms of the grant. Indeed, in that very same case the court says: "From the language used and the circumstances under which the grant was made, we are satisfied that both parties understood that the rights granted were to be exercised at the time of the final location and construction of the railroad; that the quantity of land required by the railroad company was then to be determined and the selection made by the engineer." In other words, the Supreme Court held that the parties were bound by the intent of the grant, and, in the case cited, once the railroad company having exercised its choice by selecting a right of way, it could not change or enlarge that grant.

It is no doubt a general principle, as claimed by plaintiffs in error, that when a right of way or other easement, is granted by deed, without fixed and defined limits, the practical location and use of such way, or easement, by the grantee, acquiesced in by the grantor, will have the same legal effect as if it had been fully described by the terms of the grant. *Bannon v. Angier*, 2 Allen, 128; *Onthank v. L. S. & M. S. R. R. Co.*, 71 N. Y., 194.

The grant was made to the city of Cincinnati by Jacob Burnet and Rebecca Burnet, his wife, on August 4, 1818, for and in consideration of the establishment of a public market, and no other purpose, on Sixth street between Western Row and Elm streets. This grant included a strip fifty-four (54) feet on the north side of Sixth street extending from Elm street to Western Row. There can be no doubt that this was wholly vacant property at that time, for the record discloses that Burnet made a sub-division of the property abutting upon the square in 1828. It is evident that the grant was made with the intention that the city should have the full benefit of the tract for the purposes of a market, and that the municipal authorities alone could determine when the necessity existed for the erection of a market house, as well as the extent and character of the structure itself. It is but fair to presume that the grantor had in view the fact that increased facilities would be demanded by an increasing population.

It cannot well be claimed that the city could determine as early as 1818 just what facilities would be needed for the indefinite future on that square for market purposes. The grant in this case implies the

right in the city of Cincinnati to use any and all portions of the property so granted for the purpose of a market so far as may be necessary and reasonable.

It was held in *Gall et al. v. The City of Cincinnati*, 18 O. S., 563, that general authority was conferred on the city, by its special charter to establish and regulate markets, and market places; and the same authority exists under the general municipal corporation act now in force. This is a continuing power; and its exercise at the period, by establishing a market place and erecting a market house in a particular locality, will not prevent the city council from removing such building or abandoning such locality for market purposes. The legislation under which the city is authorized to establish and maintain markets will be found in secs. 2232 and 2576 of the Rev. Stat. of Ohio. These powers were inherent in the city at the time of the original grant.

This grant is to be construed as implying in the city everything necessary to the complete and full enjoyment of the grant. In *Washburn on Easements*, 31, the writer says that the doctrine is a general one, that the grant of a thing carries all things as included, without which the thing cannot be enjoyed, by which are to be understood things incident and directly necessary to the thing granted. And again on star page 39, item 12: "But whether any and what principles pass by a grant of a thing, as well as the measure or limits of what is granted, often depends upon the circumstances and conditions of the property, and the language of the grant construed in the light of those circumstances. One general test is, how far the incidents claimed are necessary to the reasonable enjoyment of what is expressly granted."

*Babcock v. Western Railroad Corporation*, 9 Metcalf, 553; *Holt v. Sargent*, 15 Gray, 97.

The fact that for seventy years the city found that the public necessities did not require any building upon this square for the purpose of a market does not operate against the right of the city to erect such a building thereon, when they feel that public necessity may require such a building. There has been no waiver, and nothing is lost by nonuse. Indeed, the record discloses that the square in question has been used for purposes of a market almost ever since the original grant. As against the city the abutting property owners can acquire no right except by means of an ouster or an adverse use, and such adverse use must be a denial of right in the city to use the square for market purposes. The extent to which the abutting property owners have used any part of the square between the railroad tracks was at the time when that portion of the square was not needed for market purposes. Such use was not in contravention of the right of the city, but by authority and permission of the city. It is a well settled principle that when an easement has been acquired by deed, no length of time of mere nonuse will operate to interfere or defeat a right. Nothing short of a use by the owner of the premises over which it was granted, which is adverse to the enjoyment of such easement to the owner thereof, for the space of time long enough to create a prescriptive right, will destroy the right granted. *Washburn on Easements*, \*553.

The only question then for the court to determine is whether the city, by the erection of the proposed building in this square for the purposes of a flower market, is making an unnecessary and unreasonable use of the grant. The equitable powers of the court probably might be invoked to restrain the erection of a building unnecessary in extent

and character, and which would work irreparable injury to abutting property owners. But the evidence fails to show that the proposed structure will either injuriously affect such property owners in the matter of egress and ingress, or will discommode the general public to any extent in the use of the streets.

We find no error in the exclusion of evidence, and the judgment of the court in special term will therefore, be affirmed.

MOORE and SMITH, JJ., concur.

Stephen H. Wilder and Ernst Rehm, for plaintiffs.

Corporation Counsel and Foraker, Black & Bosworth, *contra*.

## MARRIAGE.

227

[Hamilton Common Pleas, 1892.]

### GEORGE B. GOODHEART, GUARDIAN, v. EDITH SPEER RANSLEY.

1. The marriage of a person who is under a decree of lunacy and guardianship, with a woman fully informed of his mental condition, notwithstanding the satisfaction of the marriage after his having been adjudged sane and the guardianship removed, but while he is in fact insane, will be annulled at the suit of the guardian appointed under the second adjudication.
2. The decree of insanity is *prima facie* evidence of the fact, and the ratification is insufficient.

KUMLER, J.

The plaintiff brings this action to annul the marriage contract existing between John B. Ransley and the defendant, his wife. The plaintiff, guardian of the person and estate of John B. Ransley, on the tenth day of December, 1891, filed his petition in this court alleging that said Ransley was on the fourth day of November, 1891, adjudged insane, and his appointment as such guardian. The plaintiff further alleges that on the seventh day of March, 1891, his ward was adjudged to be insane by the probate court of this county, and one Frederick Davenport appointed as the guardian of said Ransley, and continued to act as such until the twenty-fourth day of August, 1891, when said Ransley was adjudged to be sane by the same court, and that said Davenport was removed from the guardianship. That between the seventh day of March, 1891, and the twenty-fourth day of August, 1891, the period of Davenport's guardianship, said Ransley was insane, and ordered to be confined in Longview Asylum.

That through the procurement and undue influence of the defendant he was married in New York on the twelfth day of June, 1891; that at the time the alleged marriage contract was made, plaintiff's ward had no capacity to consent to the same, and that the defendant well knowing his insanity, and want of capacity to consent, fraudulently conspired with other persons unknown to plaintiff, in having such marriage ceremony performed in order to secure an interest in his estate.

Plaintiff asks that the alleged marriage contract be annulled, and that the defendant be restrained from asserting any interest in and to the estate of said Ransley.

The defendant Edith Speer Ransley answers, admitting the appointment of plaintiff as guardian on November 4, 1891. Admits that John

B. Ransley was adjudged insane by the probate court of this county on the seventh day of August, 1891, and the appointment of Frederick Davenport as his guardian; admits that on the twenty-fourth day of August, 1891, said Ransley was adjudged sane, by the same court, and the removal of Frederick Davenport as his guardian; admits that on the twelfth day of June, 1891, she was married to said John B. Ransley in New York City, but says that said Ransley was in fact then sane, and concludes by denying each and every other allegation in the petition. The defendant further answers by saying that if said John B. Ransley was insane on the twelfth day of June, 1891, he subsequently, before and after the twenty-fourth day of August, 1891, when he was adjudged to be sane, ratified, confirmed and consummated the marriage; defendant further answering says that on the twenty-second day of January, 1891, in the city of New York, said Ransley proposed, and the defendant agreed to marry him, and that they were married at the time named, and that said Ransley before and after the twenty-fourth day of August, ratified, confirmed and consummated said marriage, both in New York and elsewhere, and while sane he acknowledged the defendant as his legal wife, lived and cohabited with her, and that said marriage is a valid one according to the laws of the state of New York. She asks that the marriage be declared a legal one.

In reply plaintiff denies each and every allegation of fact in defendant's answer, except wherein the answer expressly admits the allegations made in the petition.

The evidence produced on the trial consisted of oral testimony, and testimony in the form of depositions, letters, correspondence and records.

The records offered in evidence from the probate court of this county disclose the fact that on the seventh day of March, 1891, John B. Ransley was adjudged by the probate court of this county to be insane, and ordered to be committed to Longview Asylum, and that one Frederick Davenport was duly appointed the guardian of his person and estate; that the said Ransley, on the twenty-fourth day of August, 1891, was adjudged to be sane, and Davenport's guardianship terminated; that on the fourth day of November, 1891, the said Ransley was again adjudged insane, and plaintiff appointed his guardian. The parties were married on June 12, 1891. From the records it appears that a period of five months and seventeen days elapsed from the time he was first declared to be insane, until he was again declared insane. Inside of two months from the date of his commitment to Longview, he was permitted to go to his mother's home in this city, in the hope that he might improve. On the second of May, 1891, after consultation with Judge Robertson, Miss Speer wrote John a letter in which she broke off the engagement to marry, giving as a reason therefor that he was in no fit state to marry. About this time his friends permitted him to go, in charge of Mr. Brown, to St. Louis and Chicago. While in Chicago he left Mr. Brown, without his knowledge, reaching New York on the ninth day of June. Miss Speer and her mother learning that John was in Chicago, communicated with him, sending him funds to come there. Before going, however, he wrote Mr. Brown a letter dated June 5, 1891, in which he says: "For God's truth, and charity sake, bear with me. Edith has awoke and demands that I come to New York, and it is my duty to go." Keeping in mind the date of this letter, and that of the marriage, and note what he says in another letter written to Mr. Brown, dated June

7th, one day later: "My dear Park (Brown), I can not resist; I have determined to go to New York and make peace with Edith. I feel like a criminal in my refusal of her requests, when in a few hours I am positive I can have Edith by my personal presence and promises, refuse to accept this last resort given to her, and stated in letter of June 6th. I want a sanity judgment first, and will and do still depend on you as implicitly as a babe to secure it for me. Oh, God, if I fail to reconcile my mother and sister, it may drive me from this country. I shall marry Edith, but it shall be on the condition that if it unman's me, and I cannot be the husband, a manhood ought to such a noble womanhood. I am now talking that of a desperate man. I will not have any reason to become so desperate if Brown stands by me; but every friend living that I remember, that I appealed to as accessible, has failed to help or encourage me, as I sought to be true to Edith in my honest love, but Mrs. Speer and she, and her lawyers, say my only recourse is marriage. I know better. What can an insane adjudged man do?"

This letter was written only five days before the marriage ceremony was performed. The deposition of M. M. Pomeroy and Samuel H. Drew, both of whom were employed by Mr. Ransley as his attorneys in the city of New York, are full of definite information, not only in respect to Mr. Ransley's insanity but that Miss Speer his intended wife, and her mother, had complete knowledge of his mental condition. M. M. Pomeroy states without hesitation that Mr. Ransley was insane, and procured a good physician to examine him. This examination took place in January. This physician pronounced him insane. He informed both Miss Speer, and her mother, of the doctor's opinion, and advised Miss Speer not to marry him on that account. The mother said, she was fully acquainted with Mr. Ransley's condition, and "they were both willing to take their chances." He protested to Miss Speer not to marry an insane man, and she replied that: "she knew what she was doing, and it was her own business." He likewise protested to Mr. Ransley that he ought not to marry in his mental condition, but he answered that he was determined to marry Edith. Mr. Pomeroy says, Mr. Ransley was greatly exercised over the prospective heir that might result from the marriage. He said she was as cold as an icicle, but such was his miraculous power, that he could from her bring forth a child which would be such an emblem of purity that Jesus Christ would sink to nothing in comparison.

Mr. Drew's testimony is very full and trustworthy. Two days before the marriage he called the attention of Mrs. and Miss Speer to Mr. Ransley's mental impairment. Mr. Drew told Edith on the tenth of June, that she was taking a very grave step in marrying this man in his present condition. On the eleventh day of June, one day before the marriage, Mr. Drew again warned Miss Speer and her mother that the marriage contract, if executed, might be annulled on the ground of his insanity. Mr. Drew also states that the marriage was arranged to take place on the seventeenth of June, but the time was changed to the twelfth, inasmuch as John was liable to be returned to Cincinnati, and incarcerated in Longview, and a speedy marriage was agreed upon. On the thirteenth day of June, one day after the marriage, his wife writes a letter from New York announcing the marriage, signed by Ransley, and addressed to his mother and sister here. Mr. Ransley interlined this letter with this remarkable admission: "I first thought of such a

decision on Thursday eve, when Edith became so sick, her great fear of losing my love, having unbalanced her memory and reason, and her rapid recovery when I settled her fears by marriage, her acting as my amanuensis attests."

On the twenty-seventh of June, 15 days after his marriage, he writes a letter from New York to Mr. Davenport, his guardian, in which he speaks of this forced marriage of June 12, 1891, and says: "That her probable fatal sickness since compelled me to marry her, to save both of our physical and mental prostrations, and to further this salvation of Edith."

On the eighteenth day of July, he wrote to Mr. Drew in regard to the purchase of his interest in Cincinnati in which he used the following: "I have left that decision absolutely for my wife's sole action, and she positively refused the same, as her absolute will decision. I have accepted the alternative to use my Chief Justice (Edith) so to speak, control of my so-called dominant will, and absolutely decide."

On the question of sanity Dr. Buck was called. He states that he has been and was his personal physician for twenty years, that he was very weak, enervated and nervous. He is of the opinion that there is a softening of the brain going on in the left hemisphere, and that his disease is of a progressive character, affecting the brain and entire body. From the doctor's care and treatment of Mr. Ransley for a period of twenty years, he is of the opinion that he suffered from this disease for that length of time, and "that it is congenital, born in him." During the trial he made a personal examination of the patient, and pronounces him to be in an "imbecile condition now."

Dr. Ricketts, another physician, says he was called to see him at his mother's about the twentieth of October, following the marriage, and that he was then a physical and mental wreck.

Again, Mr. Drew says that Ransley and his wife were absent from New York possibly one week after the marriage, and when they returned, after calling at his office, he was thoroughly convinced that Mr. Ransley was insane, and sending for Mrs. Speer so informed her.

The answer alleges that the marriage contract was entered into the twenty-second day of January, 1891, in the city of New York, and that he was in fact sane at the time of the marriage; that Ransley ratified, confirmed, consummated the marriage after he was adjudged sane; that he acknowledged the defendant to be his legal wife, lived and cohabited with her thereafter in the city of New York and elsewhere.

In a letter written by the defendant, dated in this city May 2, 1891, she declares this engagement "broken" assigning as a reason that he "was now in no fit state to marry, and by the time you are, you will in all probability be a poor man." This was about one month before the marriage. Just when they agreed to marry again does not appear in the testimony. Mr. Drew says, that Ransley and his wife returned from their wedding tour, and called at his office about one week after the marriage, when he was thoroughly convinced of his insanity. He also says that John voluntarily told him after he came back from the sea shore that the marriage had never been consummated, and that they had solemnly agreed not to cohabit previous to their marriage, and would not do so until both had recovered their health; that Mr. Ransley told him, he was afraid that if they did cohabit that his wife would get in the family way, and that the child might be an idiot or an imbecile. Again Mr. Drew says, in about five or six weeks after this he sent for de-

defendant, and informed her of the conversation he had with Mr. Ransley about not consummating the marriage, and asked her if it was true. She said it was, and that they never should consummate it until they had both fully recovered their health. He, says he, again told her upon this last visit that a great wrong had been done, and she had done it knowingly and purposely, and if the fact of non-cohabitation were known, it might interfere with the settlement of their Cincinnati affairs, and cautioned her to so inform John, which she promised to do.

It is urged with great force that Mr. Ransley was adjudged sane by the probate court on the twenty-fourth day of August, and his guardian discharged, and that thereafter the law presumed him to have been a sane man, and competent to ratify the marriage contract. It must be borne in mind that this proceeding was not resisted for the sake of Mr. Ransley and his family. Prior to this proceeding, Ransley says in his own hand-writing, about June 5th, that he received a letter from the defendant, advising him how to control himself during the examination, in which he says: "I shall have her present if she will go, for she can keep me still and silent, and not another soul can." This advice appears in a letter written by the defendant from New York, dated June 5th, in which she says: "Remember when having your examination, that silence is golden, so don't talk too much, and a still tongue is the sign of a wise head, I reckon; so don't offer too many explanations, or they will be used against you as they were before."

During this adjudication of sanity, Mr. Ransley sat between his wife and Mrs. Lathrop, of New York. While this examination took place under these peculiar circumstances we are bound nevertheless to treat the record as presuming sanity.

Sanity—not insanity, is the mental condition of every person. Those who allege insanity must establish it. *Overall v. The State*, 15 Lea. Tenn., 672; *Bishop on Mar. D. & Sep.*, sec. 1237.

In *Wheeler against The State*, 34 Ohio St., we find the doctrine as above stated. That was a criminal case in which the defendant relied on the defense of insanity, and to establish it, offered in evidence a record from the probate court, showing that four years previous to the commission of the crime, he had been adjudged insane and confined to the asylum. In this case Judge Okey, says: "And such condition of things as insanity of a party being shown, there is a presumption of more or less force, according to circumstances." The rule is the same, whether the insanity is temporary or confirmed. *State v. Wilmer*, 40 Wis., 304; *Medical College v. Wilkinson*, 108 Ind., 314; *Brook v. Townsend*, 7 Gill., 210; 11 *American Ency.*, 155; *Bishop on Mar. D. & Sep.*, sec. 1249.

It is admitted that the records of the probate court establish three important events in the life of Mr. Ransley during a period of eight months, to-wit:

First—That he was adjudged insane on the seventh day of March, 1891, and committed to Longview Asylum, and a guardian appointed to his person and estate.

Second—That he was adjudged sane, and his guardian discharged on the twenty-fourth day of August, 1891.

Third—That he was again adjudged insane on the fourth day of November, 1891, and a guardian appointed of his person and estate, and that he is now a hopeless lunatic.

It will be noticed that he was married on the twelfth day of June, 1891, at a time when he was under a decree of lunacy and guardianship. Under the law, as above stated, the presumption of insanity continued from the seventh day of March to the twenty-fourth day of August, 1891. During this time the marriage contract was entered into, and the marriage contract executed.

It is a well settled principle of law that those who claim that a marriage contract was entered into during a lucid interval must prove it. Bishop on Mar. D. & Sep., sec. 1239.

The evidence in this respect must be clear. Vol. 11, Am. Ency., 112; Gangwer's estate, 14 Pa. St., 417.

Guardianship is *prima facie* evidence respecting the disability of the ward, coupled with a decree of lunacy. Bishop on Mar. D. and Sep., secs. 1247-1249; Rennells v. Gerner, 80 Mo., 474; Wadsworth v. Sherman, 14 Barber, 469; Leonard, 31 Mass., 280.

The assent of the guardian of an insane person to a deed confers on the instrument no element of validity. Griswold v. Butler, 3 Conn., 231.

The sole remaining question is one of ratification. It is alleged in the answer that John Ransley being sane subsequently ratified, confirmed and consummated the marriage—acknowledged her to be his wife, lived and cohabited with her. In Waymire v. Jetmore, 22 Ohio St., 271, the court decide that a marriage contract entered into with an insane person rendering him incapable of consent is void *ab initio*. Assuming that insanity at the time of entering into the contract of marriage is established, the defendant insists that Mr. Ransley afterwards ratified it by consummating the marriage.

After a close examination of all the authorities cited, I have come to the conclusion that a contract of marriage entered into with an insane person may afterwards be ratified when the party is restored to reason. Bishop on Mar. D. and Sep., sec. 614 and 634.

In the cases of McDowell v. Sapp, 39 Ohio St., 562, and Holtz v. Dick, 42 Ohio St., 23, the court so expresses itself, while it is plain no question of insanity was before the court in either case.

A ratification is only complete when a party acts with a full knowledge of all material facts and circumstances touching the identical subject of ratification. Pittsburg Railroad Co. v. Gazzam, 32 Penn. St., 340; Combs v. Scott, 12 Allen, 493; Manning v. Gashaire, 27 Ind., 389; Humphries v. Harvey, 12 Minn., 298.

Keeping in mind the origin of the disease, its continuation and progress, his condition during the year 1891, and now, the evidence of both Ransley and his wife, six weeks after the marriage, that they had previous thereto agreed not to cohabit together; that about October 20, Mr. Ransley came to this city from New York a confirmed lunatic, and on the fourth of November, was adjudged to be insane; the complete knowledge of the defendant, of Mr. Ransley's mental condition, will it be contended that he was in fact restored to reason, or that he had capacity to ratify or consummate the marriage? There is no evidence of actual cohabitation, but strong testimony to the contrary.

The presumption of sanity fades before the great preponderance of testimony offered in the case. From the overwhelming weight of the testimony the conclusion is irresistible that John B. Ransley was insane at the time he entered into the marriage contract.

The plaintiff claims that the marriage contract was brought about through the procurement and undue influence of the defendant and



others. The conclusion we have reached renders it useless to pursue that branch of the case, and we will dismiss it with the remark, that this matrimonial alliance was pursued by the defendant, with the sink or swim, survive or perish determination to win at all hazards.

A decree will be entered annulling the marriage, and the appeal bond fixed at three hundred dollars.

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### ATTORNEY FEES—EVIDENCE.

249

[Superior Court of Cincinnati, May 6, 1892.]

EDMUND W. KITTREDGE ET AL. V. DAVID ARMSTRONG, REC'R, ET AL.

1. The nature and importance of the controversy, the novelty, intricacy and doubtfulness of the questions involved, the amount in controversy, the nature of the services, the standing of the attorneys in the profession for learning and skill and proficiency, and the result accomplished, are applicable on the *quantum meruit* to recover attorney's fees and may be considered.
2. The opinions of such witnesses are not to be substituted for the judgment of the jury.
3. The presentation of a claim for such services, although *prima facie* evidence limiting the amount, does not exclude evidence explaining the circumstances or showing the reasonable value of such services.

### CHARGE OF THE COURT.

HUNT, J.

Gentlemen of the Jury: This is an action in which the plaintiffs, Edmund W. Kittredge and Joseph Wilby, partners as Kittredge & Wilby, seek to recover a judgment against the defendant, David Armstrong, receiver of the Fidelity National Bank, for professional services rendered as attorneys at law, in the circuit court of the United States.

It is alleged that the defendant, David Armstrong, is now, and was at the time mentioned, the receiver of the Fidelity National Bank, formerly doing business in Cincinnati, Ohio; that he was appointed such receiver by the Comptroller of the Currency of the United States on or about June 27, 1887, and thereafter became duly qualified as such receiver, and entered into possession of its property and assets, and has ever since been, and still is, in possession thereof as such receiver, and engaged in the administration of the same in pursuance of the acts of Congress; that prior to September 19, 1887, the said David Armstrong, as receiver, requested and employed the plaintiffs, promising to pay them reasonable compensation for their services out of the said trust estate, as attorneys and counselors at law, to bring and prosecute on behalf and in the name of said David Armstrong, as receiver, a suit against the directors of the Fidelity National Bank, to recover against the directors, and each of them, in their personal and individual capacity, large sums of money which were claimed to have been by the negligence of the directors, lost from its assets and property, as is fully set forth in a certain bill of chancery on the nineteenth day of September, 1887, filed in the circuit court of the United States for the southern district of Ohio, western division, numbered 4054 on the docket of that court, and in which David Armstrong, receiver of the Fidelity National Bank,

was complainant, and Briggs Swift, William H. Chatfield, Henry Pogue, Eugene Zimmerman, and others, directors of the Fidelity National Bank, were respondents; that said suit was then and there brought, and thereafter prosecuted by the plaintiffs as attorneys and counsel for David Armstrong as such receiver.

It is alleged that such proceedings were had in that action as that on or about the month of April, 1890, a judgment was recovered therein in favor of David Armstrong as such receiver, against the respondents, in the sum of four hundred and fifty thousand dollars, and that all of said judgment had been paid into the trust fund.

It is claimed that during the management, care and prosecution of this cause, and by the recovery therein, said David Armstrong as receiver as aforesaid, for and on behalf of his said trust, became indebted in the sum of twenty-five thousand dollars to the plaintiffs for work, labor, care, diligence and attendance rendered by them as attorneys and counselors in and about prosecuting the said action in the circuit court of the United States; that the services of the plaintiffs rendered were and are reasonably worth that sum; that no part thereof has been paid; that due demand has been made for payment of the same, but payment has been refused.

The defendant by his answer admits that the plaintiffs are and were partners as attorneys at law, as averred in the petition; that he is and was the receiver of the Fidelity National Bank, and that he entered into possession of the property and assets, and has been and is in possession thereof as receiver, and that he is engaged in the administration of the trust; that he requested and employed the plaintiff, Edmund W. Kittredge, as attorney and counsellor at law, to aid the United States District Attorney for the southern district of Ohio, in bringing and prosecuting on behalf and in the name of the said David Armstrong as such receiver, a suit against the directors of the Fidelity National Bank; that said suit was brought by the plaintiff, Edmund W. Kittredge, as attorney and counsellor at law, to aid the United States District Attorney for the southern district of Ohio in bringing and prosecuting on behalf and in the name of the said David Armstrong as such receiver, a suit against the directors of the Fidelity National Bank; that said suit was brought by the plaintiff, Edmund W. Kittredge and such district attorney, and that it was thereafter prosecuted by the district attorney and the plaintiffs, Edmund W. Kittredge and Joseph Wilby, partners as Kittredge and Wilby, as attorneys and counsellors for said David Armstrong, as receiver for the said Fidelity National Bank.

It is admitted that the judgment was recovered against the respondents for which compensation was sought, and that there has been a demand for the payment of the claim, and the payment has been refused. This is followed by a denial of each and every other allegation in the petition. The answer admits the employment, so that the real question for the jury to determine is the extent and character of the services, and the fair and reasonable value of the services alleged to have been rendered.

The answer places in issue the material allegations on which the plaintiffs rely for a recovery. The burden of proof is upon the plaintiffs, and before there can be a verdict for more than a nominal amount under the state of pleadings, the jury must be satisfied by a fair preponderance of the evidence of two propositions; first, of the rendition of the services substantially as alleged; and secondly, the fair and reasonable

value of any such services, not in excess of the amount claimed in the petition.

It may be accepted as a rule of law that an action brought by an attorney at law to recover fees for professional services depends upon the same principles, and is governed by the same rules that apply to other actions brought to recover for services rendered in any lawful employment. In the absence of a special contract, the plaintiff is entitled to recover what his services are reasonably worth. It is conceded that there was no special contract in this instance, and a judgment is sought for what is recognized in law as the *quantum meruit*, that is, so much as the services may be worth, or for—a more literal translation—so much as it deserve. In a word, on the plea of *quantum meruit* the plaintiff must prove the performance of the work charged for, and that the charges are reasonable.

In estimating the value of the plaintiff's services, the jury should take into consideration the nature and importance of the controversy in which the service was rendered, the novelty, the intricacy and the doubtfulness of the questions involved, the amount in controversy, the nature of the services required of the lawyers, and their standing in the profession for learning and skill and proficiency in their employment together with the result accomplished. And the reasonableness of the compensation is a fact to be determined from the evidence like any other controverted fact.

The law permits persons familiar with the value of the services of a lawyer to give an opinion as to what they are worth, since no market value can be placed on such services. Experts, or witnesses shown to be skilled, learned or experienced in a particular art, science, trade, business, profession or vocation, or others of a like nature, may, in a proper case, give their opinion upon a given state of facts. This is known as expert evidence. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. The testimony of experts or professional witnesses is often very important, and justly entitled to great weight in a cause; the legitimate influence of such evidence is to enlighten and convince the judgment of the jury, but the jury cannot be required by the court to accept as a matter of law, the conclusions of the witnesses instead of their own judgment. It is the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance and the attending circumstances, and by applying to such services their own experience and knowledge of the character of such services. The jury may apply their own general knowledge and ideas to the facts in evidence in determining the weight to be given to the opinions expressed, for it is in that way alone that the jury can arrive at a just conclusion.

In estimating therefore, the value of the plaintiffs' services rendered in this case, the jury are not bound by the opinions of expert witnesses unless the jury shall find from all the evidence taken together, including the nature and extent of the services, the time occupied in the performance of them, the character and importance of the questions involved, the standing of the lawyers for proficiency and skill and legal ability, the results accomplished from the rendition of the services, that such opinions are correct. A knowledge of the value of professional services is not limited to professional men alone; and while great weight should

always be given to the opinions of those familiar with the subject, yet such opinions are not to be substituted for the judgment of the jury.

Some evidence has been introduced touching certain statements of the plaintiffs themselves, to the comptroller of the currency of the value of professional services rendered, and for which recovery is sought.

The presentation by plaintiffs in connection with the district attorney of a joint bill or charge of a gross sum for their services, there having been no payment or settlement of the same, if such should be the case, does not preclude plaintiffs from showing what their own services were reasonably worth, or from recovering a larger sum than that which was embraced and charged in such joint bill. The most that can be said of such joint bill is, that it contained an admission, and as such is *prima facie* evidence limiting plaintiff's claim to the amount therein agreed to be accepted, but such admission is in no sense binding, or such as to preclude plaintiffs from explaining the circumstances under which it was rendered, or from showing what they should reasonably be paid for their services.

It is the policy of the law to discourage litigation and to favor compromise. The court therefore excludes evidence relating to propositions for settlement without the intervention of the court.

If the jury find from the evidence that the claim for professional services rendered by the district attorney and Kittredge & Wilby was made out and rendered, and intended by the plaintiffs, as an offer of compromise, then the jury must disregard the bill, and the fact of its having been rendered. On the other hand, if the jury find from the evidence that such offer was not made and intended as an offer of settlement and to avoid litigation, then such claim, if the evidence shows that such claim was presented, may be considered by the jury, together with other evidence in the case, in estimating the value of the service upon which they rest a verdict.

It is the province of the court to determine the law; it is the province of the jury to determine the facts. It is not for the court to instruct the jury as to what part of the testimony before them shall control their verdict, but the jury must weigh all the testimony before them, decide as to its credibility, and as to the weight which should be given it in reaching a result. It is therefore proper for the jury in measuring the credibility of the witnesses to consider the manner of the respective witnesses in giving testimony, the opportunity the witnesses may have had for observation and to know the facts to which they testify, the apparent recollection or memory of the witnesses, the interest which any witness may have, if any, in the result of the controversy, the opinions of the experts and the reasons on which such opinions are founded, and indeed all the evidence which has been adduced, so that such weight may be given to it as it may be fairly and justly entitled to receive; and then, gentlemen of the jury, finally, it is your duty to return such a verdict free from every consideration as alone will be justified by the solemn obligations which you assumed as jurors in this case.

Paxton & Warrington, attorneys for plaintiffs.

Grosvenor & Jones, *contra*.

## JURISDICTION—COLLATERAL ATTACK.

265

[Miami Common Pleas.]

## \*I. S. ANTRAM v. W. E. TEN ECK.

The jurisdiction of the probate court to appoint an administrator by reason of his non-residence cannot be collaterally attacked, in an action of replevin brought by such time. The probate court has power to decide upon its own jurisdiction, and the appointment is conclusive.

DILLATUSH, J.

The plaintiff, as the administrator of A. S. Antram, late of Warren county, Ohio, deceased, brought suit in replevin to recover of the defendant certain personal property belonging to the estate of Antram. The defendant in answer denied that plaintiff was such administrator, because said A. S. Antram, at the time of his death, was a resident of Miami county, Ohio, and for that reason the probate court of Warren county had no authority to issue letters of administration for said estate.

To sustain this allegation of his answer, defendant offered parol testimony, to the admission of which plaintiff objected.

"The probate courts of this state are courts of record, competent to decide on their own jurisdiction, and exercise it to final judgment, and their records import absolute verity."

This is the language of the Supreme Court of Ohio in the case of Railroad Co. v. Belle Center, decided March 31, 1891, and reported in the 48 Ohio St., 273.

It is the very latest decision of the Supreme Court, touching the question. This decision is strictly in harmony with the earlier decision of the case of Shroyer v. Richmond and Staley, decided December, 1866, and reported in 16 Ohio St., 456. Paragraph six of the syllabus is as follows: "The probate courts of this state are in the fullest sense courts of record; they belong to the class whose records import absolute verity, that are competent to decide on their own jurisdiction, and to exercise it to final judgment without setting forth the facts and evidence on which it is rendered."

Paragraph seven is as follows: "Hence an order appointing a guardian, made by a probate court in the exercise of jurisdiction, cannot be collaterally impeached. The record showing nothing to the contrary, it will be conclusively presumed in all collateral proceedings that such order was made upon full proof of all the facts necessary to authorize it."

This language is clear, direct and emphatic; it would seem that it ought not to be misunderstood. What is jurisdiction? Judge Raney, in the case of Sheldon's Lessee v. Newton, decided at December term, 1854, and reported in 1 Ohio St., 494, says, "The power to hear and determine a cause is jurisdiction, and it is *coram judice* whenever a case is presented which brings this power into action."

Authority has been conferred upon the courts of probate in this state to grant letters of administration upon the estates of persons deceased within this state in certain cases.

To warrant the exercise of this authority the person must be deceased. He must have been an inhabitant of this state, and the letters

\*A contrary decision may be found in Gorman v. B. & O. Ry., ante 649.

must issue from the probate court of the county in which the deceased was an inhabitant or resident at the time of his death.

The probate court must determine these questions, and it being the tribunal expressly vested with authority to act in such matters, this act itself attaches jurisdiction.

Upon application for administration of A. S. Antram's estate being regularly made to the probate court of Warren county, Ohio, that court undoubtedly had the right to determine whether or not the allegations in the application for letters of administration were true.

Being a court competent to decide on questions of its own jurisdiction, and having exercised that jurisdiction, its records import absolute verity, and the validity of its acts cannot be brought collaterally in question. It is true that the fact of plaintiff being the administrator of A. S. Antram is a material fact. It is averred in the petition and denied in the answer. This puts plaintiff upon his proof. He produces the record of the probate court appointing him. Defendants seek to attach that record of appointment by parol testimony, showing a different state of facts from what the probate court must have found to appoint plaintiff such administrator.

That is the very thing which the courts say cannot be done. This brings me to the statement upon which defendant's counsel place so much stress, being the statement of Judge Williams in deciding the case of Railroad Company v. Belle Centre. The statement is as follows: "And it is not doubted that unless the probate court had jurisdiction over both the property and the parties, its judgment is void, and may be collaterally assailed."

This statement will be accepted as the law applicable not only to the probate court, but to every court. Jurisdiction is the foundation of all valid acts of courts. But accepting this as the law, how are we to determine in a collateral proceeding whether or not the probate court had jurisdiction. Not by the parol testimony of witnesses, nor the verdict of a jury, but by the record of the probate court itself. If that record discloses any fact which defeats the jurisdiction of the probate court, then the acts of that court may be assailed in the proceeding. Suppose that record showed that on a certain day application was made to the probate court of Warren county for letters of administration upon the estate of A. S. Antram, late an inhabitant or resident of Miami county, Ohio, and the court proceeded to issue the letters. Its proceeding would be void and could be collaterally attacked without impugning the verity of the record. My conclusions therefore are, that the testimony of witnesses as to the residence of A. S. Antram at the time of his decease is incompetent, and must be excluded.

Geo. Long, H. H. Williams, for plaintiff.

A. N. Byrnett, J. A. Kerr, for defendant.

## STREET RAILWAYS.

276

[Superior Court of Cincinnati, General Term, October, 1892.]

## CINCINNATI (CITY) V. MT. AUBURN CABLE RY. CO.

The council of Cincinnati passed an ordinance establishing street railroad routes in said city and the company obtained from the adjoining village of Avondale, the right to extend said route into the village.

It was further provided in the Cincinnati ordinances that the defendant should pay into the city treasury at the time of the commencement of the operation of said road, and annually thereafter on the first day of January, in advance, for and upon each car run by it, the sum of four (\$4.00) dollars per lineal foot, of every such car inside measurement. And in addition thereto, that the defendant should pay the city two and one-half per cent. of the gross earnings from every source of such company, to be applied to the cleaning and repairing of the streets wherein the tracks of said company existed. *Held:*

1. That the two and one-half percentage applied to all the earnings of the road, whether in the city of Cincinnati or the village of Avondale.
2. That the four (\$4.00) dollars per lineal foot, required to be paid, was in effect a license fee by the payment of which the company was granted the privilege for one year of running over its tracks the number of lineal feet paid for; and that no abatement could be made in such fee because said lineal feet of car ran less than twenty-four hours a day or less than three hundred and sixty-five days in the year.

SMITH, J.

This case has been reserved from special term upon a bill of evidence.

The substance of the petition is as follows:

That on June 25, 1886, the common council of the city of Cincinnati passed an ordinance establishing a street railroad route along Sycamore street over Mt. Auburn, to the north corporation line, to be known as Route No. 22 of Street Passenger Railways.

That on September 3, 1886, another ordinance was passed by said common council granting to the defendant, the Mt. Auburn Cable Railway Company, the right to construct, maintain and operate said Route No. 22.

That by sec. 7 of the ordinance establishing said route, it was provided as follows:

"The corporation, individual or individuals to whom such grant shall be made, shall pay into the city treasury at the time of the commencement of the operation of said road and annually thereafter on the first day of January in advance for and upon each car run by him or them the sum of four (\$4) dollars per lineal foot of every such car, inside measurement, and such payment shall be a condition precedent to the right to operate the road, and if not paid within ten (10) days after due, the mayor shall have the right summarily to stop the cars, and in the event of such stoppage, no liability for damage shall accrue. And in addition thereto such corporation, individual or individuals, shall pay under the same condition and subject to the same penalty into the city treasury quarterly, on the first day of January, April, July and October of each year, two and one-half per cent. of the gross earnings from every source of such company during the preceding quarter, to be applied to the cleaning and repairing of the streets wherein the tracks of said company exist, and the board of public affairs or common council shall at any time have the right of access to the books of the company by any

agent they may designate for that purpose in order to ascertain the amount of such gross earnings."

The petition then sets out the gross earnings of the road since its operation as claimed by the city, and alleges that the two and one-half per cent. therein have not been paid. And it further sets out the number of cars operated from year to year, the measurement of said cars by lineal feet, and the amount due therefor; and alleges that the amount paid thereon by said defendant has been but \$4,604, and that it has failed and refused to pay the whole or any part of the remainder of its indebtedness. The total amount sought to be recovered is \$12,024.10, with interest on different amounts, from different dates.

The answer of the defendant alleges that the ordinance under which it constructed and now maintains and operates its road provided for the construction and operation of a cable railroad from the corner of Fourth and Sycamore only to the north corporation line of said city, and no further, and that the two and one-half per cent. of the gross earnings to be paid quarterly for the right to construct and operate said road was limited to the route covered by said ordinance; that after said defendant had entered into its contract with said city in pursuance of the ordinance of September 3, 1886, it obtained from the village of Avondale by an ordinance dated November 13, 1886, an extension of said cable road, from its then northern terminus at the intersection of Burnet avenue and Shillito street, at the north corporation line of said city of Cincinnati, by double tracks, northerly on Burnet avenue in the village of Avondale, to Rockdale avenue, and thence easterly by double tracks on Rockdale avenue to Main avenue, and the further right of extending its said road on any street that might thereafter be dedicated, running west from Burnet avenue in Avondale to Zoological Garden. Defendant further says that it constructed said cable road over its whole route, as extended, from the corner of Fourth and Sycamore streets in Cincinnati, to the corner of Rockdale and Main avenues in Avondale, and has been operating the same as one continuous line since July 1, 1888; and that one-third of said line is in the village of Avondale, and was constructed and is now operated by virtue of said ordinance of extension.

Defendant further says that afterwards, in the year 1887, it constructed a single track on Northern avenue from Burnet avenue to the Zoological Garden, and has been operating it during six months of the year: This last route being wholly within the village of Avondale.

Defendant further says that its said cable road, partly within the village of Avondale, has been constructed and operated by virtue of two different ordinances; that fully one-third of said earnings has come from and on account of the operation of said road outside of Cincinnati, and by virtue of the Avondale extension; that the said several amounts claimed on gross earnings are upon the entire road, and branch, in Cincinnati and Avondale, and that the defendant is liable to the plaintiff only for two and one-half per cent. of the gross earnings that accrued on the Cincinnati part of the road; and that on the twenty-second of January, 1891 it formally tendered to Edwin Stevens, the then comptroller of Cincinnati, the sum of four thousand, four hundred and thirty-four 69-100 dollars (\$4,434.69) that amount being two and one-half per cent. upon two-thirds of the entire amount of gross earnings of its entire road up to the first day of January, 1891, which tender was then and there by it refused.



With reference to its liability for the number of lineal feet of cars run, the defendant denies that at the several dates named in the petition it ran the number of cars alleged by plaintiff, and that the lineal foot inside measurement is as therein alleged; denies that the car license payable by it is as therein alleged; and alleges that there is nothing due from it to the plaintiff on account of said lineal foot license.

The two and one-half percentage on gross earnings. It appears beyond dispute from the bill of evidence that the defendant was granted the right to operate a cable road in the streets of Cincinnati as alleged in the petition, and that at a subsequent date the village of Avondale, as alleged in the answer, granted the defendant the right to extend its tracks and cable into that village, and that the road, during the periods of time complained of in the petition, has been operated under these grants.

It also appears that the cable by which the cars are drawn is a continuous one, extending through the streets of the city of Cincinnati and the village of Avondale, running in a cast iron tube under ground, and operated by a stationary steam engine in Cincinnati, the cars being propelled by means of an iron grip attached to the car, and passing to the cable through a slot about an inch in width.

It also appears that in 1889 there was constructed a single track branching off from the main tracks in Avondale to the Zoological Garden, and that a single car was run over this track during about six months in each year for the purpose of carrying passengers to and from the Zoological Garden; that the car was not operated by or connected with the cable which carried the cars on the main line, but had for its motive power a small engine enclosed in itself.

As to the proportion which the length of the road in Avondale bears to the entire length of the road, there is a conflict of testimony. The plaintiff claiming that one-fourth, and the defendant that one-third of the length is in Avondale.

The first controversy between the parties arises over the construction of that proviso in sec. 7 of the ordinance of Cincinnati, and referred to in the petition, in which it is provided that the defendant shall pay "into the city treasury quarterly on the first day of January, April, July and October of each year, two and one-half per cent. of the gross earnings, from every source, of such company, during the preceding quarter, to be applied to the cleaning and repairing the streets, wherein the tracks of said company exist."

The plaintiff contends that the language of the proviso that the two and one-half per cent. shall be upon the gross earnings from every source, shall be construed to mean precisely what it says, and that no earnings of the road, whatever the source may be, are exempt from the burden of the two and one-half per cent.

On the other hand, the defendant contends that the language of the grant and all its conditions shall be construed with reference to its subject-matter—which in this case was a franchise to operate a road in the city of Cincinnati; that the earnings referred to therefore must be the earnings in the city of Cincinnati alone; and that in as much as the gross earnings set out in the petition include the earnings of the road in carrying passengers to and from Avondale, and the earnings in carrying passengers in the village of Avondale, that before the two and one-half per cent. burden is imposed upon the gross earnings there should be deducted therefrom those earnings which were made by reason of the

Avondale connection; and that the only equitable method of determining what those earnings amount to is to assume that every part of the line is of equal earning capacity, and in as much as one-third of the line is in Avondale, that one-third therefore of the earnings of the road are earned in Avondale, and are exempt from the two and one-half per cent. burden.

It is manifest upon the slightest reflection that notwithstanding the broad language of the proviso that the two and one-half per cent. are to be upon the gross earnings from every source, this language, can not be taken literally, and there must be a limitation to it. Otherwise the "corporation individual or individuals" to whom the right to construct and operate the road was given, would by the very acceptance of the grant subject their entire income whether in Cincinnati, or in Ohio, or in any other state or place, and whether derived from the road or not, to the imposition of this burden.

The limitation is one that must naturally suggest itself, and is found in those earnings which are derived by the grantee from the franchise granted to it. Whatever earnings of the road are attributable to the city's grant, and are made from a use of that grant, must bear the two and one-half per cent. burden.

It is contended by the defendant, that only those earnings from travel entirely in the city's limits are derived from the exercise of the franchise granted by the city. But is this a sound claim?

The franchise granted to the cable company is not merely to run its cars through certain designated streets, and to charge a car fare to passengers in such cars, but includes the additional right to lay in the streets, track rails of steel upon which the cars are to run, and the right to place a cast iron tube in the street between the car tracks, through which tube is drawn a wire cable, which, operated by means of a stationary steam engine, propels the cars which are attached to the cable by means of an iron grip, which passes through an open slot in the street to the cable in the tube.

Now, while it is true that the cable company when running its cars in the village of Avondale, is not using that part of the franchise granted to it by the city of Cincinnati which permits it to run its cars over its streets, yet it is also true that as the road is now operated with a continuous cable running through the streets of Cincinnati and Avondale and operated by a stationary engine in said city, that the cars could not run in Avondale unless the company used the franchise granted to it by the city of Cincinnati of drawing a cable through its streets.

The earnings, therefore, from Avondale travel, in all the cars except those on the Zoological Garden branch, are directly dependent upon and attributable to the Cincinnati franchise, and are therefore included in the terms of the grant, and subject to the two and one-half per cent. burden.

This conclusion finds confirmation, too, in the circumstances attending the making of the grant.

Thus, in the city ordinance of June 25, 1886, and that of September 3, 1886, it is distinctly provided that after the road is extended eastwardly on Shillito street to Burnet avenue, it shall not have the privilege of running northwardly on Burnet avenue to the north corporation line, unless the village of Avondale should extend the same rights and privileges over Burnet avenue as those granted in the ordinance.

The explanation of this provision lies in the fact that at the times of the passage of these ordinances the division line between Avondale and the city of Cincinnati ran through Burnet avenue, and that unless Avondale granted to the company the same privileges which were granted by the city of Cincinnati, the operation of the road along Burnet avenue would necessarily be embarrassed if not prevented.

To the extent, therefore, that the road was to pass over the Avondale portion of Burnet avenue, the grant did contemplate a running into Avondale and an earning of fares therein. And it is significant that the grant does not by reason of this fact provide for an apportionment of the earnings of the road, but regarded the earnings arising from travel on the part of the road within Avondale, as covered by the general provision, that the company should pay two and one-half per cent. on the gross earnings "from every source of such company." And if the road should for any reason be extended further into Avondale than along that part of Burnet avenue owned by such village, what evidence do we find in the grant that the policy of the city to impose a tax upon the gross earnings from every source is to be changed? We can discover none. And in view of the circumstance just alluded to, we think the burden of establishing such a change of policy is upon the defendant.

Another circumstance attending the grant which tends to confirm the construction of the plaintiff, is the character of the country through which this road ran. Although there is no evidence in the record upon this subject, yet none is required, because the court takes judicial notice of the general nature of the territory within its jurisdiction. And taking such judicial notice of the country through which this road runs after it reaches the hill top, we feel justified in concluding that while no further extension into Avondale than along Burnet avenue is mentioned in the grant, yet that a further extension into that village, must have been contemplated by the parties at the time the grant was made; because such further extension from the very nature of the country through which the road passed, would be suggested by an enlightened self interest. And the passage of the ordinance by the village of Avondale, on November 13, 1886, a period of only two months after the ordinance of the city of Cincinnati had been adopted, is confirmatory of this conclusion.

Now, if it is reasonable to infer that at the time the city of Cincinnati made this grant the parties to it contemplated an extension of the line, is it not also reasonable to infer that if any apportionment of gross earnings was to be made, some reference to it would be found in the grant, and not the broad language used, that the tax was to be upon the gross earnings "from every source."

It is contended by counsel for the defendant that the requirement in the city ordinance granting the franchise that the percentage from gross earnings should "be applied to the cleaning and repairing of the streets wherein the tracks of said company exist," is in itself an indication of the purpose of the ordinance to levy the percentage upon the gross earnings only in the city, because it is only the operation of the cars over the tracks in the city that would tend to make unclean the streets of the city, or to put them out of repair.

But is the assumption upon which this contention is based, a correct one? Is it only the operation of the cars upon the streets of the city that tends to make them unclean, or to put them out of repair?

So far as the cleanly condition of the streets is concerned, while it is materially affected by the operation of horse cars, it is so little affected by the operation of a cable line, that it becomes in the latter case an entirely unimportant consideration.

So far as the keeping of the streets in a condition of repair is concerned, the operation of a line of street cars affects it in several ways. If the motive power of the cars is horses, the travel of the horses upon the streets constitutes a constant factor in wearing out the streets between the tracks; but if the motive power is not horses, or if it is, the presence of the tracks in the street has in three ways a positive tendency to unsettle the paving of the streets. First: By the travel of the cars themselves over the tracks, which travel constantly tends to loosen the tracks and the street where it adjoins them. Second: By the obstacle to travel which the tracks present, which being constantly struck by passing vehicles, are gradually loosened, and the street, where it adjoins them thrown out of repair. And in the case of a cable road, this obstacle, by reason of the slot rails between the tracks, is greater than where horses are the motive power. Third: By the increased travel which the presence in the street of car tracks naturally throws upon those portions of the street upon each side of the car tracks.

Now, in the case of the defendant's line it is true that when the cars are in Avondale they are not disturbing the condition of the streets of Cincinnati, by travelling upon the tracks laid in the city; but it is also true that the tracks still remain in the streets of Cincinnati, and that the other tendencies to throw the streets out of repair, which are created by their presence, are certainly at work.

The contention of the defendant, therefore, that the purpose of collecting the percentage upon the gross earnings is solely to keep the streets of the city clean and in repair, and that the operation of the cars in Avondale does not affect the condition of the streets, and therefore the percentage is not intended to bear upon the earnings in Avondale, is found to rest upon a false assumption, and is therefore untenable.

The defendant by way of authority, in support of its contention, has cited the case of the Baltimore Union Passenger Railway Company v. Baltimore, (71 Md., 405), secs. 2774, 2776, Rev. Stat. of Ohio; and the following cases decided by the United States Supreme Court: The Delaware R. R. Tax Case, 18 Wallace, 208-231; Erie R. R. v. Pennsylvania, 21 Wallace, 492; The State R. R. Tax cases, 92 U. S., 608-611; The Western Union Telegraph Co. v. Massachusetts, 125 U. S., 630-552.

In the case of the Baltimore Union Passenger Railway Company v. Baltimore, *supra*, the street railroad company tracks were partly in the city limits and partly beyond them, and one fare entitled the passenger to ride over the entire length of the line. The ordinance of the city granting the franchise, provided that the "company should pay the city register for the use of the Park Fund, 12 per centum of the gross receipts accruing from passenger travel within the city limits."

"It was held that in the absence of a more accurate basis of calculation, the greatest sum to which the defendant was entitled as a deduction of its total gross receipts from passenger travel during that period, embraced in this suit in respect of the passenger travel outside the city limits, was that sum which bore the same proportion to the said total gross receipts as the number of miles travelled by said cars outside the city limits, bore to the total mileage travelled by said cars."

But we think the terms of the grant in this case so distinguishes it from the present case, that a mere reference to such language is all that is required to show the inapplicability of that case as an authority to the present case. In that case the grant distinctly declared that the percentage to be paid by the company, was only upon "the gross receipts accruing from passenger travel within the city limits," while in this case the ordinance declares that the percentage is to be upon the "gross receipts from every source."

Another important distinction between that case and the present one, is that in the former case horses furnished the motive power, and the cars outside of the city were run without using the franchise granted by the city; while in this case, as we have seen, the cars outside the city limits can not be run without the defendant company availing itself of the franchise granted by the city of running a cable through its streets.

The sections of the Revised Statutes cited by counsel for the defendants, and to which reference has been made, are those which relate to the taxation of railroad companies whose lines run through different counties of the state, or whose lines are partly in this state and partly in another, and which provide for an apportionment of the taxes to be collected. The decisions of the United States Supreme Court are those in which the constitutionality of such legislature is upheld.

While it is true that railroads running through different counties and states have one feature in common with the defendant cable road, viz.: that they run through land lying in different and distinct jurisdictions; yet this common feature is not in itself sufficient to authorize us to declare that the policy of taxation which is adopted with reference to them, shall be declared to have been the intention of the contracting parties to this ordinance with reference to the two and one-half percentage; because the two cases have so many and such radically dissimilar features that the two classes of cases are not analogous.

First—The one case deals with a tax levied by the state under its power of taxation, and may be changed at any time, as it is imposed without the assent of the railroad company. But the percentage in this case is the result of a contract between the city and the cable road, and its meaning is to be determined, not by some vague sense of equity, derived by the tax laws of the state, but by a proper construction of the language of the grant.

Second—The steam railroads usually are the owners of their road-bed, do not run through the streets of a city, and generally speaking, do not, by their operation, necessitate a constant repairing of the streets.

Third—A steam railroad like a street railroad which has horses for its motive power, does not, as the cable road, while running its cars in one jurisdiction, find it necessary to exercise a franchise granted in another.

For the reasons stated, our conclusion therefore is that the two and one-half percentage rests upon all the gross earnings of the road, and that those earnings which arise from travel to and from, and within Avondale, are not to be excepted therefrom.

The earnings from Advertising Privileges. Another point of controversy between the parties to this cause is as to the right of the city to include the earnings from advertising privileges in the gross earnings upon which it may collect the two and one-half percentage. These earnings arise from rentals from the privilege granted to advertisers of hav-

ing their signs carried in the cars in such a way as to attract the attention of the passengers without interfering with their comfort. The line of reasoning which we have followed with reference to fares collected on the road would apply equally well to the earnings from advertising privileges, and in our opinion such earnings fall within the comprehensive language of the grant, "gross earnings from every source." The two and one-half percentage therefore is imposed upon them.

The Branch to the Zoological Garden. The fact that a branch road runs from a point on Burnet avenue to the Zoological Garden, has been previously referred to. It appears from the evidence that the street over which this branch road runs, has been within the corporate limits of the city of Cincinnati, since 1888, although the dedication of the street was not accepted by the city until 1890. During the operation of this branch line, therefore, it has been in the city of Cincinnati.

The evidence also discloses that but one car, a "dummy," so called, and not drawn by the cable, runs over this branch during only four months of the year, and then almost entirely during two evenings of the week, and that the purpose in operating this branch is to enable those who wish to go to the Zoological Garden, to do so by travelling upon the line of the defendant company. In other words, the right to travel on the branch road is a privilege which is accorded to passengers upon defendant's line, and which they may avail themselves of or not as they may deem best, and does not require the payment of any additional fares.

If any fares were collected by the company solely for rides upon this branch line, the evidence does not disclose the fact, and we should judge from the character of the country through which the road runs --an open country, with no houses on either line--that if any such fares were collected they must have been so few as to warrant us in the application of the principle *De minimis lex non curat*.

But if any such fares had been collected it was within the power of the company to have kept a separate account of them, and if it has failed to keep such separate account, and thus to enable the court with some degree of accuracy to determine what amount should be deducted for this travel from the gross earnings, the fault lies with the company, and not with the city, and no deduction can be allowed therefor.

Earnings prior to July 1, 1888. There appears to have been an omission of the company to pay the percentage upon its earnings prior to July 1, 1888. The testimony of the president of the road is that the road began operations to the power house in March, 1888, and began to run through to Avondale, about June 8, 1888. We are clearly of the opinion that the company is indebted to the city for the two and one-half percentage upon the amount of gross earnings thus omitted.

Tender of Payment. The testimony shows that on January 22, 1891, several years after the payments for percentage became due, the company for the first time, made a tender of payment. The amount thus tendered was two and one-half per cent. on two thirds only of the gross earnings, because of its claim that one-third of the road being in Avondale, one-third of the gross earnings were exempt from the percentage. The city by its proper officers declared a willingness to accept such payment, and give a receipt therefor on account, but the tender was made only on the condition that the city officers would give a receipt in full. As the amount tendered was less than the amount due, the condition attached that the receipt should be in full, was without any warrant of

law, and the tender was not good. *State Railroad Tax Cases*, 92 U. S., 617.

**Car License Fees.** The next question is as to the car license fee payable by the company, and involves the construction of the following language of the ordinance:

"The corporation, individual or individuals, to whom such grant shall be made, shall pay into the city treasury at the time of commencement of operation of the road, and annually thereafter on the first day of January, in advance, for and upon each car run by him or them, the sum of \$4 per lineal foot for every such car, inside measurement, and such payment shall be a condition precedent to the right to operate the road."

The constructions for which the parties respectively contend are clearly, and fairly stated, we think, in the brief of the corporation counsel. He says, "the company makes two conflicting claims. Counsel for the company in their brief claim, in the first place, that the above clause of the ordinance means that the company shall pay car license on the basis of the number of cars operated on the first day of January of each year, and that it may put on additional cars during the year at any time after the first day of January, without the payment of additional license fees. Secondly, it is claimed in the brief of counsel for defendant, which also cites the testimony of the secretary of the company that the company need not pay a license on the whole number of cars operated by it at any time during the year, but that taking sixteen hours as the average day's running of the cars, it may calculate license fees upon that basis, and that any cars running a less number of days than 365 per year, or a less number of hours than sixteen per day, should pay only a proportionate sum; for instance, a car running only four hours per day, would pay according to that plan only at the rate of one dollar per lineal foot inside measurement, and if said car ran only one-fourth of the number of days of the year, it would pay only at the rate of one-fourth of one dollar, or twenty-five cents per lineal foot inside measurement. That is to say, they read the ordinance to mean that four dollars per lineal foot, inside measurement, of each car shall be paid if the car runs 365 days of the year, and sixteen hours per day, and if it runs a less number of hours, the basis of payment shall be proportionate.

"On behalf of the city, we claim that the car license fee must be paid in advance for each foot of the car, inside measurement, which the company desires permission to run; that it is not the number of cars, but the largest number of feet of cars, inside measurement, which the company will operate at any one time upon which the company must pay license fees at the rate of four dollars per annum. In other words, we claim that the company's license is, for instance, a permission to operate one hundred feet of car, inside measurement, up to the first day of January next ensuing, and as soon as the company desires to operate more than one hundred feet at any time during the year, it must first get permission by the payment of a license at the rate of four dollars per foot for each of such additional feet."

The first claim of defendant that the payment for the year is to be determined solely by the number of cars run on the first of January rests entirely upon a strict and literal reading of the language of the ordinance, without regard to any public policy to be subserved by this provision.

It is based upon the assumption that the first of January is not merely a date fixed for payment because it is the beginning of a new year, but is an arbitrary date selected as a fair example of the coming year, and that the number of lineal feet of cars run upon that day is to conclusively determine the amount which is to be paid for the entire year.

We are, however, of the opinion that this construction of defendant is not even sustained by a strict and literal reading of the language of the ordinance. On the contrary, we are of the opinion that the commencement of the operation of the road and the first of January are merely points of time at which payment is to be made for the year, and that the requirement of the ordinance is that the company must, at those points of time, declare its purpose as to the number of lineal feet of cars it intends to run.

If we turn to the general street railway ordinance of February 7, 1879, whose terms and conditions and amendments are, by sec. 8 of the ordinance under examination, declared to be applicable to this ordinance, except so far as they are inconsistent therewith, we shall find in its provisions as to car license fees, a complete refutation of defendant's theory. Section 11 of that ordinance is almost identical with the corresponding section of the Mt. Auburn Cable Road Ordinance, and the latter was, no doubt, taken from it.

In that section (11) it is declared that:

"The owner of each street railroad shall pay into the city treasury at the time of acceptance, and annually thereafter on the first day of January, in advance, for and upon each car run by him, the sum of four dollars per lineal foot of every such car, inside measurement, etc., etc."

The acceptance referred to in this ordinance is the acceptance of the grant to construct and operate the road, and is required to be filed in writing within thirty days after the final passage of the ordinance granting the right (sec. 4) and the owner is not entitled to begin even the construction of the road until this acceptance. At the time of the acceptance therefore, no cars can possibly be in operation, and the requirement that the payment for the year shall be made in advance at the time indicates conclusively that these periods of time are mere periods of payment at which time the company is called upon to declare as to the lineal feet, inside measurement, it proposes to run during the year.

There is, too, a principle of construction, with reference to statutes, that will apply quite as well to ordinances that would forbid such a construction as is contended for by plaintiff. The principle is that:

"It is the plain duty of the courts in the interpretation of a statute unless restrained by the rigid and inflexible letter of it to lean most strongly to that view which will avoid absurd consequences, injustice, and even great inconvenience; for none of these can be presumed to have been within the legislative intent." *Moore v. Given*, 39 Ohio St., 663.

Now, if the number of cars operated on the first day of January is to determine the payment, then it is within the power of the company to defraud the city by running very few or very small cars on the first day of January, and then increasing the number or size of the cars during the year without the payment of an additional license fee; and to repeat this practice from year to year. And if for any reason, through accident or design, no cars are run upon the first of January, the defendant company, under the construction of plaintiff, would be at full liberty



to use the streets at its pleasure for the next year without the payment of any license fees. We can not adopt such construction because we can not believe it would properly express the intention of the parties to this grant.

We come next to the other construction of defendant, viz.: That the payment of the license fee of four dollars a lineal foot entitles the company to run a lineal foot of car thus paid for over its tracks for three hundred and sixty-five days a year, and for sixteen hours each day, and if at the beginning of the year the company was able to declare that it would not run this lineal foot for three hundred and sixty-five days, or for the entire sixteen hours on each day, then it is entitled to a proportionate reduction, or if it finds at the conclusion of the year that it has run more lineal feet of cars or for a greater period of time than it had contemplated it is entitled to recover the excess thus paid from the city.

If the ordinance had intended that the license fee should be graded, as plaintiff contends, we should certainly have found prescribed in the ordinance, a standard number of hours for a day, and a standard number of days for a year; whereas, on the contrary it says that for and upon each lineal foot operated upon the road, a certain payment shall be made.

Furthermore, as the payment is required to be made in advance, and as it is impossible to foresee for a year the exact number of hours that each car would run, the payment in advance would be at best but an approximation. At the end of each year it would be necessary to have an accounting between the city and the road in which accounting every influence that interrupted or increased the travel on the road would necessarily have to be considered. A snow storm, for instance, which interrupted travel, or the breaking of a cable would be a source of loss to the city of Cincinnati, and any public gathering in the city which increased the number of hours of travel on the road would be a source of income to the city.

Certainly, so far as the parties hereto are themselves concerned, there is no evidence that either one of them ever thus construed the ordinance; for there is no evidence that the company ever offered at the close of the year, to pay more than it had on the first of January, or ever made any demand upon the city for a refunder for any part overpaid.

Our construction of this provision of the ordinance therefore is that the payment of the license fee is a condition precedent which is required of the company to enable it to secure the privilege of running upon the streets of the city the number of lineal feet of cars thus paid for; that the company is not compelled to run the same car or cars at all times, but may change at will the particular car or cars run, provided there is not operated on the road more lineal feet of car than is paid for on the first of January preceding; and that if the company, having paid in advance a license for a certain number of lineal feet, fails to exercise its privilege, it must bear the loss and the city is not concerned with it; and if the road puts in operation during the year more lineal feet of cars than it had paid for on the first of January, it must pay to the city for this purpose at the rate of four dollars per lineal foot for such extra feet so operated.

This construction is in harmony, too, with the policy of the city in reference to other licenses. (See Russell License Law, 2672-1, Rev. Stat.) and is the only one that is definite, practical, and fair to all concerned.

It has been urged by counsel for the defendant that whatever construction may be given, this ordinance, with reference to the payment of license fees, an abatement of at least one-third should be made in this case, because that proportion of its line is outside the city limits.

But this contention overlooks the fact that the payment is for a license to operate the cars upon the streets of the city. If the company sees fit not to exercise its privilege to the extent it might, but during a part of each trip runs its cars beyond the city's limits, and into Avondale, this circumstance does not entitle it, for reasons we have previously stated, to any rebate of its license fee.

As to the number of feet operated by the company in 1888, 1889, 1890 and 1891, we are of the opinion that the evidence of the city is not sufficient to disturb the payment of the company in this matter for the year 1888, so far as the number of cars run is concerned, but that the manner of estimating, the proper number of feet is incorrect, and that for the years 1889, 1890 and 1891, the company should pay annually upon fifteen trains of two cars each.

As to the length of the coach and grips we are of the opinion that the measurements of Harter and Johnson should be accepted for the purposes of this case.

An entry may be drawn in accordance with the principles herein laid down.

HUNT and MOORE, JJ., concur.

Theodore Horstman and John Galvin, Corporation Counsel, for plaintiff.

Smith & Martin, for defendant.

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## APPEALS.

[Hamilton Common Pleas.]

IN RE SIMPKINSON.

1. There is no flexibility to the statute requiring that bond for appeal from the probate to be in double the amount where money is ordered to be paid.
2. The statute applies to appellants, other than those to whom the order to pay was directed.

EVANS, J.

The case before the court was the proceeding that had been instituted in the probate court by the unsecured creditors of Simpkinson & Co., to have set aside the preferential chattel mortgages given by that firm immediately before executing a general assignment for the benefit of their creditors. In the probate court, Judge Ferris, following the decision of the Supreme Court, had sustained the mortgages. Appeals were taken, and the bond under each appeal fixed by Judge Ferris at \$250. A little later came the Cross v. Carstens decision in the Supreme Court, in which it was held that original affidavits must be attached to copies of chattel mortgages filed in another township. Copies of the Simpkinson mortgages were filed in Delhi township, the residence of the partners; and it is claimed by the unsecured creditors that the affidavits attached to these copies were not originals. It was this question which counsel for the unsecured creditors expected to try before Judge Evans, when they were met by the motion to dismiss their appeal.

The ground of the motion to dismiss was inadequacy of the bond of \$250.00 given in each case. Section 6408 provides that whenever bond is given under an order to pay money, the bond must be in double the amount of the judgment. It was contended by counsel for the unsecured creditors that it was their desire to give a good bond, and that the amount of the bond which they did give was fixed not by themselves, but by the court, and was given within the statutory time. But Judge Evans held that there was no flexibility to the statute requiring that the bond must be in double the amount where money is ordered paid, and that this statute applied to the appellants, notwithstanding the order to pay money in this case was not directed to them.

The amount of the mortgages as to which the appeals were taken, aggregate about \$78,900. The effect of this ruling, should nothing further be done on behalf of the unsecured creditors, would be to establish the validity of the mortgages without reference to the question as to the nature of the affidavits attached. But counsel for the unsecured creditors have already filed a motion for leave to increase their bond and perfect their appeal.—[Editorial.

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### RAILWAYS—SAFETY GATES.

299

[Police Court of Cincinnati, 1892.]

#### STATE OF OHIO v. HEUBACH.

A city has no power to compel a railroad company to maintain safety gates, under sec. 2500a Rev. Stat., at street crossings, other than those where there is a switching and coupling of cars.

GREGG, J.

The defendant, Heubach, is an engineer in the employ of The Cincinnati & Westwood Railroad Co., and it is charged that on or about the twenty-third day of July, 1892, he crossed Harrison's Pike where the tracks of said railroad company intersect the same, with a locomotive and cars, there being no safety gates at said crossing, and there being no watchman at said crossing. This, it is claimed by the prosecution, is contrary to an ordinance of the city. It is admitted by the defendant that he did as charged in the affidavit, but he claims in defense that the Harrison avenue crossing is not such a crossing as is contemplated by the statute authorizing the ordinance. The ordinance in question provides that the Cincinnati & Westwood Railroad Co. be required to construct and maintain safety gates at the intersection of its railroad tracks with Harrison avenue, and to place and maintain a watchman at said crossing. Section 2 of the ordinance provides that any officer, agent, employee or servant of said railroad company who crosses said Harrison avenue with a railroad locomotive or car, without such safety gates being at said crossing, and without there being a watchman at said crossing, shall be deemed guilty of a misdemeanor.

It is well settled in this state that municipal corporations have such powers and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted. Our courts restrict rather than enlarge upon these powers.

The powers expressly delegated to the board of legislation, by sec. 2500a (from which the ordinance in question derives its authority), are to provide by ordinance against the obstruction, use or occupancy of any street or public highway, with any locomotive, car, cars or train, by any railroad company, superintendent, agent or other employee thereof, either directly or indirectly permitting or suffering such locomotive, car, cars or train to remain upon or across such street or public highway, or any part thereof, or by coupling, switching or shifting of locomotives, cars or trains, or the making up of trains upon or across such street, highway, or any part thereof, or by moving or stopping of trains upon or across the same for a period longer than two minutes at one time; to prevent (by ordinance) such obstruction, use or occupancy of any such street or other public highway by any railroad company, superintendent, agent or employee thereof, either directly or indirectly, for a period of ten minutes after the same has been once so obstructed, used or occupied for such period of two minutes, so as to guarantee to the public the exclusive use of such street for ten minutes thereafter, and to require any railroad company so using such street or public highway for said period of two minutes, to provide and maintain bars and gates, and a watchman at such street or other crossing or warn the public against the danger attending such use.

Limiting the operation of the ordinance therefore to the power expressly granted by statute, it must follow that railroad companies may be required to maintain safety gates and watchmen only at such streets or other crossings as are used or crossed by the railroad company in switching, coupling and shifting their cars, trains and locomotives, or in making up their trains, for a period of two minutes at one time.

It appears from the testimony that the Harrison avenue crossing is not such a crossing; neither is it used as provided for in the statute.

The case must therefore fail for want of proof, and the defendant will be dismissed.

Decided August, 1892.

A. D. Shockley, for the railroad company.

Prosecuting attorney, *contra*.

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## DEVISE.

[Superior Court of Cincinnati, General Term, November, 1892.]

LEWIS M. DAYTON ET AL. V. SARAH PHILLIPS ET AL.

P. devised two-thirds of his estate to his executors in trust, and provided for the disposition of one-third of said two-thirds as follows:

"My said trustees shall from time to time pay over one-third of the net income arising from the said two-thirds of my estate, to my son George during his natural life, and at his death to his children or the survivors of them, in equal shares during the natural life of each of them. In the case of the death of either of the children of my son George without lawful issue the share of such child shall go to his brothers and sisters during their lives, and to the issue, if any, in fee of any that may be dead; and in case of the death of all of said children without lawful issue, then the said share shall be held by said trustees in trust for the same purposes as hereinafter provided for the remaining two-thirds. But in case of the death of either of said children of my son George leaving issue, such issue shall receive as owner in fee the share of said trust fund of which said child had the income."

P. died in March, 1870, leaving his son George and five of the children of George surviving him. M. the last child of George, was born in September 1, 1870. George died in 1873. *Held:*

1. That inasmuch as there was a possibility that George might have children conceived and born after the death of the testator, there was a possibility that the vesting of the estate might be suspended beyond the period of a life or lives in being and twenty-one years; and such possibility made the devise as to the personalty void under the common law against perpetuities, not only as to such after-conceived and born children, but as to all the children of George. Because under the common law, a devise to a class, some members of which may possibly not take within the prescribed period, is wholly void.
2. That as to the realty, the above rules of the common law were abrogated by sec. 4200, Rev. Stat., which has no reference to time, and only avoids devises to persons who are not either in being, or who are not the immediate issue or immediate descendants of persons in being at the death of the testator, and that inasmuch as all the children and grandchildren of George were among the class empowered by sec. 4200 to take, the devise as to them was good.
3. That M., being in his mother's womb at the time of the death of the testator, and it being to his interest to be considered alive at such time, he will in contemplation of law be so considered.

SMITH, J.

This case has been reserved to general term upon a bill of evidence.

The plaintiffs as trustees under the will of Thomas Phillips, deceased, seek the permission of this court to dispose of a valuable piece of real estate in the city of Cincinnati, and make all the heirs of said Thomas Phillips, deceased, a party to the proceeding. Among such defendants are the children and grandchildren of the testator's son George. They contend that the trust of plaintiffs with respect to said piece of real estate has terminated, and pray, therefore, that they may be declared to be the owners in fee simple of the same, and that said trustees shall be directed to convey to them in fee simple the portion of said estate to which they may be entitled, and that such accounting, settlement and division of said estate be had as they are legally entitled to have.

The contention of the parties is not for any construction of the will of Thomas Phillips; because the will, in so far as it relates to the trust created for the benefit of George Phillips and his issue, is clear and free from ambiguity. The question raised is: Whether that trust is to any extent a violation of the Ohio law against perpetuities; and if so, to what extent?

Thomas Phillips died on the — day of March, 1870. In his will he first made provision for his wife. He then devised one-third of his estate absolutely to his son George, and his daughters Nellie and Kate. The remaining two-thirds he devised to trustees with certain powers with respect to the alienation of the same. The income from this trust estate is provided for in item 3, clauses 3 and 4 of the will.

These clauses are as follows:

3. "My said trustees shall from time to time pay over one-third of the net income arising from said two-thirds of my estate, to my son George during his natural life, and, at his death, to his children or the survivors of them, in equal shares during the natural life of each of them. In the case of the death of either of the children of my son George, without lawful issue, the share of such child shall go to his brothers and sisters during their lives, and to the issue, if any, in fee of any that may be dead. And in case of the death of all of said children, without lawful issue, then the said share shall be held by said trustees in trust for the same purposes as hereinafter provided for the remaining two-thirds.

But in case of the death of either of said children of my son George, leaving issue, such issue shall receive as owners in fee, the share of said trust fund of which said child had the income.

4. My said executors shall pay over to each of my daughters Nellie and Kate during the natural life of each of them, one-third of the net income arising from said two-thirds, for their sole and separate use, free from all control of their husbands, so that they shall not sell, mortgage or otherwise dispose of the same by way of anticipation. In case of the death of either of my said daughters, the said trustees shall transfer the share of such daughter to her issue in fee, if any survive her; and in case she shall leave no issue, they shall hold the same in trust for my three surviving children, or transfer the same to their issue according to the same limitations as has been herein provided for the portions devised to said trustees for the said surviving children or their issue."

The trust created by clauses 3 and 4 therefore, is:

1. To pay the income to his son George during his life.
2. Upon his death, to pay such income to his children or the survivors of them during their natural lives.
3. Upon the death of any of such children with issue, to pay the principal of that child's share to such issue.
4. Upon the death of any of such children without issue, to divide such share into portions equal in number to the children of George then living, and those then deceased leaving issue then living; to give to each such stock of issue of deceased children its share of the principal, and to pay the income of each other share to the child during its life, with remainder over on death as with reference to the original shares.
5. Should all of George's children die without issue, the remainder in trust to the trustees under clause 4, of item 3, upon the trust therein named.

In the solution of the questions raised in this case, it is important to bear in mind the following facts:

Thomas Phillips, the testator, died in March, 1870. George Phillips survived his father, and died March 3, 1873, having had six children, five of whom survived their father. The last child born to George Phillips was Maurice Dudley Phillips, born September 19, 1870, a period of about six months after the death of the testator, Thomas Phillips. At the time of such death, therefore, Maurice Dudley had been conceived, and was *en ventre sa mere*.

The claim of the heirs of George Phillips, is that inasmuch as the absolute right to the personal property and the ultimate vesting in possession of the fee simple of the real estate is suspended during the lives of George Phillips and of his children, and inasmuch as George Phillips survived the testator, and might by possibility have had children, conceived and born after the death of the testator, the common law rule against perpetuities, viz., that a limitation restraining the ultimate vesting cannot extend beyond a life or lives in being and twenty-one years thereafter, is violated; and that the only way in which the intention of the testator can be effected is to vest the fee simple in the children of George Phillips, instead of his grandchildren.

The claim of the trustees as to the rights accruing under item 3 is that the common law rule above mentioned is not the law of Ohio, either as to personalty or as to realty; or that if such rule is still applicable to personalty, it is certainly not applicable to realty, because the Ohio statute against perpetuities has no reference to time, but only avoids devises

to persons who are not, either in being themselves, or the immediate issue or descendants of persons in being at the time of the making of the will; and that the devise to George Phillips for life, and to his children for life, and to their children in fee is good, so far as those children of George Phillips are concerned who were alive at the death of the testator, Thomas Phillips; and as all of George Phillips' children were alive at such time (including Maurice Dudley Phillips, who was *en ventre sa mere*, and therefore alive in contemplation of law), the trust can be carried out as Thomas Phillips intended.

It is undeniable that if the common law rule against perpetuities is in force in this state, both as to realty and to personalty, the trust which the testator attempted to create is illegal and fails; because the rule, as stated by Gray, in his work on Perpetuities, sec. 201, is that:

"No interest subject to a condition precedent, is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest."

And as the condition upon which the fee simple in this case is to vest is the death of the children of George Phillips, and as at the time of the death of Thomas Phillips, George Phillips was living and might thereafter have had children, it might occur that the fee would not vest until the death of such an afterborn child of George Phillips when more than twenty-one years and a life in being had expired since the death of the testator. See also *Jee v. Audley*, 1 Cox. Chan., 824.

Our first inquiry therefore necessarily is: Is the common rule above referred to, in force in Ohio at the present time?

The question depends for an answer upon the effect to be given to sec. 4200 of the Rev. Stat. The law embodied in this section was doubtless taken from a similar law purchased in 1784 by the state of Connecticut, and was passed in 1811, and has remained unchanged to the present time. It is as follows:

"No estate in fee simple, fee tail, or any lessor estate in lands or tenements lying within this state, shall be given or granted, by deed or will, to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail."

We do not think that any argument other than the mere reading of the statute itself is necessary to conclusively show that this statute, whose "only object was to prevent the creation of perpetuities and impolitic clogs upon the *jus disponendi* of real estate" (*Turley v. Turley*, 11 Ohio St., 180), and to define the limits beyond which estates could not be entailed, has distinctly empowered the persons named in the statute to receive devises of real estate, and that any rule of the common law which impairs such power to accept devises, is to that extent, abrogated in this state.

In *McArthur v. Scott*, 113 U. S., 382, the difference between the principle upon which the common law rule was based and that upon which our statute is based, was clearly pointed out; and what is there said is at present the highest and best authority upon that subject.

In that case the scheme of the testator, generally speaking, was a devise of all his lands and personal property to his executors in trust, to hold for division until his youngest grandchild, who should live to be twenty-one years of age, should arrive at that age, with provisions as to

who should inherit in case any of his grandchildren should die before the final decision, leaving children.

The court held that the scheme of the testator did not violate the common law rule previously referred to with reference to perpetuities, and therefore it was not necessary to consider whether that rule is in force in Ohio. But in the course of the decision, the court said:

"Under the common law rule against perpetuities, a devise to a class, some members of which may possibly not take within the prescribed period, is wholly void. *Leake v. Robinson*, 2 Meriv., 363; *Pearks v. Moseley*, 5 App. Cas., 714. But that is because, as observed by Sir William Grant, "It is the period of vesting, and not the description of the legatees, that produces the incapacity," and the devise is not "to some individuals who are, and to some who are not capable of taking." 2 Meriv., 388-390. The rule of the common law by which an estate devised must at all events vest within a life or lives in being and twenty-one years afterwards, has reference to time, and not to persons. Even the life or lives in being—have no reference to the persons who are to take, for the testator is allowed to select as the measure of time, the lives of any persons now in existence; and the twenty-one years afterwards—are not regulated by the birth, or the coming of age of any person, for they begin, not with the birth, but with the death, and are twenty-one years in gross, without regard to the life, or to the coming of age, of any person soever. *Cadell v. Palmer*, 1 Cl. & Fin., 372. It is doubtful, to say the least, whether the like effect can be attributed to the statute of Ohio which has no reference to time, and only avoids devises to persons who are not either in being themselves, or the immediate issue or immediate descendants of persons in being at the time of the making of the will. The devise of their parents' share to the children of any grandchild deceased before the time of division, would seem to be valid as to those great grandchildren whose parent, a grandchild of the testator, was living at the time of his death, because they would be 'immediate issue' of a person in being at that time; and valid also to any great grandchildren whose parent, though born after the testator's death, had died before their grandparent, a child of the testator, because they would be, if not, 'immediate issue,' certainly 'immediate descendants' of that child, who was in being at that time; and invalid as to those great grandchildren only, whose parents (as in the case of Mrs. Madeira, daughter of the testator's child, Mary Trimble) born since the testator's death, died after their grandparents, and who therefore, by reason of the interposition of the life of their parents, were neither 'immediate issue' nor 'immediate descendants' of a person in being when the testator died. See *Stevenson v. Evans*, 10 Ohio St., 307; *Turley v. Turley*, 11 Ohio St., 173."

It is impossible to read the foregoing language and avoid the conclusion that the U. S. Supreme Court is of the opinion that although under the common law a devise to a class some members of which may possibly not take within the prescribed period, destroys the entire devise, because the incapacity is produced by the failure of the estate to vest within a certain period; yet under our Ohio statute, the devise is good as to those persons who are empowered to take by sec. 4200, Rev. Stat., and void only as to those who are not thus empowered, because our statute has no reference to time, and only avoids devises to certain persons.

Applying these principles to the case at bar, it follows that the mere possibility that George Phillips might have born to him a child after the



death of the testator, and that such child might live to such an age as to prevent the vesting of the estate within the prescribed common law period for vesting, does not invalidate the testamentary scheme of Thomas Phillips as to those descendants of George Phillips who are empowered to take under sec. 4200; and that inasmuch as we shall hereafter have occasion to point out, all of the children of George Phillips, including Maurice Dudley, were alive at the time of the death of the testator, the testamentary scheme may be carried out with reference to the children, grandchildren and great grandchildren of the testator in the manner provided for in the will.

It is also contended by the defendants, who attack the devise to George Phillips and children, that not only does the devise violate the rule against perpetuities because of the possibility previously referred to with reference to children born to George Phillips after the death of the testator; but also because of the cross-remainders, or executory devises therein provided, by which in case of the death without issue of any child of George Phillips who might have been living at the death of the testator, the share of such child goes to the surviving children of George Phillips or the issue of those who are dead, among which surviving children or issue might be found persons who do not fall within the description of persons empowered to take by sec. 4200, Rev. Stat. And that the devise is void for the further reason, that in case all of George's children die without issue, the remainder goes in trust to the trustees under clause 4 of item 3 upon the trust herein named, which is to his daughters Nellie and Kate, or their issue, and that such issue might be neither the immediate issue or descendants of persons in being at the time of the testator's death.

The answer to these contentions is two-fold: First—The possibility that the estate may finally vest in a class among whom are persons incapable of taking, does not invalidate the devise as to those capable of taking; and, Second—Devises, whether for life or in the way of vested remainders, are not invalid because the executory devises over, provided in the will, are too remote. *McArthur v. Scott*, 384.

And in this case, if upon the death of all of those children of George Phillips who were living at the time of the death of the testator, and the consequent determination of their life estates, it should be found that the further devises are too remote to take effect under our statute, such further devises will be invalid, and the estate will descend according to law as if the testator had died intestate, so far as any provision was made as to the course of the estate after the expiration of the life estates. For, as said by one of the counsel in the case, "a court will follow the scheme of the testator, so far and so long as that scheme is consistent with the rules of law, and when that consistency ends, the law seizes hold of the property, and distributes it according to its own rules."

But it is insisted by counsel for defendant that, inasmuch as it would be impossible to carry out the testamentary scheme of the testator with respect to George Phillips and his children and grandchildren as the testator intended, nevertheless it should be carried out as far as possible, and this can only be done by investing the fee in the children of George Phillips instead of his grandchildren; and in support of this proposition, the case of *Gibson v. McNeely*, 11 Ohio St., 131, is relied upon.

There are two answers to this argument: First—It assumes that the common law rule against perpetuities, by which a devise to a class,

some members of which may possibly not take, is still in force in Ohio, and renders the devise entirely void, and that it is necessary therefore, in order to uphold the devise, that the fee should vest in the children instead of the grandchildren of George Phillips. But we have previously seen that this assumption is erroneous. The case of *Gibson v. McNeely*, relied upon, furnishes no authority for holding, that in opposition to the manifest intention of the testator, the fee may be made to vest in the children instead of the grandchildren of George Phillips.

In *Gibson v. McNeely*, "S. devised certain real estate in Cincinnati, to the children of his sister N. W. for and during the term of their natural lives, share and share alike, and at the decease of any such devisee, the share of the devisee so dying was given to the issue of such devisee, share and share alike for the term of their natural lives respectively; and again at the decease of the issue last aforesaid, or any of them, the shares of the issue so dying were given to the issue of such issue, or any of them, for the term of their natural lives;" the devisee concluding with this language, "and in this manner down in entailment, as far as may be allowed by the statute in such cases made and provided."

It was held that N., J. and W., the children of testator's sister, should each take a life estate in the undivided third part of the premises devised, remainder for life of each one's share to his or her issue in being at the date of the will, remainder in tail to the unborn issue.

But the court placed its decision, that the fee should vest upon the death of the children of the sister of the testator, who were in being at the death of the testator, upon the ground that it was carrying into effect the expressed intention of the testator, which was that the life estate should not continue down beyond the time allowed by the statute.

The following is the language of the court upon this point:

"Now, in the construction of wills, it is a well settled rule sanctioned alike by reason and authority, that the intention of the testator must govern, so far as the law will permit. And it is quite apparent that the testator in this case intended to keep the estate devised, in the families of his sister's children and their lineal descendants, without alienation, as long as the statute would permit. This intention is clearly expressed in so many words, and must therefore control, where the terms of the devise are equally descriptive of different estates. Now, it was competent for the testator in making his will, to carve out life estates and devise the remainder in fee tail to the issue of any person or persons then in being. He might either make the children of his sister the donees in tail, or he could give them a life estate with remainder in tail to their issue. And as the latter course would best effect his intention by restraining alienation for one generation longer than the former, the will should be so construed."

But neither the expressions which were present in the will in *Gibson v. McNeely*, nor any of similar import are present in the will of Thomas Phillips, from which a court would be warranted in saying that it was the intention of the testator that if the vesting of the fee in his great-grandchildren made the devise void, that in such case it was his intention that the vesting should be in his grandchildren.

As is well said by one of the counsel in this case: "The court cannot make a new will for the testator. It is obliged to follow his scheme in so far as it is consistent with the law, and reject it where such consistency fails. Nor can it distribute the estate according to any scheme

which it might be supposed the testator would have expressed had he been aware of the invalidity of the scheme set out in the will."

Coming now to an application to this case, of those principles of law which we have found should govern it, we find that all the issue of the children of George Phillips have good estates under the statute, for the reason that all of the children of George Phillips were alive at the time of the death of the testator, and therefore, when the fee vests in them, if it ever does, it will vest in "the immediate issue or descendants" of persons in being at the death of the testator.

All of the children of G. Phillips, except M. Dudley, were alive at the death of the testator. And as to M. Dudley, the law is well settled that inasmuch as he was *en ventre sa mere* at the death of the testator, and it is to his interest to be considered alive, he will in contemplation of law, be so considered. Thus Gray on Perpetuities, sec. 220, speaking on this subject says: "Whatever may have formerly been the law, it is now generally agreed that a child *en ventre sa mere* is to be considered as born when it will be for his benefit so to be considered."

The foregoing discussion has been entirely with reference to real estate. And the conclusion we reached that the common law rule against perpetuities, that a devise to a class, some members of which may possibly not take within the prescribed period, is void, is not the law in this state, was based entirely on the fact that the rule had been abrogated by sec. 4200 of the Rev. Stat. But that statute applies only to real estate. And we are unable to see upon what ground we would be warranted in concluding from the statute which expressly and distinctly refers only to real estate, that the state intended to apply its policy to all classes of property, both real and personal. On the contrary, as the statute so plainly confines its provisions to real estate, we are of the opinion that as to personalty, the common law rule against perpetuities is in force in Ohio, and that consequently the scheme of the testator with reference to that class of property fails, for the reason that "under the common law rule against perpetuities, a devise to a class, some members of which may possibly not take within the prescribed period, is wholly void;" and (as we have seen) under the devise to George Phillips, his children and grandchildren, there is a possibility that some member might not take within the prescribed period.

What property should be regarded under this will as real estate, and what property should be regarded as personalty are questions that have not been argued before us, and as to which we expressed no opinion; and unless counsel desire to be heard upon those questions, a decree may be drawn in accordance with the principles here laid down.

HUNT, J. and MOORE, J., concur.

Wm. C. Herron, Wm. Worthington, for plaintiff.

Thomas McDougall, for defendants.

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## DESCENTS—DOWER.

[Clark Probate Court, 1892.]

## JAMES FLEMING, ADM'R, V. JOHN JORDAN ET AL.

1. Insurance money accruing after the death of the deceased property owner, while collectible by the administrator, is to be distributed as real estate.
2. The widow is entitled to dower in such money, in the same manner as she would have been in the insured real estate.
3. J. died seized of certain real estate, upon which he had effected insurance. The insurance expiring, the administrator had the property reinsured. The original policy had a stipulation that the loss, if any, was payable to a certain mortgagee. This clause was inserted in the renewal policy. J. died leaving no personal assets. Between the date of the administrator's appointment and his filing the petition to sell the real estate, the insured property was seriously damaged by fire. The amount of such damage was paid to the administrator, and by him applied on the mortgage. The widow waived dower in metes and bounds and asked the same in money. The property was sold to pay debts in its damaged condition.

*Held:* That the widow's dower should be calculated upon the total amount realized from the sale of the premises and the insurance money.

## ROCKEL, J.

In 1890, Michael Jordan died seized of a house and lot in the city of Springfield, Ohio, of the value of about one thousand dollars, his widow Mary Jordan surviving him. He left no personal estate whatever. There were two mortgage liens on the property, in which the wife had joined and thereby released her dower as to them in the premises. There was also a judgment lien on said premises, but subsequent in priority to the mortgage liens. Michael Jordan during his lifetime had had the property insured, with a condition or stipulation, usual in such cases: "Loss, if any, payable to the mortgagee \* \* \* as his mortgage interest may appear." Some time shortly after Jordan's death, James Fleming in the meantime having been appointed his administrator, the insurance policy expired by limitation of time. Mr. Fleming then had it reinsured, with the same conditions and limitations as to payment as those contained in the former policy. Before the administrator filed his petition in this court, the house caught fire and was very much damaged. The insurance company declined to repair the building, and elected to pay the amount of the damage in money, which was adjusted at the sum of \$432.50, which sum they paid to the administrator, and which was by him applied on the mortgage as in the insurance policy stipulated. He then filed his petition to sell the property to pay debts of the decedent, making all necessary parties defendants, the several mortgagees and lien holders setting up their respective claims. The widow waived the assignment of her dower in metes and bounds, and asked that the value of the same be allowed her in money in lieu thereof. The premises sold for \$525.00. The matter now arises upon the distribution of the proceeds, and upon what sum is the widow entitled to dower upon the \$525.00, the amount received for said premises after they were damaged, or upon \$525.00, the amount of the sale plus \$432.50, the amount of insurance received for the damage done the premises? Is she dowerable in the insurance money? The question is novel and not free from difficulty. It is well settled in Ohio that where a wife joins in a mortgage with her husband, therein releasing her dower, and the premises are sold

by order of court, that she is endowable out of the entire proceeds of the sale, and not only out of the sum remaining after the payment of the mortgage. *Mandel v. McClare*, 46 Ohio St., 407; *Kling v. Ballentine*, 40 Ohio St., 391. If therefore the premises in this case had been sold before they were partially destroyed by fire, the widow would have been endowable in the entire sum that they would have sold for, which in this case it is fair to presume would have been \$957.50, the total sum received from the sale and insurance. Or if after the fire the insurance company had elected to repair the house, and thus replace the damage incurred by the fire, the widow would have been endowable in the entire proceeds that would have been received from the sale of said premises. Provided of course, in all these cases, that the mortgage liens were first paid in full, and the remainder only to be applied on the widow's dower.

If the widow therefore is not endowable in the entire sum realized from the premises, she has been deprived of that right by some other agency than her own. It is true, probably, that she had an insurable interest in the premises, but with insurance taken by the administrator, amply covering the value of the premises, and with the conditions therein stipulated, it is questionable whether any other insurance could have been procured on the building. And unless therefore that this insurance could inure to her benefit, subject to the mortgagee's claim, her interest there was without protection.

It is, I think, well settled that where a mortgagee's claim is to be paid out of the insurance, although not so expressly stipulated, the insurance inures to the parties in interest in the insured premises as to the excess of the insurance above the mortgage claims.

There is a singular paucity of reported decisions, or even text book authority upon the matter in issue.

In *Scribner on Dower*, 2 vol., page 598, it is referred to briefly as follows: "But where buildings subject to dower had been insured, and after the death of the husband they were destroyed by fire, it was held that the widow was entitled to a share in the insurance money to be estimated according to the proportion of her interest in the estate." Citing 2 *Jones' Eq.*, 357.

In the case of *Wyman v. Wyman*, 26 N. Y., 254, the facts were that John R. Wyman, the deceased, died seized of a hotel on which he had effected an insurance of \$3,000.00, Wyman died wholly insolvent, leaving a widow, who took out letters of administration, and two children, his heirs at law. Shortly after his death the property insured was destroyed by fire. In the opinion it is said: "The plaintiff claims this money as personal property and part of the assets of the estate of John R. Wyman, to which she is not only primarily but absolutely entitled as his administratrix; while the defendants insist that it belongs to them as his heirs at law. It results that although we are not required formally to determine whether an action could have been sustained by either of these parties, yet the controversy between them cannot be determined except by ascertaining their legal or equitable rights to the amount due by the contract of insurance. \* \* \* The doctrine contended for by appellant's counsel that not only the right of action, but the beneficial interest in the contract of the insurers passed to the administrator at the death of John R. Wyman, fails when it is put to the test. He had no legal estate and no beneficial interest in the premises. The title to the contract, and a recovery upon it, was vested in her by the operation of the

law, and not by express assignment or transfer. He is, of course, a trustee for creditors of the assets in her hands, but not of the lands of the deceased, nor of a contract like this, which is for the indemnity of those who have a beneficial interest in the lands. Upon the reason of the matter it is equally evident that the beneficial interest in such a contract belongs to the heir, and not to the personal representative of the deceased.

The heir is the absolute owner of the property entitled to its income and its enjoyment, and damaged by its destruction. He only can bring an action for any damage to it after the title has passed to him from his ancestor.

If the destruction of this building has been the result of malice or carelessness of another, the heirs of John R. Wyman could have had their action against such person and recovered damages for the very loss against which this contract is an indemnity. *It follows, that it is a contract which, even if made or continued with her, is in truth, for the benefit of the parties to whom that property belonged.* The building which burned was real estate. As such it was vested in the heirs immediately upon the death of the intestate. And its subsequent injury by fire could not convert it into personal estate, so as to divest the heirs or give a new direction or character, to the money payable by way of indemnity, for their loss. Again, it was a part of the contract of insurance in this case. As is usual in policies of insurance against fire, that upon destruction or injury of the property the insurers, if they chose, might restore or repair in specie. If they had elected to take that course, the expenditure which would thus have been made would, of course, have been entirely for the benefit of the heirs. \* \* \* It would be a singular result if the election of the insurers could determine whether the heirs or administratrix should take the benefits of their contracts, whether they would make compensation in money to the latter, or in kind to the former." After reviewing some supposed applicable authorities, and considering the case at some length, the judge concludes:

"As the widow of John R. Wyman, she is entitled to a dower interest in this fund prior to his creditors. \* \* \* The judgment should be so modified as to provide for the satisfaction of the dower interest of the widow in the moneys in question; for the payment of the surplus to her as administratrix to be applied by her in the satisfaction of debts entitled to payment out of such assets in the order and manner established by law, and that the residue, if any, be divided among the heirs at law of the deceased according to their rights as such heirs."

This decision is followed with favorable comments in the case of *Culbertson v. Cox*, 27 Minn., 309.

In that case Culbertson in his lifetime, had effected an insurance against loss by fire upon a dwelling house owned by him, and occupied by himself and family as a homestead. The policy of insurance ran to himself and his personal representatives. Upon his death the plaintiff, his widow, was entitled to hold the premises as a homestead during her natural life. After his death, and during the life of the policy, and while the plaintiff continued to occupy the premises as such homestead, the dwelling house was destroyed by fire. It was held that the interest in the policy devolved upon those beneficially interested in the real estate. And in case of loss the damage accrued to them. That if the administrator collected or received the proceeds of the policy, he would not hold it as a part of the general personal estate of Culbertson. but as

trustee for the widow, creditors and heirs in accordance with their respective interests in the real estate itself. That therefore, the plaintiff, being entitled to hold the real estate for the period of her natural life was entitled to the use for life of the insurance money. In the opinion the court say: "It is impossible to reconcile the claim of the personal representative to hold the insurance money as part of the general assets of the deceased with well recognized legal principles. \* \* \*

"An examination of the authorities discloses the fact that the assertion of text writers to the effect that the heir or devisee has no interest in the policy, but the entire beneficial interest in its proceeds belongs to the personal representatives, as a part of the general personal estate, rest upon a very slim foundation."

The distinction between the case at bar, and those above cited and liberally quoted from, is that in those cases the insurance was effected during the lifetime of the owner, and in this it was by the administrator. That this ought to make no difference, in the principle to be applied, may be justly inferred from the judge's opinion by me italicized and above herein quoted, where he says: "It follows that it is a contract which even if made or contined with her," (that is with the administratrix) "is in truth for the benefit of the parties to whom that property belonged.

In *Globe Ins. Co. v. Boyle*, 21 Ohio St., 129, where property was insured in the name of Mrs. E. W. Boyle, executrix, it was said, "The sense in which the term executrix was used was ambiguous, and consequently, left to be determined by extrinsic evidence, from which it is clear that the parties so used the term and understood its meaning to be equivalent to the phrase 'for the benefit of the parties entitled to the estate of Stephen S. Boyle.'" So in this case, when the administrator had this property insured, it was for the parties entitled to the estate of Michael Jordan. The widow had her interest in that estate under the laws of Ohio, just as secure as any of his heirs at law, or any creditor. That this insurance was to inure to those in interest in the real estate upon which insurance had been effected, is still more conclusive when we consider that by the stipulations of the policy itself, it demanded that the loss which might be paid thereunder should be applied, not to the payment of the claims of the general creditors, or be applied to the general assets of the estate, but to a lien on the property. It seems to me that neither in law nor equity have the general creditors, to the exclusion of the widow a right to claim any benefit from the result of his insurance.

Courts have always favored the widow's dower. *Ld. Coke*, saying, "there be three things highly favored by the law; life, liberty and dower." *Co. Litt. 124b*.

In *Kennedy v. Nedrow*, 1 Dall. (U. S.), 417, Ch. J. McKean, says, "Dower is a legal, equitable and moral right, favored in a high degree by the law, and next to life and liberty held most sacred."

A liberal construction and application should therefore be made in its favor. By giving the widow the right to have her dower calculated on this insurance money, no creditor of her husband's estate is in a worse condition than he would have been had the premises remained as they were at the death of the husband. I can see no sound reason why the widow should be the loser and a creditor the gainer from a pure accident in which neither had any act or part. It is therefore ordered that the funds in said administrator's hands be distributed and applied as follows:

It is sought by the relator in this proceeding to call in question, especially, the act of the legislature passed April 19, 1892, (89 Ohio Laws 455), entitled an act to create a state supervisor of elections with deputy state supervisors for the conduct of elections in the state of Ohio. (House Bill No. 855.)

This act, in brief, creates the offices of state supervisor, and of deputy state supervisors of elections, with certain powers and duties prescribed for the conduct and supervision of all the elections in this state except school directors and road supervisors.

The secretary of state, by virtue of his office is made state supervisor of elections, and he is required to perform the duties imposed upon him by this act as such supervisor, in addition to the duties already devolving upon him as secretary of state.

It is made his duty among other things to appoint four deputy state supervisors, as they are denominated, in each county, who shall be qualified electors of the county for which they are appointed.

This act also makes provision specifically, for the manner of appointment of these boards, the filling of vacancies, and for removal by the state supervisor, their organization and their duties generally, in and about the holding and conduct of elections in the various precincts in the several counties. It also confers on these boards the power of appointment of judges and clerks of election in precincts where voters are not registered, subject to the provision that the councilmen and clerks of municipalities, and the trustees and clerks of townships shall be *ex officio* clerks and judges in holding their respective elections.

The act also provides that the state supervisor and the deputy supervisors shall perform all the duties imposed by the law and act of April 30, 1891, as amended and supplemented, upon the secretary of state, or the clerk of the court, or board of elections. It further provides that these deputy supervisors "shall receive the returns of election, make abstracts of the same, and transmit such abstracts to the proper officers at the times and in the manner that clerk of court by secs. 2980, 2981, 2982, 2983, 2989 and 2994, is required to canvass the return, make abstracts thereof, transmit the same, and issue certificates to persons entitled to the same." No other act is expressly repealed by the one above referred to.

On the same day (April 18, 1892), the legislature passed an act to re-enact and amend certain sections of the statute as therein specified. (Senate Bill No. 280), which so far as the questions sought to be made in this proceeding are concerned, provides that the clerk of the court, with the assistance of two justices of the peace, shall open and canvass the returns of election, and make abstracts of the votes as returned to him in the several precincts in the counties; and it required that the clerk of the court make and certify under seal of his office, duplicate copies of the abstracts made by him, and (in the case of members of congress) transmit same to the secretary of state. Section 2994, however, provides that in congressional districts the abstracts of the votes in each county shall be transmitted to the clerk of the court of the county having the largest population, and after being canvassed by him, as provided in sec. 2980, shall be incorporated in an abstract with the returns from his county, and he is required to make and transmit to the persons elected certificates of their election." This was, substantially, a re-enactment of the law, as it was before the passage of the act of April 30, 1891, as to canvassing the county returns, and repealed the act of April



12, 1889, as amended April 30, 1891, which provided for a county board of election appointed by the probate judge of the several counties.

The act of April 30, 1891 (88 O. L., 449), known as the Australian Ballot Law, provided among other things, for the appointment of a county board of elections in each county, except in counties containing cities of the first class, consisting of four persons, who were required to be electors of the county, to be appointed by the probate judge. These boards were charged with the duty of providing the necessary booths, blanks, poll-books, tally-sheets, ballots, etc., for the several precincts, the appointment of judges and clerks, and otherwise attending to the conduct of the elections. The returns of the election were required to be transmitted—one copy to the county board of elections and one copy to the clerk of the court, in each county. The county board was required to open and canvass the returns, and to make and certify, under seal an abstract in triplicate of the same, and in the election of a member of congress, the president of the board was to file one copy of the abstract with the clerk of the court, and transmit one copy to the secretary of state.

Another act was also passed on the same day (April 18, 1892), which was an "act amendatory of and supplementary to" the act of April 30, 1891 (89 O. L., 432). This was principally a revision of the law of April 30, 1891, in relation to the holding of elections under the Australian Ballot system, as it is known, and provided for several important changes in the former act. Among others, it provided that "if the secretary of state is, or shall be constituted, state supervisor of elections with authority to appoint deputy supervisors to act as the canvassing officers for the several counties for which they may be appointed, such deputy supervisors shall have the powers and discharge the duties conferred and imposed upon clerks of the courts by this act." And it further provides that "in all counties, in or for which there is or may be established a board of elections or deputy supervisors of election, or other officer or officers whose duty it is to receive and canvass the returns of elections and transmit abstracts thereof, such deputy supervisors shall have all the powers and perform all the duties conferred and imposed by this act on the clerks of the court." It repeals the act of April 30, 1891, and certain amendments to said act.

Then follows the act of the same date first referred to, creating the office of state supervisor of elections. (89 O. L., 455.)

It was the evident purpose of the legislature by the act of April 18, 1892 (House Bill No. 855), which creates the office of "state supervisor of elections with deputy state supervisors," and the act of same date (Senate Bill No. 279) to commit the conduct and supervision of elections in this state into the hands of a state supervisor of elections and deputy state supervisors, so far as these acts prescribe their duties, and to relieve the probate judge of the duty of appointment of county boards of elections, to abolish the county boards, and to impose upon the deputy supervisors the duty of canvassing the county returns, the making of abstracts thereof and the transmission of the same to the officers designated in those acts, and to relieve the clerks of the courts of these duties.

It is claimed by the relator that the act creating the office of state supervisor of elections, although the duties of that office are vested in the secretary of state, by virtue of his office, and although his duties as such supervisor are attached or added to his office as secretary of state, is in violation of Art. II. sec. 27 of the constitution of the state; and

that the creation of the office of deputy supervisors in each county by appointment under the state supervisor, as provided for in this act is also in violation of Art. X, sec. 1, of the constitution. It is also claimed by him that even though the act is constitutional, the abstracts of the returns which have been transmitted to the secretary of state are illegal and should be rejected by the defendants, in that they have not been canvassed and signed by the proper officers.

I am aware that some confusion arises from the fact that these acts of the legislature were all passed on the same day; but looking at the evident intention of the legislature from the several provisions contained in the acts, there can be but little doubt but that the effect has been to create the board of deputy supervisors for each county, and to vest in them the authority and the duty of canvassing the returns from the several precincts in their counties respectively, make abstracts of the same and transmit the abstracts to the proper officers; and to relieve the clerk of the court and the justices of the peace from the duties of making such canvass, and the clerk from certifying and transmitting the abstracts as required before the passage of these acts.

It seems to me this is the only reasonable conclusion which can be arrived at in the light of all the provisions in these several acts, and is warranted by the ordinary and well settled rules of construction. *Hirn v. State*, 1 Ohio St., 15; *Fuller v. Coates*, 18 Ohio St., 343; *Sturdevant v. Tuttle*, 22 Ohio St., 211; *Moore v. Green*, 39 Ohio St., 661; *Beaver v. Trustees*, 19 Ohio St., 97; *Miller v. State*, 3 Ohio St., 475; 28 Ohio St., 521; 25 Ohio St., 283; *Cooley on Const. Lim.*, 617; *Sedgwick on Stat. and Const. Law.*, 225, 247.

On the contrary, I can find no reason for the construction of these statutes, which would require that the clerk and justices should have canvassed the returns, either by themselves, or in connection with the deputy supervisors, unless upon the theory that the act creating the deputy supervisors is unconstitutional, and therefore should have been disregarded. But this proposition would hardly be insisted upon as tenable.

But even if these acts, being construed together required the election returns to have been canvassed by the clerk of the court and justices, and certified and transmitted by the clerk, in connection with the deputy supervisors, or that these duties should have been performed by these officers, without the deputy supervisors (which latter construction could only be given by treating the supervisors' act as either repealed by implication or as being in violation of the constitution), still I think this would not furnish sufficient grounds for setting aside the returns which have been made by the supervisors. Certainly not, if the requirement was that they should have been made and returned by the clerk of the court in connection with the supervisors. The authorities are abundant on this proposition. A common rule of construction of statutes is that when they direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential, the proceedings are held valid, though the command of the statute is disregarded or disobeyed. "In these cases, by a somewhat singular use of language," says Mr. Sedgwick, the statute is said to be directory. *Sedgwick*, page 368. See also *Shelby v. Com's*, etc., 1 Ohio St., 77; *Miller v. State*, 3 Ohio St., 475; *Pine v. Nicholson*, 6 Ohio St., 176; *Fry v. Booth*, 19 Ohio St., 25; *Lehman v. McBride*, 15 Ohio St.,

573; State ex rel. v. Harris, 17 Ohio St., 608; 38 Penn. St., 270; 46 Penn. St., 359; 18 N. Y., 221; 26 N. Y., 514; 39 N. Y., 198; 1 Allen, 476; 4 Bla. Com., 207; 10 Am. L. Reg., N. S., 577; Cooley's Const. Lim., 617.

This rule has been carried so far as to hold that where a statute directed the vote of the common council of the city of New York to be taken by ayes and nays, this provision is merely directory. *Stoker v. Kelly*, 7 Hill, 9.

And, again, it has been decided that the provisions of a statute, requiring inspectors of corporate elections to take an oath, is only directory. *In re Hudson R. R. Co.*, 19 Wend., 143.

The rule has also been applied to popular elections, and an election has been held valid, though the inspectors were not sworn as prescribed by the statute, and kept the polls open after the time fixed by law, and committed other minor irregularities, there being no actual evidence of fraud, and no proof that the irregularity complained of had produced an improper result. *People v. Cook*, 14 Barb., 259 and 4 Seld., 88, 89, 93.

And a strict compliance with the provisions of the statute is not essential to the validity of the proceedings, unless it be so declared in the statute. Same, and see 12 Am. L. Reg., 409.

So, if inspectors of elections come into office, by color of title, that is sufficient to constitute them officers *de facto*.

And acts done by those who are officers *de facto* are good and valid as regards the public, and third persons who have an interest in their acts; and their title to the office cannot be inquired into collaterally. This doctrine has been applied to cases where the official duty of the officer, in its nature, consists in the performance of a single act. *People v. Cook*, 14 Barb., 259-261.

"The omissions of officers, conducting elections, through negligence, mistake or inadvertence, to comply with all the directions of the statute," say the court in this case "ought not to be allowed to disfranchise the electors." Same; see also 4 Cowen, 297; *The people ex rel. v. Vail*, 20 Wend., 14; 3 Hill, 42; 5 Denio., 409; *Strong Petitioner*; 20 Pick., 484-494.

Election statutes are to be tested like other statutes, but with a leaning to liberality, in view of the great public purposes which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated, and not otherwise, their provisions designed merely for the information and guidance of the officers must be regarded as directory only, and the election will not be defeated by a failure to comply with them, provided the irregularity has not hindered any who were entitled, from exercising the right of suffrage, or rendered doubtful the evidence from which the result was to be declared. *Cooley on Const. Lim.*, 618; see also *McCrary on Elections*, sec. 127.

Those provisions which affect the time and place of the election, and the legal qualifications of the electors are generally of the substance of the election, while those touching the recording and return of the legal votes received, and the mode and manner of conducting the mere details of the election are directory. *McCrary*, same section.

The objection to the abstracts now in the hands of the defendants, in this view of these acts of the legislature simply comes to this: that the canvass of precinct returns was made and signed by the deputy supervisors alone, whereas they should have been made and signed by the clerk of the court with two justices of the peace, and the deputy super-

visors. Can this be regarded as anything more than an irregularity—a non-compliance with statutes which are directory in these respects?

It is not asserted that the result would have been different, if the returns had been otherwise canvassed, and there is no pretense that any fraud was committed in any of the elections.

The principle is that irregularities which do not tend to affect results, are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed. *Juker v. Com.*, 20 Penn. St., 493.

The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents. *McCrary on Elections*, sec. 128, and numerous authorities there cited.

Some cases may be found holding otherwise, as in the case of *Niblack v. Walls*, 42d Congress, cited by counsel, where county returns were rejected because signed by a single judge, whereas they were required to be signed by a judge, clerk and justice; but they are not in accord with the decided weight of authority; besides I think it will be found that on examination, most of them involve the additional ingredient of fraud; and it might be that a different rule would prevail in case of a direct contest between candidates.

Another objection is made by counsel for relator to the abstracts as made, is that the law creating the office of state supervisor and deputy supervisors is in violation of the constitution, and if his right to the writ of mandamus as prayed for was otherwise clear, this question would in my judgment be a very serious one, even under the most liberal construction which could be given to that act.

Whether or not, the general assembly, under the prohibition of the constitution as to the power of appointment and the further requirement that county and township officers shall be elected, may create the office of state supervisor of elections, and by legislative appointment invest the secretary of state with the duties of that office in addition to his own, empowering him to appoint deputy supervisors in each county in the state, who in turn may appoint all the judges and clerks of elections in all the precincts throughout the state, and thus place the machinery for holding all the elections in the state under the control and supervision of one officer, and that officer appointed by the legislature, would in my judgment, in a proper case, present a question for very serious consideration.

It is true some limitation is placed on his authority, by providing a certain method or plan of appointment as to the deputies, and also as to the appointment of the judges and clerks in the precincts, but the appointments are nevertheless made by him either directly or through deputies appointed by him.

The arguments of counsel for the relator, and authorities cited by them, present strong reasons for holding that the supervisors' act contravenes at least two sections of the state constitution.

If the supervisors' act were held to be unconstitutional, whether it would not then leave standing in force, the act which provides for the canvassing of the returns by the clerk and justices, and what effect could then be given to abstracts of the vote not signed by these officers—abstracts not signed by any lawful authority—would be important questions also involved, if a proper case were presented, requiring their determination.

But in the view I have taken of this application, it does not become necessary for me to undertake the task of answering these questions one way or another. And I am the more willing to do so, not only on account of the gravity and responsibility of their determination, involving as they do, two sections of our state constitution, but because I am well satisfied that the relator is not entitled to the writ upon other grounds, whatever view might be taken as to the act in question being constitutional or otherwise.

The right to the writ of mandamus is regulated by statute in our state, in the first instance, and is defined to be a command to some board, tribunal or person to perform some act which the law specifically enjoins as a duty resulting from an office, trust or station. Section 6741, Rev. Stat.

And the writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law. Sec. 6744.

To entitle the relator to the writ of mandamus, under our statute and under numerous decisions of the courts, he must show a clear right to the specific remedy thus sought. If he has an adequate remedy at law, he is not entitled to it. And if the remedy is not effective, he is not entitled to it. *State ex rel. v. Berry*, 14 Ohio St., 315; *State ex rel. v. Foster*, 38 Ohio St., 599; *R. R. v. Comrs. Clinton Co.*, 1 Ohio St., 77; *Shelby v. Hoffman*, 7 Ohio St., 450; *State ex rel. v. B'd of Education*, 42 Ohio St., 374; *State ex rel. v. McGregor*, 44 Ohio St., 628; *Dalton v. State ex rel.*, etc., 43 Ohio St., 652.

And there must be some beneficial interest in the relator to be subserved by the allowance of the writ. *State ex rel. v. Turnpike Co.*, 16 Ohio St., 308; *Same v. Comrs.*, etc., 20 Ohio St., 425; *Moses on Mandamus*, 124.

In the case of *State ex rel. v. Berry*, above referred to, where a writ of mandamus was applied for, to compel the clerk of the court to correct certain returns, which it was alleged, had been improperly rejected by him, the court denied the writ, holding that a contest on appeal to the court of common pleas is the specific remedy provided by statute for the correction of all errors, frauds and mistakes which may occur in the process of ascertaining and declaring the public will, as expressed through the ballot boxes." And further that "when it can be seen, that the writ, in its operation, must prove abortive and fruitless to the relator, the writ will not be issued to compel its performance."

The law does not, and the courts governed by law, cannot require the performance of a vain thing. *People ex rel. v. Supervisors*, 12 Barb., 217.

"The court will refuse the writ," says Tapping, "if it be manifest that it must be vain and fruitless, or cannot have a beneficial effect." *Tapping on Mandamus*, 17.

In the case of *Dalton v. State*, 43 Ohio St., 653, the court hold that the jurisdiction which sec. 6, art. 2, of the constitution confers upon each house of the general assembly "to judge of the election, returns and qualifications of its own members" is exclusive, and that a pretended judicial determination of any other tribunal, in form deciding that a candidate for either house is elected, is a nullity.

The same is true of the congress of the United States. Sec. 5, art. 2, Const., U. S.

The jurisdiction of each house to decide upon the election, returns and qualifications of its own members is supreme and exclusive. *Cooley Const.*, Lim. p, 133.

The remedy, the court hold in *Dalton v. State* is by contest before the branch of the general assembly for which the party is a candidate.

In the case of *State ex rel. v. McGregor*, 44 Ohio St., 628, above referred to, the court held that the clerk of the court of common pleas and the justices called to his assistance to abstract the votes of an annual election, cannot be required by a mandamus to abstract votes cast for a person for an office, unless the same is required to be filled by the electors at such election." And this for one simple reason, "that it would not help the relator."

The writ will not issue upon the information of a private citizen to secure the enforcement of a purely public duty. *State ex rel. v. Murphy*, 2 Circ. Dec., 190.

The rule is well stated in *State ex rel. v. Bickman*, 2 Circ. Dec., 526.

To entitle the relator to the writ, he must plead issuably all the facts necessary to show dereliction on the part of the officer against whom the writ is prayed; he must also show by proper averments that facts which would justify the omission complained of do not exist; that the relator has a clear right to the performance of the act which he asks the court to order; that he will be prejudiced by its non-performance, and that he has no other adequate remedy.

The writ at common law, was a high prerogative writ, usually issuing out of the highest court of general jurisdiction; directing a person, corporation or inferior court to do some particular thing therein specified, and which pertained to their office or trust. 3 *Blackstone's Com.*, 110; 4 *Bacon's Abr.*, 495.

It is the absence of a specific legal remedy which gives the court jurisdiction. 2 *Sel. N. P.* under title of *Mandamus*; *Com. ex rel. v. Supervisors, etc.*, 29 *Penn. St.*, 121; *Same v. Com. Council, etc.*, 34 *Penn. St.*, 496.

But the party must have a perfect legal right. 27 *Mo.*, 225; 11 *Ind.*, 205; 20 *Ill.*, 525; 25 *Barb.*, 73; *Bouvier's Law Dic.*, 142.

The rule as stated in *Com. ex rel. v. The Select and Common Council, etc.*, 34 *Penn. St.*, 496, is that if there be a clear legal right in the relator, a corresponding duty in the defendant and a want of any other adequate and specific remedy, a writ of mandamus will lie.

Applying the foregoing principles to the case of the relator, as stated in his petition, is he entitled to the writ?

It seems to me, clearly he is not. The "remedy"—if it may be called a remedy—sought is somewhat novel and singular. He asks that the defendant be required to reject all the abstracts which have been made and signed by the deputy supervisors, and his petition shows that these are the only abstracts which have been transmitted to the secretary of state, and then he asks that they make a legal canvass of the vote of the state.

In what manner they are to make a legal canvass, or any other canvass, if the returns, and the only returns in their possession, are thrown out, is not explained.

A command of this kind would certainly be a vain and meaningless thing. It would in effect be a command to reject the returns they have, and—do nothing.

Besides it does not appear that the rejection of these returns would in any way benefit the relator. He does state that he was a candidate at the election, but whether he received a majority or plurality of the votes cast at the election in his district does not appear, and if he did, I am unable to see how the rejection of the returns in the office of the secretary of state would result favorably or otherwise in declaring his election.

And finally, to grant the prayer of the relator's petition would not judicially determine his right, nor settle any question.

The writ "in its operation would prove abortive and fruitless." It would not be worth more than the paper upon which it was written, and the decision would not extend beyond the bench where delivered. It would be a nullity.

The demurrer is sustained and the rule to show cause is discharged.

H. R. Smith, of Wooster, O., and O. W. Aldrich, for the relator.

Attorney General, for the defendants.

## LICENSES.

[Hamilton Common Pleas.]

### \*LITTLE v. STATE OF OHIO.

1. To the "Russell" vehicle license law, requiring owners of vehicles to pay an annual tax on them, an amendment during a year, requiring tin tags to be put on the vehicles, does not violate the obligation of a contract, and the amendment is constitutional.
2. The amendment is not invalid because certain vehicles are excepted from the tin plate provisions, and the regulation imposed on others not excepted by the statute amended.

ERROR to the Police Court of Cincinnati.

KUMLER, J.

The case below was tried on an agreed statement of facts. The plaintiff filed a general demurrer to the information, which was overruled, and plaintiff excepted. He then plead not guilty, but was found guilty and fined \$10 and costs. The information in the case was based on sec. 1 of the Russell law, as amended April 15, 1892. On error to the common pleas, the judgment below was affirmed, the court saying:

"Without reciting in full the agreed statement of facts, it is admitted in substance that said Little took out and paid for all licenses under the law relating to vehicles in and for the year of 1892, and that he was arrested and convicted under the act aforesaid. Under what is known as the Russell law, passed April 16, 1883, 80 O. L., 119, amended March 25, 1884, 81 O. L., 78, the owners of all vehicles used upon the streets of Cincinnati were required to pay certain annual license fees. These laws were held not to be in conflict with the constitution. *Marmet v. The State*, 45 Ohio St., 63.

"The plaintiff in error claims that the law, as amended April 15, 1892, is unconstitutional. That it embodies special, partial and class legislation.

"That the license which he received is in the nature of a contract, and the legislature has no power to modify or change the law during the time for which the license was issued.

"It is urged that legislature has no power to except cabs, hacks, sulkies, buggies and carriages, from the operation of the tin plate provisions, and impose the regulation on vehicles not excepted under the statute. In this respect it is claimed, that the statute embodies special, partial and class legislation, and is therefore invalid. Plainly two classes of vehicles are meant in the law, vehicles

\* This judgment was affirmed by the circuit court; opinion 4 Circ. Dec., 285.

carrying merchandise, and vehicles engaged in carrying passengers. Is the law open to the objection under consideration? All persons or firms using the excepted class of vehicles are not required to exhibit the tin plates on each side of their cabs, etc., while all persons or firms using vehicles not embraced in the exception, must exhibit the tin plates in a conspicuous place on each side thereof, indicating the year for which the license had been taken out. The statute in my opinion is general and uniform, operating alike on each class of vehicles. Clearly there is no discrimination between persons or business in the same class. Laws and ordinances which distinguish between classes are treated alike. *Horr & Bemis, Municipal Police Ord., sec. 268; New Orleans v. Kaufman, 29 La. Ann., 283.*

"The statute under which the plaintiff in error obtained his license, is an example of a gradation and classification. Farmers marketing the products of their own farms are not liable for selling without a license. Vehicles are graded according to the number of horses used.

"Peddlers selling from vehicles pay a larger sum than those who carry their goods from place to place. These instances of discrimination are held to be within legislative discretion. *Marmet v. The State, supra.*

"Under the statute a system of identification and inspection is provided. *Nelker v. New Orleans, 31 La. Ann., 828.*

"It is one of the modes of enforcing the collection of license fees due the city. It is agreed that the city auditor, without charge, tendered said Little the tin plate signs when he obtained his licenses in and for the year 1892, and he refused to accept them. The tin plate signs are furnished free of charge to the owners of all vehicles. Licenses of this kind are issued for the period of one year only. It is also agreed that said Little painted his name and number of his license on each side of his vehicle during the year 1892. Why omit "the year" for which such licenses had been taken out? Designing persons might be tempted to use the old sign, or a different sign, and evade the payment. Can a statute be said to be invalid, unreasonable, partial and oppressive because it exempts from its operation, the excepted class of vehicles named in the statute, and imposes the regulation upon the owners of vehicles not so exempted? We think not.

"Whether the regulation is the exercise of the police power is not material. We find it in the statute in express terms, and we cannot question the legislative discretion when it is vested by the constitution in the general assembly; *Marmet v. The State, 45 Ohio St., 69; Cincinnati v. Buckingham, 10 Ohio, 257; Cincinnati v. Bryson, 15 Ohio St., 15; Horn & Bemis on Municipal Police Ordinances, sec. 268; New Orleans v. Kaufman, 29 La. Ann., 283; Magenan & Brunner v. City of Fremont, 9 Lawyers' Reports, 787; City Council v. Pepper, 1 Rich. S. C. Law, 364.*

"The plaintiff in error claims that the law of April 15, 1892, impairs the obligation of contracts; that his license is in the nature of a contract, and having paid his license fees in full on January 6th, for the year 1892, the legislature had no power in April following to enact the statute in question. The law under which he obtained his license was passed March 25, 1884. It provided that licenses should be exhibited in his place of business. Under the ordinance of December 5, 1853, it was sufficient to paint his name and the number of his license on each side of his vehicle, which he did. It is agreed that he complied with all the laws and ordinances relating to vehicles except the law of April 15, 1892.

"A license is permission granted to some competent authority to do an act, which, without such permission would be unlawful. *The State v. Hipp, 38 Ohio St., 192.*

"A licensee, unless especially exempted, holds his license subject to the laws of the state. 13 American and English Encyclopedia, page 516.

"The licenses give no authority, and are mere receipts for taxes; *Cooley's Constitutional Limitations, (6 ed.) 720.*

"There is nothing in the license itself, nor in the laws and ordinances named, to warrant a conclusion that the law is unconstitutional."

Stephens, Lincoln & Smith, for plaintiff in error.

Fred. Hertenstein and J. B. Kelley, for the state.



## CORPORATIONS—OVER-ISSUE OF STOCK.

15

[Superior Court of Cincinnati, General Term.]

## \*CITIZENS' NATIONAL BANK ET AL. V. C., N. O. &amp; T. P. RY. CO.

By reason of the nature of certificates of stock; the benefit of which accrues to a corporation by their characteristic of transferability; and the well known custom in the commercial community of buying such certificates or of loaning money upon the same. *Held:*

1. The corporation owes a duty to exercise care in the examination and supervision of the conduct of its agents charged with the business of issuing and transferring stock to prevent such agents from fraudulently putting upon the market certificates of stock bearing the genuine signatures of the issuing officers, and attested with the genuine seal of the corporation; and that for the negligent failure to exercise such care if by reason of such failure the agent is enabled to perpetrate the fraud, the corporation is responsible.
2. That this duty of the corporation is due not only to stockholders, but to all persons who, in good faith, purchase such certificates or loan money upon the same, and that no other privity is necessary, upon the part of such purchasers or lenders to enable them to maintain an action against the corporation, than the negligent conduct of the corporation and the consequential injury.
3. That in such a case the negligence of the corporation, and not the fraud of the agent, is the proximate cause of the injury.
4. That the circumstance that the certificates are in favor of one of the certifying officers is not of itself sufficient to put lenders of money upon inquiry, for the failure to make which they are guilty of contributory negligence and thereby forfeit their right to recover.

SMITH, J.

This is a proceeding in error to reverse a judgment of this court in special term.

In the action below the Cincinnati, New Orleans and Texas Pacific Railway Company was plaintiff, and all the other parties in the case were defendants. The petition alleged:

"That the plaintiff was a corporation incorporated under and by virtue of the laws of the state of Ohio; that it was incorporated on the eighth day of October, 1881, with an authorized capital of three millions of dollars, divided into thirty thousand shares of one hundred dollars each; that all of said shares on or about the twelfth day of October, 1881, were lawfully subscribed for at par by *bona fide* subscribers, and the amount of said subscriptions immediately paid by such subscribers to the treasurer of plaintiff; that proper certificates of stock were issued to the subscribers respectively; that said certificates were duly signed by Theodore Cook, who was the president, and George F. Doughty who was the secretary of plaintiff, and evidenced by the genuine seal of the corporation; and that its capital stock has never been increased, and still remains as at first.

"That by the provisions of its by-laws duly and regularly adopted and in force at the time hereinafter mentioned, it was the duty of the secretary to keep the stock ledger of the company, and to make transfers of stock; that Theodore Cook from time to time, from the first day of November, 1881, until the twenty-fifth day of May, 1882, signed a number of certificates of stock in blank, and left the same in possession of

\* For opinion of the superior court in special term, see 10 Dec. Re., 614, and on the demurrer reserved to special term, see 11 Dec. Re., 50; 10 Dec. Re., 614; see also, 8 Dec. Re., 788, 9 Dec. Re., 147, 1 Circ. Dec., 109.

the plaintiff was authorized by law to issue, which the defendants do not admit, and whereof they have no knowledge, except as it is derived from the allegations of the plaintiff's petition, and which the defendants deny, that then and in that case the said certificates were issued by the plaintiff corporation by its president and secretary under the genuine seal of the corporation negligently and fraudulently; that the plaintiff by its officers and agents wholly failed to observe any care in respect to the issue of the certificates for its capital stock, and that the president of the corporation signed his name in blank to such certificates without any inquiry or knowledge in respect to the issue made or to be made of said certificates, or as to whether there had been a surrender of valid certificates of the stock of the corporation before the said certificates owned by the defendants were issued, and without any investigation thereafter of the use that had been made of certificates so wrongfully signed in blank by the president of said corporation; that the plaintiff corporation permitted and by its by-laws provided that certificates for the capital stock in plaintiff corporation should be issued to its president and to its secretary in the same manner and form and by the same officers as the same were provided to be issued to all other parties; and that the exercise of ordinary care and prudence, or of any care and prudence by the plaintiff corporation through its board of directors and other officers, would have prevented the wrongful issue of the certificates aforesaid."

The defendants further aver that the loans for which said certificates were taken as collateral security, are long since due, that they have made demand upon the plaintiff corporation to transfer said shares of stock on the books of the corporation, which demands have been refused, and they therefore ask judgment against defendants for the amounts of their loans, with interest.

The cause coming on to be heard in special term, the decision of the court was that "the directors and president of the plaintiff company were negligent in the examination and supervision of the said certificate books and register of transfers and of the certificates from time to time surrendered and in the possession of the company for cancellation, and of the use being made by said Doughty of certificates signed in blank, and said negligence enabled said Doughty to commit the fraud complained of," and that such negligence was the proximate cause of the injury which the defendants had suffered, but "that the presence of the name of George F. Doughty, both as secretary and owner of the certificates, put each of the defendants acquiring said certificates respectively, upon inquiry, and the failure of said several defendants to make inquiry of some officer of the plaintiff company other than Doughty, constituted contributory negligence on the part of each of said defendants, whereby they were prevented from recovering upon their several cross-petitions their loss sustained by reason of the negligence of the plaintiff as stated in the conclusion of fact."

As to some of the certificates held by certain of the defendants, the court held that they were the genuine certificates of the corporation; and also held that by reason of the acts and statements of Theodore Cook as president of the corporation, and acting on behalf of the corporation, after the discovery of the frauds by the corporation, certain of the defendants had been misled to their damage, and that to the extent of such damage they were entitled to a judgment against the corporation.

The opinion of the court upon these matters fully appears in the report of the case; ante 50.

At the request of the defendants, the court stated separately its conclusions of fact and law. And inasmuch as the decision of the case must largely rest upon the facts so found, and because it is necessary to an intelligent discussion of the legal questions raised by the case that these facts should be constantly borne in mind, we have incorporated such findings of fact in this opinion, omitting those in which the court finds certain certificates to be genuine, and omitting those with reference to the statements of Theodore Cook made to certain defendants subsequent to the railway company's discovery of the Doughty frauds.

Conclusions of fact. First—That the plaintiff was incorporated under the laws of Ohio, on October the eighth, 1881, with an authorized capital stock of three millions of dollars, divided into thirty thousand shares of one hundred dollars each, all of which shares were lawfully subscribed for by *bona fide* subscribers, paid in full in cash, and proper certificates therefor duly issued to such subscribers on or before October the 12th, 1881; which certificates were duly signed by Theodore Cook, as president, and by George F. Doughty, as the secretary of the plaintiff, and were evidenced by the genuine seal of the plaintiff corporation.

That Theodore Cook was elected and qualified as president of the plaintiff corporation at the date of the organization, and George F. Doughty was elected and qualified as secretary of the plaintiff corporation at the date of its organization, and that the said Theodore Cook and George F. Doughty were re-elected and qualified as president and secretary, respectively, of said corporation on the first Monday in January, 1882, and the said Theodore Cook continued to be president thereof until January, 1883, and the said George F. Doughty continued to be its secretary until his death, on May 25, 1882. That the plaintiff's capital stock has never been increased by any express action of the directors or of the stockholders as provided by the statutes of the state in that behalf. That, upon its organization, the plaintiff corporation adopted, among others, the following by-laws, in reference to the issue of its certificates of stock, which continued in force until January, 1883.

"Article 8. Certificates of stock shall be issued to each subscriber for the number of shares which he may own, under the corporate seal of the company, signed by the president and secretary, setting forth the amount paid, and the amount due upon each share.

"Article 9. It shall be the duty of the secretary to keep the office of the company open during business hours. He shall be the custodian of the seal of the company, and shall affix the same with his attestation thereto whenever the official business of the company may require; he shall attend all meetings of the stockholders, directors, and executive committee, unless excused, and keep and record a full and true minute of their proceedings. He shall also attend the meetings of any committee appointed by the directors or stockholders if requested, and keep a record of their proceedings. He shall keep the stock ledger of the company, and make transfers of stock upon the surrender, and properly indorse and cancel all stock certificates which may be presented for transfer. He shall give bond for fifty thousand dollars, with two good securities, to be approved by the executive committee."

Second—All of the stock certificates of the plaintiff, issued by it, and all the stock certificates of the plaintiff purporting to be issued by the plaintiff, and held by the defendants, were in the same form, and were as follows: with the blanks for the number of shares, and the party in whose favor they were issued, filled in in writing, to-wit:

## FORM OF CERTIFICATE.

"This is to certify that \_\_\_\_\_ is entitled to \_\_\_\_\_ shares, of one hundred dollars each, in the capital stock of The Cincinnati, New Orleans and Texas Pacific Railway Company. Transferable only on the books of the company, in person or by attorney, on the surrender of this certificate.

"Witness the seal of the company, and the signatures of the president and secretary, at Cincinnati, this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Secretary.  
"Corporate Seal"

\_\_\_\_\_  
President.

That all of said certificates issued during the lifetime of George F. Doughty were filled out and signed by George F. Doughty as secretary. They all bear the signature of Theodore Cook, as president, with the exception of two, which were signed by John Scott, the Vice-President, and all bore the seal of the plaintiff corporation, affixed by George F. Doughty, its secretary.

Third—The certificates, before issue, were bound in two books, called the certificate books, with stubs, numbered from one to five hundred, in the first, and from five hundred and one to one thousand in the second. Each certificate bears the same number as its stub.

The secretary, Doughty, was provided with a stock ledger and stock journal and register of transfers, and the books containing the blank certificates regularly numbered as above stated. There was no book designed to contain the actual transfer of the stock, but instead of that, each certificate was indorsed with a blank form of assignment to be filled out when assigned or surrendered, in form as follows:

"For value received, \_\_\_\_\_ sells to \_\_\_\_\_ the stock within mentioned, and authorize \_\_\_\_\_, attorney, to transfer the same on the books of the company.

"Witness \_\_\_\_\_ hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 188—.

"In presence of \_\_\_\_\_."

The register of transfers was a book containing a regularly ruled page with numbers on it to correspond with the numbers of certificates, and was arranged with reference to each, so as to permit the book-keeper to show both the certificate from which and the one into which it was transferred. The stock ledger simply kept a ledger account with each stockholder, and was posted from the stock journal in which the entries were journalized. The secretary Doughty's mode of keeping the certificate books was to mark upon the new certificate the number of the certificate surrendered, in addition to the date, the name of the transferer and transferee, and the number of shares; the stub had a place for the receipt of the transferee upon getting the new certificate.

Fourth—The president, Theodore Cook, gave but little, if any, personal attention to transfers of stock, except to sign the certificates. After the issue of the certificates to the original subscribers to the capital stock of the plaintiff, the president was in the habit of signing a number of certificates in blank, and leaving them with Doughty, as secretary, to be filled out when necessary, upon the presentation to said Doughty, as such secretary, of outstanding certificates for transfer, duly indorsed as above provided, and for no other purpose. When the secretary, Doughty, died, there had been signed by the president and secretary, with the corporate seal affixed and removed from the book, certificates for

thirty-four thousand shares of stock which had not been surrendered or cancelled by them. The authorized stock was thirty thousand shares.

Fifth.—Said George F. Doughty originally subscribed for six hundred and fifty shares, and received therefor certificates No. 86, 87, 88, 89, 90 and 91. Of these, Nos. 87 for two hundred and fifty shares, and 88 for fifty shares, belonged to others who paid the subscription therefor, and the certificates therefor indorsed by Doughty were at once delivered to them, and never again came into his possession. The certificates, No. 89 for 50 shares, and 90 for one hundred shares, were subscribed for by said Doughty on the equal joint account of himself and defendants, Herman Klein & Son, and issued in the name of George F. Doughty. The subscription therefor was paid with funds borrowed on a pledge of said certificates, 89, 90 and 91, on October 8, 1881, by said Doughty and Herman Klein & Son, and said certificates were never afterward in the possession of said Doughty and Herman Klein & Son, until the same were redeemed and returned to said Doughty, on May 17, 1882.

On November 9, 1881, Doughty issued Certificates Nos. 255 and 256 to himself, and noted upon the register of transfers that they had been issued upon the surrender of certificate No. 86. No. 86 was then in the bank of Kuhn & Sons as pledgees as above stated. On May 20, 1882, the secretary Doughty delivered to Herman Klein & Son certificates Nos. 547 and 548 for one hundred and twenty-five shares, but made no entry thereof on the books of the company. On May 5, 1882, Joseph Rawson & Sons purchased a note of George F. Doughty for seventy-five hundred dollars, secured by one hundred shares of plaintiff's stock represented by certificate No. 86, which they continued to hold until November 27, 1882, and then sold the same in the market. Subsequently to Doughty's death, to-wit, on September 6, 1882, Herman Klein & Son surrendered to the company certificates Nos. 547 and 548, and Theodore Cook, as administrator of George F. Doughty, surrendered certificate No. 89 for fifty shares, and seventy-five shares from certificate No. 90 for one hundred shares, and the company issued to Herman Klein & Sons certificates No. 597 and 598 for one hundred and twenty-five shares. Said Doughty afterward became the owner of fifty shares on December 23, 1881, represented by certificate No. 373, which he sold and transferred to other parties than the defendants herein. He also became the owner of fifty shares on December 23, 1881, represented by certificate No. 373, which he sold and transferred to other parties than the defendants herein. He also became the owner by purchase of twenty-five shares on December 31, 1881, represented by certificate No. 434, which was found indorsed by George F. Doughty in an envelope marked "George F. Doughty, Private," in the safe of the company, and came to the possession of Theodore Cook, and the court find that said certificate was the private property of George F. Doughty, and that it came into the possession of Theodore Cook as his administrator, and was subsequently transferred by said Theodore Cook, as administrator, to other parties than the defendants named in this case. He also became the owner by purchase on February 27, 1882, of one hundred shares evidenced by certificate No. 466, the which he subsequently sold and transferred to parties other than the defendants in this case. And on April 1, 1882, said Doughty purchased one share of capital stock evidenced by certificate No. 513, which was neither found in the possession of said Doughty nor of said plaintiff at the time of his death. The

above were all the shares which the court find that the evidence shows were ever held or owned by said George F. Doughty.

Sixth—The court further find the personal account of George F. Doughty in the stock ledger at the death of Doughty was as follows:

DR.		GEORGE F. DOUGHTY.	
1881.			
Oct. 15,	To Meyer Bettman.....	4	\$5,000 00
Dec. 8,	Sundry parties.....	10	1,000 00
1882.			
Jan. 5,	Albert Netter.....	11	12,000 00
(The above line is stricken out in original )			
1881.			
CR.			
Oct. 8,	By Capital Stock.....	3	60,000 00
Oct. 8,	By Capital Stock.....	3	5,000 00
Nov. 11,	By L. Markbreit.....	7	1,000 00
Dec. 23,	By Simon & Huseman.....	10	5,000 00

But that the account as shown by comparison with the stock certificate book and the register of transfers was neither complete nor correct.

And the court find the stock certificate books and the register of transfers contain the only entry of the issue of fraudulent certificates by said George F. Doughty. That the entries upon the stock certificate books and the register of transfers disclose, from November 9, 1881, down to the death of George F. Doughty, entry after entry that was suspicious upon its face, and was fraudulent in fact, and that very little investigation of these books would have disclosed the fraud which Doughty was engaged in perpetrating, in issuing stock certificates hereinafter referred to and found to be spurious by the court. And that the directors and president of the plaintiff company were negligent in the examination and supervision of the said certificate books and registers of transfers, and of the certificates from time to time surrendered and in the possession of the company for cancellation, and of the use being made by said Doughty of certificates signed in blank, and that such negligence enabled said Doughty to commit the frauds hereinafter referred to. To the latter part of which finding, plaintiff, the Railway Company, excepted.

The seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth findings of fact are made with reference to the special facts connected with the issue and ownership of the certificates of stock held respectively by Heistand & Co., Rachel S. Gaff, Mary J. Perin, The First National Bank of Hamilton, Ohio, The Third National Bank of Urbana, Ohio, The German National Bank of Covington, Ky., The Citizens National Bank of Cincinnati, Ohio, The National LaFayette Bank of Cincinnati, Ohio, R. A. Holden, The Third National Bank of Cincinnati and Edward H. Miller.

Excepting the difference as to dates, the number of shares represented by the certificates, the amounts of the loans, and the fact that two certificates were signed by John Scott, the Vice President, instead of Theodore Cook, the President, the findings of fact from the seventh to the eighteenth are in effect as follows:

That George F. Doughty, disregarding his duty in the premises and without the knowledge of the plaintiff or any of its officers other than himself, falsely and fraudulently filled up the certificates in his own favor that had been signed in blank by the president, and either falsely and fraudulently entered upon the books of the company that the certificate had been issued, or falsely and fraudulently made no entry of the certificate upon the books of said company; that the said George F. Doughty made and executed his promissory notes, and sold the notes through a banker with the certificates properly indorsed by the said George F. Doughty for transfer; that the defendants bought said notes relying wholly upon the representations in said certificates contained, and made no inquiry in respect to the validity of said certificates or the issue thereof of any officer of the company; and that no defendant had any knowledge of the issue of any notes or certificates by said Doughty, or in his favor, other than the notes and certificates bought by him.

It also appears in these findings that although the fraudulent certificates bore dates ranging from November, 1881, to May, 1882, yet no one of the defendants made his or her loan prior to February 18, 1882, and some of them as late as May 20, 1882.

The nineteenth finding of fact is as follows:

Nineteenth—The court further find that each of the above named parties defendant are the holders and owners, respectively, of said promissory notes. That they purchased the same in the ordinary course of business, without any actual knowledge of any fraud or irregularity of said Doughty in respect to or in the issue of said certificates of stock; and relying upon the same as genuine and valid security for the money advanced by them in the purchase of said notes. That each of said parties knew that said George F. Doughty was the secretary of the said company, and that none of said parties made any inquiry of any of the officers, agents or stockholders of said company in respect to said certificates of stock or the issue thereof, before purchasing notes, except as hereinafter stated.

And the court find that if any of the parties defendant, in the purchase of the foregoing notes, had made inquiry as to the genuineness of the certificates pledged to secure any one of said notes, such inquiry would have disclosed the fraudulent character of such certificates—to which conclusion each of the defendants severally excepted.

The court further find that each of said parties defendant presented his aforesaid certificates to the plaintiff corporation, and made demand for the transfer of the same at the dates alleged in their several answers and cross-petitions, and that the plaintiff refused to make such transfers. The court further find that each of said parties defendant thereupon commenced an action in the superior court of Cincinnati and in the court of common pleas of Hamilton county, as alleged by them in their several answers and cross-petitions; and that the plaintiff filed its answers as therein set forth; and that several actions are still pending in said courts.

The twentieth finding of fact relates to the statements of Theodore Cook, made on behalf of the corporation to certain of the defendants subsequent to the discovery of the frauds.

The twenty-first finding of fact is as follows:

Twenty-first—The court further find that the market value of the stock of the plaintiff at the time of the demands made by the several defendants upon the plaintiff herein was eighty-five per cent. of the par

value thereof, except as to the time of demand by Heistand & Co., when it was sixty-five per cent. of the par value thereof.

In the twenty-second, twenty-third and twenty-fourth findings certain certificates are designated as spurious, and othes as genuine.

The conclusions of law, as found by the court below, are as follows:

Conclusions of Law. First—That the presence of the name of George F. Doughty, both as secretary and owner of the following certificates, to-wit: Nos. 256, 526, 294, 484, 446, 524, 292, 489, 472, 298, 296, 469, 471, 527, 499, 546, 467, 454, 455, 447, 473, 488, 295, 522, 495, 299, 494, 449, 376, 384, 435, 545 and 375, put each of the defendants acquiring said certificates respectively upon inquiry; and the failure of said several defendants to make inquiry of some officer of the plaintiff company other than Doughty constituted contributory negligence on the part of each of said defendants, whereby they are prevented from recovering upon their several cross-petitions their loss sustained by reason of the negligence of the plaintiff as stated in the conclusions of fact.

Second—That the signing, sealing filling up and use by George F. Doughty on said several certificates mentioned in conclusion of law No. 1, and held by said defendants, respectively, was not the act of the plaintiff, and creates no obligation on the plaintiff's part to recognize said defendants or any of them as the owners of the shares of stock which the fraudulent certificates respectively purport to represent.

Reference to the third, fourth, fifth, seventh and eighth conclusions of law may be omitted at this time, except to state that they find certain certificates valid and others spurious.

The sixth finding is in substance that "the plaintiff is entitled to have the certificates held by the defendants each and all surrendered to it by the said defendants, respectively, holding the same for cancellation, and is entitled to an injunction against each of said defendants to restrain them from prosecuting the several actions commenced by them against said plaintiff."

The present case is the outgrowth of the litigation which began in the courts of this city and county shortly after the discovery of the Doughty frauds, and has been continued ever since; in which litigation the holders of the certificates of stock issued by Doughty under the circumstances above detailed, seek to recover damages against the railroad company for the loss they have suffered in relying upon such certificates as genuine. The rulings and decisions of the local courts in such litigation, so far as they have been reported, will be found in the following cases: *Citizens' National Bank v. Railway Co.*, 9 Dec. Re., 147; *The Railway Co. v. Third National Bank of Urbana*, 1 Circ. Dec., 109; *Railway Co. v. Jos. Rawson & Sons*, 9 Dec. Re., 709; *Mary J. Perin v. Railway Co.*, 10 Dec. Re., 113; *Railway Co. v. Citizens' National Bank et al.*, 10 Dec. Re., 614; and *Railway Co. v. Citizens' National Bank et al.*, ante 50.

In the present case, which, as we have seen, is a proceeding in equity, all the holders of the stock issued by Doughty are made parties, and all questions necessary to a final determination of the rights of such parties are presented for adjudication.

The first proposition which is relied upon by the railway company is: that a certificate of stock is a non-negotiable instrument, and the transfer of it is governed by the rules which are applicable to choses in action; that the transferee of a certificate of stock takes it subject to all the equities that exist between his transferrer and the company; and



that as Doughty had no title to these certificates against the railway company, he could transfer no title to the defendants.

A chose in action is property or money that may be recovered by an action, and may arise either out of contract or tort. It has reference solely to the original parties between whom the transaction was had which created it, and has no concern whatever as to third persons. Whoever purchases therefore, the rights of either party, acquires no rights different from those of the party from whom he purchases. He stands in the shoes of the person from whom he made his purchase, and takes subject to all those defenses which could have been made against such person.

But it will become evident from a consideration of the nature and purpose of a certificate of stock, and an examination of the authorities relating to that subject, that while in some respects the transfer of such certificate may be subject to the rules governing the assignment of choses in action, as, for instance, in the case of the right of a corporation to assert a lien upon the stock for unpaid assessments when the certificate does not state that all assessments are paid, yet inasmuch as the certificate of stock contains a representation as to the ownership of the shares, addressed to all persons who may come to deal in such stock, the corporation, if it has issued the certificate, should not be and is not allowed, under the guise of setting up equities on a non-negotiable instrument, to contradict such representations as against a *bona fide* purchaser for value, who has acted upon the representations in the certificate, that the holder of the same is the owner of the shares therein stated.

In the opinion of Judge Taft in *Railway Co. v. Citizens' National Bank*, *supra*, he thus defined the nature and effect of a certificate of stock.

"A certificate of stock is the written evidence of the contract between the company and its stockholders by which the latter is entitled to share in the control and profits of the company during his life, and to receive his just proportion of the assets on dissolution. The peculiar characteristic of joint stock companies like the plaintiff, as distinguished from a partnership, is the right of a holder of any interest in it, whether great or small, to transfer it to a stranger without the consent of his co-owners. To facilitate such transfers, the company is given power by statute to issue through its president and secretary and over its seal, certificates of ownership of its stock to its stockholders, the chief purpose of which is to enable each stockholder to prove to the trading world his title to the shares recited in his certificate. The ease with which, by the use of such certificates, stock may be dealt in invites investment, and thus gives additional value. *Bank v. Lanier*, 11 Wallace 339.

The certificate is a contractual representation made through the stockholders by the company to any member of the public who shall rely on the stockholders' rights thus evidenced, and on the faith of it shall advance value. When such a *bona fide* purchaser calls upon the company to recognize his rights so obtained, and it refuses, because the stock evidenced by the certificate has no existence and the certificate is untrue, his right of action against the company is not the common-law action of deceit, based upon an intent by the company to deceive, but it is to recover damages against the company for its refusal to make good the contractual representation, the truth of which it is estopped to deny. As between the company and the purchaser, he is the owner of valid stock by virtue of the contract and representation of the certificate, and no matter what the motive or ground for the mis-statement of the certificate, the company, if it issued it, must respond in damages as if it had refused to recognize valid stock."

And in the trial at special term of *Citizens' National Bank v. Railway Co.*, *supra*, Judge Force in defining the nature of a certificate of stock directed attention to the representation as to title contained in the certificate as a circumstance that was to be borne constantly and promi-

nently in mind in considering the rights of third persons arising out of a purchase of certificates. After stating that such a certificate was not negotiable, although freely assignable, he said:

"If then it is not negotiable, the question is presented and has been discussed, how it is that an assignee could have a good title if the paper was invalid in the hands of the original holder. It seems to me the question is settled in England, at all events so far as the English rule is concerned, in the case of Bahia and San Francisco Railway Company, where it was held that a certificate of stock containing a statement that the stock represented by the certificate will be transferred fully only by surrender of the certificate and entry of transfer upon the books, and delivery of the new certificate, that that representation in a certificate is a representation made not only to the person to whom the stock is issued, but to all persons who deal with the holder of the certificate for a transfer and sale of it, and that the person who is induced by that representation to act, has a right of action in whatever form it may be, against the corporation, if he sustains a loss by reason of being induced by that representation.

That decision has been several times affirmed in England, by the House of Lords as well as by other courts. That rule, in that form at all events, has not, as far as I know, been declared in the United States; yet the Supreme Court of the United States, while not in that form, has made substantially, I think, the same ruling. In the class of cases, several of which have been disposed of in the Supreme Court of the United States, where the legislature of a state authorizes a municipal corporation to issue its bonds upon the performance of certain precedent conditions, if the bond contains a recital that those precedent conditions were performed, the corporation cannot declare they were not performed, as against any *bona fide* holder. Now, it is true that the bond, the obligation to pay, is negotiable; but the recital, the statement of facts, is not negotiable; and hence the ruling is that this recital is a representation which is made directly by the corporation to every person who deals with those bonds when once issued. The question has not been specifically discussed, as far as I know, in our Supreme Court. The form of certificate must then be regarded. Now the form of certificate is that "This is to certify \_\_\_\_\_," to whom. "This is to certify that George F. Doughty is entitled to 250 shares of one hundred dollars each, of the capital stock, and so forth, transferable on the books of the company, in person or by attorney, on the surrender of this certificate." For whose benefit is the statement made that this is transferable on the books of the company in person or by attorney, on surrender of the certificate? It is of no consequence to Doughty; it is not to advise him how he can get rid of his property; it is of consequence to purchasers, to advise them of the steps necessary to acquire legal title to the stock. So I take it that the rule, which is entirely established in England, and which is supported by analogous rulings by the Supreme Court of the United States, if not specifically announced by our Supreme Court, I take it to be the law in Ohio; that is, that the representation in a certificate of stock of this form is a representation by the corporation to all persons who deal for the purchase of such shares of stock."

It is clear, too, from the decision in the case of Railway Co. v. Robins, 35 Ohio St., 500, that our Supreme Court, by reason of the representation as to title contained in a certificate of stock, will not regard the rights of a shareholder as a mere chose in action.

In that case the corporation had issued a certificate of stock in favor of Voce, Perkins & Co. Voce, Perkins & Co. sold the certificate and transferred it by indorsement to Fassett, the defendant's intestate. The corporation had no notice of this sale and transfer of the certificate to Fassett. Subsequently, upon the representation of Voce, Perkins & Co. that the certificate had been lost, they procured the company to issue new certificates to Burke and Perkins, who were the secretary and vice-president of the corporation.

Now, if the corporation had simply been indebted to Voce, Perkins & Co. as upon a chose of action, and Voce, Perkins & Co. had assigned their claim to Fassett, who had failed to notify the company of such assignment, and the company had subsequently paid the indebtedness to

Voce, Perkins & Co., they would have discharged their obligations, and would have been under no liability to Fassett. And this, in effect, was the defense that the company made in that case. And if the liability of the corporation in respect to a certificate of stock is like its ordinary liability on simple debt or chose in action, the defense would have been good. But the court held the defense not good as to the ownership of the stock, because the statement in the certificate addressed to the public that the holder of the certificate is entitled to ownership of the shares therein stated imposes a trust upon the corporation for the protection of the interests of persons into whose hands such certificates may come; but did hold the defense good as to the dividends that had been paid by the corporation, because the production of the certificate was not necessary to draw the dividends, and the failure upon the part of one purchasing a certificate to notify the corporation of his purchase justifies the corporation in paying them to him whom the books show to be the owner thereof.

This preliminary examination as to the difference between the liability of a corporation as respects its certificates of stock, and that on an ordinary simple debt or chose in action, brings us directly to a line of cases in which the precise question now under examination is determined, viz.: Whether the holder of a certificate of stock can, as against the corporation, convey to a *bona fide* purchaser for value a better title than such holder or transferrer has.

In *Holbrook v. New Jersey Zinc Co.* (57 N. Y., 621-2), it was held that although as between the transferrer of certificates and the corporation, the transferrer was not the owner of the shares, and his right to enjoy them was subject to equities which would have defeated that right, and have made him merely a trustee of the shares, yet he, having sold the certificates to *bona fide* purchasers for value, such purchasers were entitled, as against the corporation, to recover damages for its failure to recognize them as shareholders. And that:

"It cannot now be denied that if a corporation having power to issue stock certificates does in fact issue such a certificate in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate that he is an owner and has capacity to transfer shares. This proposition does not rest on any view of the negotiability of stock, but on general principles appertaining to the law of estoppel."

In the leading and thoroughly considered case of *Simm v. Anglo American Telegraph Company*, L. R., 5 Q. B. D., 204, the contention of the railway company that a transferrer of a certificate of stock can transfer no better title than he himself has, is examined at length and distinctly repudiated.

In that case Coates was the owner of stock in the telegraph company. His clerk, Phillips, without authority from Coates, instructed a broker to sell the stock. The stock was sold through the broker to Burge & Co., who received through the broker what purported to be a transfer to them from Coates. The transfer was a forgery. Burge & Co. took the transfer to the telegraph company, who registered them as stockholders, and subsequently, at the request of Burge & Co., in consideration of money loaned to Burge & Co. by Simm & Ingelow, the stock was transferred to the latter parties, and a certificate was issued to them by the company.

It was held in that case that as between the Telegraph Company and Burge & Co., the latter had no title to the stock, inasmuch as their title depended upon the transfer from them to Coates, which transfer was a forgery, and that the blame for accepting the forgery as genuine was no more attributable to the Telegraph Company than to Burge & Co.; but it was further held as between the Telegraph Company and Simm & Ingelow that inasmuch as the latter had advanced money to Burge & Co., relying upon the representation contained in the certificate issued by the company, the latter, as to Simm & Ingelow, were estopped to deny the ownership of the stock by Burge & Co.

The decisions in this class of cases result not from any forced or refined reasoning, but from the application to the statements contained in a certificate of stock of the simple and easily understood principle of estoppel laid down years ago in *Pickard v. Sears*, (6 A. & E., 469) and *Freeman v. Cooke*, (2 Ex., 654), viz.: "that if you make a representation with the intention that it shall be acted upon by another, and he does so act, you are estopped from denying the truth of what you represent to be the fact." In *re Bahia and San Francisco Railway Company*, (L. R., 3 Q. B., 584.)

Nor are certificates of stock the only instruments to which this principle is made applicable, but it is extended to any instrument issued with the intention that it shall be acted upon by others than the immediate party who first receives it. An illustration of this principle is found in the case of *Webb and others v. The Commissioners of Herne Bay*, (L. R., 5 Q. B., 642.) In that case, "Commissioners were incorporated by statute for the purpose of improving the town of H——, and were empowered to levy rates and to borrow money. For securing the payment of the loans made to them they were authorized to issue in a prescribed form debentures bearing interest and capable of assignment. A person being a commissioner was forbidden under a penalty to accept any contract for carrying out the objects of the statute. The commissioners bought bricks for the purposes of the act from P. H., a commissioner; and in order to provide for payment of the bricks they executed and delivered to him debentures in the prescribed form, which were duly registered as required by the act. P. H. assigned them to the plaintiffs for value without notice of the circumstances under which they were issued."

It was held that so far as plaintiffs were concerned, it was immaterial whether the transaction between the commissioners and P. H. was illegal or not, or whether P. H. had a right upon any ground to recover from them; and the commissioners were held liable upon the ground that they "issued the debentures with the knowledge that they were capable of being transferred, and would very likely be transferred to a holder for value," and that upon the principle of *Pickard v. Sears*, *Freeman v. Cooke*, and *In re Bahia and San Francisco Ry. Co.*, it did not "lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal."

Notwithstanding the principle so clearly and positively declared in the foregoing cases, it is urged for the railway company, that certificates of stock are similar in every legal aspect to bills of lading and warehouse receipts; and that inasmuch as the assignee of these latter instruments takes them subject to all the equities existing between the original parties thereto, the same rule should apply to certificates of stock. The cases cited in illustration of this principle as applicable to the case at

bar are, *Pollard v. Vinton*, (105 U. S., 7); *Friedlander v. Ry. Co.*, (130 U. S., 416,) and *Second National Bank v. Walbridge et al.*, (19 Ohio St., 419).

In the first two cases, the carrier's agent issued bills of lading without receiving the goods, and the bills afterwards passed into the hands of a *bona fide* purchaser for value. In those cases it was held that the agent had no authority to issue bills unless he received the goods, and that this fact could be set up by the carrier as a defense in an action against it by the *bona fide* purchaser.

In *Bank v. Walbridge*, where different warehouse receipts were issued by mistake for the same property, it was held that in an action against the warehouseman by a *bona fide* purchaser of the receipt issued by mistake, the warehouseman was entitled to set up such mistake as a defense.

But we think a manifest distinction is to be made between a bill of lading or a warehouse receipt and a certificate of stock. The two former instruments are, primarily considered, merely evidence of a contract of carriage or storage; although it is true that they have come into such general use in the commercial world that notwithstanding the decisions in the U. S. Supreme Court, to which we have referred, it is held in New York and Pennsylvania that the issuing of similar instruments has the force of a statement by the carrier or warehouseman that the goods have been received; and in many states the legislatures have by statute seen fit to give them a binding effect as against the carrier and warehouseman in respect to the title of the goods described in them. Yet it remains undeniably true that the nature and purpose of these instruments is different from that of a certificate of stock. The representations in a certificate of stock are addressed not merely to the persons in whose favor it is issued, but to third persons generally; and it has no reason to exist except as an evidence of ownership, and to certify and represent that the person named in it is entitled to the shares therein specified.

This distinction between these different classes of instruments is pointed out by the Supreme Court of Maryland in *Baltimore & Ohio R. R. Co. v. Wilkins*, 44 Md., 28, where it is said that:

"Certificates of stock are of an entirely different character from bills of lading. The distinction between them has been well stated in the brief of the appellant's counsel. (In which brief it is said that 'the certificate of stock fulfills its purpose by merely stating the fact of ownership. But a bill of lading performs an entirely different function; it is a contract for the transportation of goods. It is not intended to give information as to the ownership of intangible property.') The agent who signs a bill of lading is not held out to the public as authorized to make statements like those in a certificate of stock, but only to make contracts to carry visible and tangible property."

In the case of *Emsel v. Levy & Bro.*, 46 Ohio St., 255, our Supreme Court applying the principle of estoppel declared in *Pickard v. Sears and Freeman v. Cooke*, *supra*, held that: "Where the owner of goods sells to one on credit, and knowingly delivers to him a receipt drawn in such form and given under such circumstances as to cause an innocent purchaser buying from the vendee rightfully, to believe that the goods will be delivered upon compliance by said purchaser with certain conditions in the receipt contained, and he parts with his money in good faith upon the belief thus created, such purchaser has the right to avail himself of the terms of the contract, and the vendor is estopped to afterward set up a lien for purchase money and insist upon its payment as

further condition to delivery of the goods;" and to the argument that the instruments in that case were warehouse receipts, and that therefore the defendants had the right to set up against the purchasers of them any defenses that they might have set up between the original parties, the court said:

"The case seems to have turned in the superior court upon the question whether or not the receipts delivered by the defendants to Baum & Co., (from whom the vendees purchased them) were warehouse receipts, and much argument has been adduced in the briefs of counsel upon that question. But we think the real question is not whether those papers were in form or in substance warehouse receipts, but whether or not the firm which executed and put them in circulation may, as against an innocent holder, be permitted to set up any claim to the property, or insist upon any conditions of delivery other than those contained in the instruments."

As in that case, the Supreme Court held that the statements contained in the receipt were addressed to the public generally, as well as to the party to whom it was given, and that the principle of estoppel should be applied in such case where the receipt had gone into the hands of a *bona fide* purchaser, even though there was a good defense between the original parties, and even though such a receipt was what is commonly known as a warehouse receipt, against which ordinarily the equities between the original parties may be set up; *a fortiori*, may it not be expected to hold that when a corporation issues a certificate of stock, the sole purpose of which is to certify ownership, and the representations of which as to ownership are addressed to all persons into whose hands it may come, the corporation is estopped as against third persons from setting up any defense that contradicts such representations of ownership, even though as against the person to whom such certificate is in the first instance issued by the corporation, such defense might be made?

The foregoing discussion as to the nature and purpose of a certificate of stock and the responsibility with respect to third persons which attaches to a corporation which has issued a certificate, warrants us in the conclusion that the proposition of the Railway Company that a certificate of stock is a mere non-negotiable instrument whose transfer is subject to the laws governing the assignment of choses in action, is subject at least to the following limitation, viz.: That inasmuch as the purpose of the certificate is merely to evidence and certify ownership in the shares which it purports to represent, and inasmuch as the certification as to the ownership of the shares is addressed to every one who may come to deal in such shares--where a corporation has issued a certificate, and a third person in good faith by reason of such representation has been misled to his injury, the corporation will be estopped as to such third person from asserting that its certification as to the ownership of the shares is untrue, although, as between the corporation itself and the immediate person to whom it was issued, such assertion might be permitted.

We have reached, therefore, the inquiry: Did the corporation, in contemplation of law, issue the certificates which are involved in this litigation? If it did not, it is of course not liable in any form upon them. If it did, aside from the question of the duty of inquiry upon the part of the purchasers, its liability is unquestioned, and it is immaterial that as between the corporation and Doughty the certificates are invalid.

In the course of this inquiry the plaintiffs in error have placed their contention that the issue of the certificates was the act of the corporation, upon three grounds:

First—That the corporation was negligent in the matter of the transfer of the certificates of its stock, in that it was negligent in its failure to supervise the conduct of its agents in that respect, and that such negligence enabled Doughty to commit the frauds complained of; that such negligence was the proximate cause of the injury, and that therefore there arises an estoppel *in pais* against the corporation, which estops it from asserting that it did not, in fact, issue the certificates, and that such estoppel is in no way avoided by the circumstance that the certificates, although signed by Doughty as secretary, ran in his favor; because such circumstance was not sufficient to put the purchaser of the certificates upon inquiry as to the validity of the issue, and the purchasers having made no such inquiry, are not therefore guilty of contributory negligence.

Second—That the act of Doughty in issuing the certificates was the act of an agent of the corporation, acting in the course of his employment, and for which act, therefore, upon the plain principles of agency, the corporation is responsible.

Third—That the matter of issuing certificates was entrusted by the corporation solely to Cook, its president, and Doughty its secretary, and the seal of the corporation given into the sole possession and control of the latter; that these officers, therefore, became, so far as the issuing of certificates was concerned, the corporation itself, and certificates, in the hands of *bona fide* purchasers for value, bearing the genuine signatures of Cook and Doughty and the seal of the corporation, are necessarily the certificates of the corporation.

Recurring now to the first ground above stated: The fourth finding of fact was that: "The president, Theodore Cook, gave but little, if any, personal attention to the transfers of stock, except to sign the certificates. After the issue of the certificates to the original subscribers to the capital stock of the plaintiff, the president was in the habit of signing a number of certificates in blank, and leaving them with Doughty, as secretary, to be filled out when necessary, upon the presentation to said Doughty, as such secretary, of outstanding certificates for transfer duly indorsed as above provided, and for no other purpose. When the secretary, Doughty, died, there had been signed by the president and secretary, with the corporate seal affixed and removed from the book, certificates for thirty-four thousand shares of stock, which had not been surrendered or cancelled by them. The authorized stock was thirty thousand shares." No exception was taken to this finding.

And in the sixth finding of fact it is found :

"That the entries upon the stock certificate books and the register of transfers disclose from November 9, 1881, down to the death of said George F. Doughty, entry after entry that was suspicious upon its face, and was fraudulent in fact, and that very little investigation of these books would have disclosed the fraud which Doughty was engaged in perpetrating in issuing stock certificates referred to and found to be spurious by the court. And that the directors and president of the plaintiff company were negligent in the examination and supervision of the said certificate books and register of transfers, and of the certificates from time to time surrendered and in the possession of the company for cancellation, and of the use being made by said Doughty of certificates

signed in blank, and that such negligence enabled Doughty to commit the frauds hereinafter referred to."

To the latter part of this sixth finding the Railway Company excepted. And while it insists that the evidence does not warrant such a finding, it is also urged that even if this court should determine that this finding of fact is sustained by the evidence, yet, the plaintiffs in error are not for that reason entitled to maintain an action against the Railway Company for negligence. Because

(1) There is no relation of privity or duty owing by a corporation as respects those who purchase spurious certificates of stock unless such purchasers acquire the certificates in a dealing with the company itself, or with a duly authorized agent acting on behalf of the company; and

(2) The law does not require that a principal shall supervise the conduct of an agent.

The first inquiry then is: whether persons who are not stockholders, but who seek in good faith and for value to become so, by the purchase from third persons of certificates of stock bearing the genuine signatures of its officers, and the genuine seal of the corporation, have any right of action against the corporation, if such certificates are subsequently discovered to have been fraudulently issued by one of the issuing officers for his personal benefit, and if such officer was enabled to perpetrate such fraud by reason of the negligence of the corporation with reference to the transfer of its stock.

To constitute negligence there must be some duty owing from the party whose negligence occasions the loss to the party who is injured. (Deering on Negligence, sec. 3.)

This proposition is universally conceded to be true, although expressed by text-writers, and courts in a variety of forms. Thus, in Cooley on Torts (p. 630), negligence is defined as "the failure to observe for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such person suffers injury;" and in Thompson on Negligence as "a failure of duty generally unintentional, but sometimes intentional." And in Smith on Negligence (p. 2) it is said: "It can not be predicated of any particular act that it is *per se* negligent; it is only so because it is a breach of duty, so that an act done by one man may be negligent, which, done by another, would not be so because he had no duty with respect to it. Sometimes the duty may have arisen out of a contract between the parties; but it is not necessary that it should have so arisen. It may come out of the relative situation of the parties, or be imposed by statute." And in line with the foregoing definition of negligence is that of our Supreme Court in *Harriman v. Railway Co.* (45 Ohio St., 20), where it is said:

"Actionable negligence is sometimes defined to be 'the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill by which neglect the plaintiff, without contributory negligence on his part, suffered an injury to his person or property; and actionable negligence exists only where the one whose act causes the injury, owes to the injured person a duty created either by contract or operation of law, which he has failed to discharge.'"

It will be seen from the above definitions of negligence that while the law commits itself by a definition of negligence to the proposition that it is the failure to observe the duty which one person owes another,



yet it distinctly refuses to commit itself to anything more than a general statement as to the circumstances which give rise to such duty, but in conformity to the expansive principles of the common law, leaves that question to be determined by the courts in each case, according to the particular circumstances of such case and the obligations which those circumstances create.

Thus the law of negligence, while retaining always its vital principles, finds new fields for the application of them in the constantly increasing and complex demands of an advancing civilization.

The inquiry then here is: Upon principle and authority, does a corporation owe to purchasers who seek to purchase its shares, such a duty to protect them from being imposed upon by certificates apparently genuine, but in reality issued through the fraud of an officer whose duty it is to issue them, as makes the negligent failure to exercise that duty the foundation of a right of action upon the part of the injured purchaser against the corporation?

In the former part of this opinion we found it necessary to examine into the nature and purpose of a certificate of stock; and what was then said upon that subject, although it need not be repeated, should again be borne in mind.

The following additional authorities, however, which direct attention especially to the benefit which the corporation derives from its power to issue such certificates, and the relation which it necessarily therefore bears to probable purchasers of its stock, have especial pertinency to the question under discussion.

*In re Bahia & San Francisco Railway Co.*, *supra*, 594-5, Cockburn, C. J., said:

"This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is therefore for the benefit of the company in general, and it is a declaration by the company to all the world that the person in whose name the certificate is made out and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares."

To the same effect is the language of the Supreme Court of the United States in the case of *Bank v. Lanier*, 11 Wallace, 377, where it is said:

"The power to transfer their stock is one of the most valuable franchises conferred by congress on banking associations. Without this power it can readily be seen the value of the stock would be greatly lessened, and obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the stockholder than the public that the certificate representing stock, should be in a form to secure public confidence, for without this he could not negotiate to any advantage.

"It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in

all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. It is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told under the seal of the corporation, that the shareholder is entitled to so much stock which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him."

The two cases from which these citations are taken, did not involve the question as to the liability of a corporation for negligence in permitting fraudulent certificates, bearing the genuine seal of the corporation, to be put upon the market by its agents authorized to issue certificates; but they did involve the question as to the nature of the franchise exercised by a corporation in the issue of its certificates, and the relation which the corporation bore to the public in the exercise of that franchise; and they are therefore pertinent to the question before us.

And if these authorities and many more of similar import did not exist, who could doubt the soundness of the propositions they declare, viz.: That the issue of certificates of stock by a corporation, and the facility of transfer which attaches to them, are quite as much for the benefit of the corporation and its shareholders as for the public; that the certificates, while evidence of ownership, are invitations also to purchasers; and that the presence on them of the seal of the corporation and the genuine signatures of the officers of the corporation, are evidence and assurance that the invitation is genuine?

Yet, counsel for the Railway Company, notwithstanding this relation of the corporation to the public with respect to its certificates of stock, contend that it owes no duty to a member of the public whom it invites to become a shareholder in it, and whose interests are advanced by the acceptance of that invitation, to exercise the care that an ordinarily prudent person would exercise under the circumstances to see that such purchaser is not misled into the purchase of a worthless piece of paper instead of a certificate of its shares, by the wrongful acts of its agents in affixing their genuine signatures and the corporation seal to such pretended certificates.

Let us carry the argument of counsel for the Railway Company to its logical conclusion by the supposition of an extreme case, for the purpose of bringing out more distinctly and prominently the contention that the corporation owes no duty such as we have described.

Nor is the supposition of an extreme case of negligence an unfair mode of argument, because the inquiry now is, not as to the degree of care that the corporation is to exercise, but whether it is required to exercise any care.

Suppose, for instance, that a corporation should employ and put in charge of its business of issuing and transferring certificates, two men whom it knew to have previously been guilty of the issue of fraudulent certificates, and should devise no system of checks upon them, and provide for no supervision of their acts; and that these men upon the assumption of their offices, should proceed to fraudulently issue certificates; and that circumstances should arise of a grossly suspicious nature, and

be brought actually to the knowledge of the corporation; and yet, notwithstanding these facts, the corporation should supinely allow the officers to continue in their business.

Would a *bona fide* purchaser for value of a certificate, signed by these officers, and having thereon the corporate seal, and issued under all these circumstances, have no right of action against the corporation, if it should transpire that the certificate he had purchased was a fraud and had been issued for the personal benefit solely of a fraudulent officer?

It seems to us there can be but one answer to such an inquiry, otherwise, the definitions of the law of negligence as laid down by text writers and the courts will need a radical revision.

But we are not compelled to rely solely upon the general principles of the law of negligence, unaided by adjudication upon this precise point.

In *Railroad Co. v. Robbins* (35 Ohio St., *supra*), although the manner in which the corporation was negligent was different from that in the case at bar, yet our Supreme Court, in the following language, speaking through one of its ablest judges, declared that a corporation was responsible to persons injured by its negligence in the matter of transferring stock.

"The duty of a corporation towards those interested in the transfer of its shares of stock has been thus stated; 'it is made the custodian of the shares, and is clothed with power to protect the rights of every one from unauthorized transfers. The power thus vested in the corporation is a trust placed in its hands for the protection of individual interests, and like every other trustee it is bound to execute the trust with proper diligence and care, and is responsible for any injury sustained by its negligence or misconduct.'"

In *Allen & Craft v. Boston R. R. Co.* (150 Mass., 200), the plaintiffs *bona fide* and for value came into the possession and ownership of certain certificates of stock, fraudulently issued by the secretary of the company; said certificates having been issued in proper form under the seal of the company, and having been duly signed by the officers authorized to issue them.

In the course of the opinion in which the company was held liable, the court said:

"The agreed facts in both cases show gross negligence on the part of the president in signing certificates in blank, and negligence on the part of the directors in not examining the books of the company and discovering the fictitious transfers of stock made by Reed, (the secretary). In both cases, after the frauds were discovered, the defendant refused to recognize the certificates of stock as valid, and refused to allow them to be transferred, or to issue new certificates. \* \* \* The present cases, we think, fall within the principle, that where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit the fraud."

The case of the *N. Y. & N. H. R. R. Co. v. Schuyler* (34 N. Y.), grew out of the frauds of Schuyler, the transfer agent of the railroad company, in issuing fraudulent certificates; and the opinion of the court is one of the most elaborate found in any of the reports. The liability of the corporation is placed upon two distinct grounds. First—The negligence of the corporation with respect to the matter of issuing and transferring stock enabled Schuyler to perpetrate them, and the company was therefore responsible; and second—The acts of Schuyler were the acts of an agent in the course of his employment, and therefore bound the company. Upon the subject of negligence the syllabus of the case is as follows:

"The doctrine of implied agency arising out of negligence has its true basis in the principle of estoppel *in pais*; and is based upon the injustice of allowing a party to be the author of his own misfortunes, and then to charge the consequences upon others; and it implies an act in itself invalid, and a person forbidden for equitable reasons, to set up its invalidity."

"Where the act of the agent can be charged home upon the corporation, then the *bona fide* holder of any certificate issued by the transfer agent has a primary and direct claim upon the company, either to be admitted as a corporator, or to be compensated for the fraud practiced upon him."

"To entitle the aggrieved party to sue in such case, no privity is necessary except such as is created by the unlawful act and the consequential injury."

In the course of the opinion, the court say (page 51).

"In one general proposition an inquiry is primarily involved into the duties concerning its stock which the corporation owed to the public, and especially to all who might become dealers therein."

And then after reciting the powers which were sought by and granted to the company in respect to the issue of certificates of stock with a view to well known and established commercial usages, says of the corporation:

"They adopted a form of transfer of certificates and of assignment and power of attorney indorsed thereon, and gave them every characteristic of negotiability in their power to confer. They sought the commercial center of this continent, and there established a transfer office and agency, and thus gave and secured the most unbounded facilities for dealing in the stock. \* \* \* This course was legitimate, but it brought with it corresponding duties and obligations. I can not doubt but that upon general and long established principles of law, the corporation became bound to the exercise, in this branch of its business, of such ordinary care and skill as should afford to dealers a safe and reliable mode of acquiring title to its shares in the form of transfers and certificates as provided by its by-laws. \* \* \* 'Mere negligence where there is no obligation to use care, as where a man digs a pit on his own land and leaves it open, affords no ground of action; but where there is anything in the circumstances to create a duty to an individual or to the public, any neglect to perform that duty from which injury arises, is actionable.'

"It is upon this duty that the courts have established the rights which dealers acquire through the certificates of corporations who thus enter their stock upon the market, and the liabilities which flow from a refusal to permit the enjoyment of those rights.

"I can not, therefore, subscribe to the idea that the duties of the plaintiffs, in respect to their stock, were limited to themselves and existing shareholders. They extended also to the commercial community whose confidence and trade the plaintiffs invited, and who in turn were entitled to good faith and fair dealing at the hands of the company; and they sprang into full vigor in behalf of every party who entered upon such dealing."

See also the case of *Bruff v. Mali*, 36 N. Y., 200, where the doctrine here laid down is approved, and where, referring to the *Schuyler* case, it is further said:

"It was also decided in this case that, to entitle a party holding spurious certificates to sue, no privity was necessary except such as was created by the unlawful act and the consequential injury."

It is insisted, however, by counsel for the Railway Company, that in the cases above cited there had been a dealing with an officer of the company on behalf of the company by the assignor or of the *bona fide* purchaser, and that such a dealing created the necessary privity to maintain an action of negligence; and that inasmuch as there was no such previous dealing in the cases at bar, this necessary privity is lacking.

In reference to this criticism it may be observed, First: That if no authority can be applicable to a case under discussion unless the precise facts are present in the latter case that were present in the former the use of previous decisions as authorities in courts of law must necessarily be very limited. A difference in fact is only important when such difference affects the principle decided. Otherwise the difference is immaterial. Second: It is true that in the first two cases above cited there may have been such a previous dealing as/counsel contend, although it is doubtful whether such previous dealing was always present in the Schuyler case. (See opinion in the same case in the lower court.) But one may examine and scrutinize those decisions in vain to find that such dealing was regarded by the courts as essential to the recovery. On the contrary, in our opinion, the contention that those decisions insist that the bona fide purchaser must establish a privity by contract to maintain his action, is based upon a misapprehension of the principle there declared.

Thus, in the Robbins case, it is declared that in the matter of the issue and transfer of the certificates of stock, the corporation is clothed with power to protect the rights of every one from unauthorized transfers and discharge a trust placed in its hands for the protection of individual interests and "is responsible for any injury sustained by its negligence." In the Allen and Craft cases the decision is placed on the ground that "the present cases fall within the principle that where one of two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit the fraud." And in the Schuyler case, approved in *Bruff v. Mali*, supra, the court said (page 60):

"To entitle the aggrieved party to sue, in such case, no privity is necessary except such as is created by the unlawful act and the consequential injury."

It is insisted, however, by counsel, that it was declared in the *Mechanics' Bank* case, 13 N. Y., that no privity existed between the corporation and such bona fide purchasers as we have in this case. But the question of negligence was not raised in that case (*Schuyler* case, p. 53); and in *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y., 151, the judge who wrote the opinion in the *Schuyler* case said:

"We certainly did not put our judgment on the ground that the plaintiffs were not in privity of dealing with the defendants by reason of the non-negotiable character of the certificates, and therefore could not sue for fraud." (*Schuyler* case, 661.)

And if we bear in mind the principle upon which in the cases cited the courts sustained an action of negligence against the corporation; the proper scope and effect of such principle; the nature and purpose of a certificate of stock; and the relation which a corporation bears to those who deal in it shares; it becomes impossible to reconcile with the established law of negligence the contention of the Railway Company that no liability attaches to a corporation unless an actual privity of contract has at some period been created between the corporation and an owner of the certificate. And the unsoundness of this contention will receive additional confirmation as we examine the correctness of the other proposition, which is urged by the Railway Company; to which we have previously alluded; and which in the order of discussion we have now reached.

That proposition is that negligence in the supervision of an agent, is not a violation in law of a duty that the law imposes upon any principal; that the full duty of the latter is discharged by a prudent selection of a trustworthy agent; and that a surveillance of such agent is degrading to the manhood of both the principal and agent; and contrary to the spirit of the common law.

It is therefore contended that the findings of fact with reference to the negligent supervision are of no legal significance. It is important therefore to examine the authorities on this question, and to determine the principles which they declare.

In the case of *Cutting v. Mahlor*, 78 N. Y., 454-460, it appeared that the defendant, as collateral security for a loan made to him by a bank, delivered to it certain securities which were taken and converted by the president to his own use.

In an action against the defendant by a receiver of the bank to recover the amount of the loan, it was held that the bank was chargeable with negligence in not properly supervising the conduct of the president, and that the defendant was entitled to counterclaim the value of the securities. The court said:

"A corporation is represented by its trustees and managers; their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this. But in addition they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice, especially those so openly committed and easily detected as there are shown to have been. Here were no supervision, no meetings, no examination, no inquiry. A system of management of a banking house in which such conduct of its officers was permitted, was a breach of duty and grossly negligent towards its dealers and persons having stocks and bonds in its keeping."

This case is also cited with approval in *Onderkirk v. C. N. R. Co.*, 119 N. Y., 273, and *Preston v. Praether*, 137 U. S., 604-614.

And in respect to the duty to supervise the conduct of its agents which a bank owes to those who deal with it, the Supreme Court of the United States has said in *Martin v. Webb*, 110 U. S., 15.

"Directors can not, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business. And to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declarations of dividends. That which they ought by proper diligence to have known as the general course of business in the bank they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In *Leather Manufacturers' Bank v. Morgan*, 117 U. S., 96, the question arose as between a bank and one of its depositors as to who should bear the loss occasioned by the fraudulent act of the agent of the depositor in raising checks which were cashed by the bank. In passing upon the question of the necessity for supervision of an agent upon the part of the depositor, the court said:

"We must not be understood as holding that the examination by the depositor of his account must be so close and thorough as to exclude the possibility of any error whatever being over-looked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making the examination, and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and therefore has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination—without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent where the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal, can not be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business."

This principle requiring the supervision of an agent, is again recognized by the United States Supreme Court in the case of *Briggs v. Spaulding et al.*, 141 U. S., 132, where, although the court divided by a vote of five to four on the question of fact as to whether there had been negligence, did not differ as to the correctness of the principle of law we have been examining.

In *Allen & Craft v. South Boston Railroad*, supra, we find the court saying that:

"The agreed facts in both cases show gross carelessness on the part of the president in signing certificates in blank, and negligence on the part of the directors in not examining the books and discovering the fictitious transfers of stock made by Reed."

and that this negligence having enabled Reed to commit the fraud, entitled the plaintiff to a recovery. (Page 207.)

And in the *Schuyler* case the court said:

"If the managers faithfully perform their duty, they exercise a constant and vigilant supervision over the acts of their officers, and where such acts are unauthorized or in opposition to their will, they should and probably do direct their discontinuance, and in case of wilful and palpable violation of duty, dismiss the agent. If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection, they are as much bound to those who are not aware of any want of authority as if the power had been directly conferred. I cannot file my mind to the belief that equity attaches no consequence to such negligence upon the idea that it is not sufficiently proximate as a cause of the injury. \* \* \*

A wrong which ordinary care will prevent is in a legal sense caused by the omission of that care where it is a duty to use it. At any stage, a discovery of *Schuyler's* past frauds would have arrested his career of crime. A discovery would have followed on an examination of the books of the office, which were the only records of the vast stock transactions of the company at New York. An examination was a duty, because it was the obvious dictate of good sense as to the earliest and safest check upon the agent's conduct. The long continued and reckless omission was therefore a culpable negligence without the concurrence of which *Schuyler* could not have committed the frauds by which the defendants have suffered; for it was this omission of duty that left him with power to wield the weapons with which the company had armed him, and, therefore, it may be said to have led directly to the injurious acts."

In view of the foregoing authorities it would not be profitable to further discuss the contention that the supervision of the conduct of an agent is never incumbent upon a principal.

It is a familiar principle of the law of negligence which is expressed by the maxim, *causa proxima non remota spectatur*, that while one is responsible to other persons for such injuries as are the natural and probable consequence of his negligence, and which might and ought to have been foreseen by the wrongdoer as likely to follow from his act, *Hoags v. R. R. Co.*, 85 Pa., 293, yet if the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action. *Cooley on Torts*, page 69; *Railway Company v. Staley*, 41 Ohio St., 122.

The occasion does not call for an extended examination of this principle. It is sufficiently apparent, however, from the citations we have made from the foregoing authorities upon the subject of the supervision of an agent, that where it is held that a supervision is required of the principal, and the agent is enabled by the failure of the principal to discharge this duty, to commit a fraud, such fraud of the agent is regarded as attributable to the failure to exercise the supervision, and such negligence is therefore the proximate cause of the injury. The act of the agent becomes, in contemplation of law the act of the principal.

And the cases of *N. Y. & N. H. R. R. v. Schuyler*, *Allen & Craft v. South Boston R. R. Co.* and *Martin v. Webb*, *supra*, are undoubtedly authority to the effect that where a corporation authorizes an agent to act for it upon the happening of certain events, and the agent fraudulently assumes to act for it, for any length of time, when such fraudulent conduct would have been prevented or discovered by the exercise by the corporation of a reasonable supervision of the conduct of the agent, the negligence of the corporation in contemplation of law is the cause of the fraud of the agent, and is therefore the proximate cause of the injury. That which the corporation ought to have known it will be held to have known, and that fraud which its negligence permitted its agent to commit will be held to be its fraud. The act of the agent becomes the act of the corporation.

Let us apply this principle now to the case of certificates of stock bearing the genuine seal of the corporation and the genuine signatures of the officers authorized to issue certificates, and in the hands of bona fide purchasers for value.

We have previously seen that the representation in the certificate as to title is addressed, not only to the person who appears upon the face of the certificate to be the owner thereof, but is addressed to every one who may come to deal in this certificate.

If, now, by reason of the negligence of the corporation the fraud of the agent is attributable to the corporation, and the act of the agent is the act of the corporation, then the acts of the fraudulent officer in affixing the corporate seal, and his own signature to certificates of stock signed by the president, and in putting the same upon the market as valid certificates, are the acts of the corporation; the certificates become the certificates of the corporation, and the representations therein contained the representations of the corporation.



The negligence of the corporation or the board of directors in respect to the supervision of the transfer agents was sufficient therefore to constitute the proximate cause of the injury.

Whether in case the president had been negligent in signing certificates in blank, and in the supervision of the conduct of the secretary with reference to certificates so signed, but there had been no negligence of the corporation itself, aside from that of the president, there would have been a liability upon the part of the corporation by reason of the president's negligence, we need not now inquire. That question has not been argued before us; is not, in our opinion, necessarily raised by the evidence in the case, and we therefore express no opinion upon it.

But assuming, for the purpose of argument, that such negligence of the president would not of itself have created a liability on the part of the corporation; yet where such negligence is found to co-exist with that of the corporation itself and the board of directors independent of that of the president, we are unable to see that the negligence of the president can have any other effect than that of increasing and aggravating that of the corporation and board of directors.

In such a case there is a failure of the stockholders to provide for any supervision; a failure of the board of directors to so provide, although the statute expressly declares that "the corporate powers, business and property of corporations must be exercised, conducted and controlled by the board of directors," sec. 3248, Rev. Stat., and the negligence of the president whose signature is by law required with that of the secretary to be upon all certificates of stock, sec. 3254, Rev. Stat.

We thus have presented a case where there is present the negligence of the corporation and of every officer thereof who is by law concerned in the issue of certificates of stock except the secretary by whom the fraud was committed. And as the result of such negligence was to give the widest opportunity for the practice of fraud by the secretary, is not such negligence therefore the cause of the fraud, and therefore the proximate cause of the loss? In the light of either principle or authority, we can see no room for doubt as to the correctness of such a conclusion.

At the beginning of the discussion of the proposition that negligence in the supervision of an agent is not a violation of a duty the law imposes upon any principal, we stated that in an examination of the soundness of that proposition we would find additional confirmation of the unsoundness of the other proposition advanced by the Railway Company, viz., that no liability attaches to a corporation for an over-issue of stock, such as we have in this case, unless an actual privity of contract has at some period been created between the corporation and an owner of the certificate; and we may now properly direct attention to such additional confirmation as the examination just concluded may have developed. We have previously seen that when a corporation actually issues a certificate of stock, and represents therein that the holder is entitled to the shares of stock therein recited, and the statement is relied upon by a bona fide purchaser, the corporation is estopped as to such purchaser to deny the truth of the statement; because in contemplation of law the statement is addressed to all persons who may come to deal in such shares of stock. And the examination made as to the law relating to the supervision of an agent by a principal leaves no doubt that where a corporation negligently fails to supervise an agent connected with the issue of stock, by reason of which failure to supervise, the agent is en-

abled to fraudulently issue stock bearing every indicia of genuineness, such issue, while not actually is nevertheless to be considered as legally the act of the corporation.

The contention therefore that no purchaser can maintain an action for want of a necessary privity of contract unless there has been a previous dealing between a prior owner of the certificate and the corporation, is seen to be fallacious; because the right of the holders of such certificates to an action against the corporation has its foundation in the law of estoppel, and may be asserted by any one who acts upon the representations in the certificate.

The principle on which a corporation is made responsible for the fraudulent issue of stock by its officers where such fraud is the natural result of the negligence of the corporation, has long been recognized and applied to negotiable paper. In such cases, because of the probability that such paper will go into the hands of third persons, the law is settled, that if one not observing with proper care the instrument to which he affixes his name, does, through the fraud of another, affix it to such paper, such person, signing, is estopped to deny the binding effect of the paper in the hands of bona fide purchasers for value.

Decamp v. Hanna, Ex'r, 29 Ohio St., 467; Roos v. Doland, 29 Ohio St., 473; Putnam v. Sullivan, 4 Mass., 45; Stephen's Digest on Evidence. (Chase) pp. 188-9, and cases cited.

And the extension of this principle to instruments other than negotiable paper, where such instruments have a mercantile value and contemplate reliance upon them by third persons, is illustrated in the two following cases:

In the case of Ensel v. Levy & Bro., supra, where the defendants signed receipts for whiskey with an agreement for delivery contained in the receipt, and then afterwards as against third persons into whose hands the receipts had passed in good faith and for value, attempted to attach conditions as to the delivery other than those in the receipts, our Supreme Court said: (p. 263-4.)

"It is not necessary that we find a fraudulent purpose on the part of the defendants. Gross negligence is sufficient. That we think abundantly appears and they shall not now be heard to attach new conditions."

• • • • •

"It is insisted that the receipts were to be acted on only by Baum & Co.—that the contract was exclusively between the firm and the defendants, and that where a representation is made only to one person, no other person can claim it as an estoppel. The very face of the receipts contradicts this claim. The terms imply that they may be assigned, 'to be held for account of and subject to the order of G. Baum & Co.' 'This receipt properly indorsed' is the language. The representations in this case can not be confined to such narrow limits. On the contrary, the representations here made were of that class that are considered as addressed generally to all who may, in the ordinary course of business, have occasion to act upon them, and where a person so acting may claim them as an estoppel, (Pence v. Arbuckle, 22 Minn., 417; Bigelow on Fraud, 89-90)."

In the case of Coventry, Sheppard & Co. v. Great Eastern Railway Company, 11 Q. B., 776.

"The defendants received a consignment of wheat, and issued a delivery order for it which came into the hands of B. Upon this delivery order B. obtained advances from the plaintiff. Shortly afterwards the defendants issued a second

delivery order in respect of the same consignment of wheat. The two delivery orders were different and such as might be reasonably supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from the plaintiffs who were under the belief that the delivery orders related to distinct consignments of wheat. B. having afterwards become insolvent.

[ ] "Held: That the defendants were estopped by their negligence from showing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate the plaintiffs for the loss sustained by them through the advances of B."

In the course of his opinion, Brett, M. R., said:

"The conduct of the defendants showed that they undertook to deliver to those persons to whom the document should be handed over." \* \* \*

"It is true that there can be no negligence unless there be a duty; but here the documents have a certain merchantile meaning attached to them, and therefore the defendant owed a duty to merchants and persons likely to deal with the documents."

"Then, was the negligence of the defendants the 'proximate' cause of the loss sustained by the plaintiffs? I use the expression 'proximate cause' as meaning the 'direct and immediate cause.' Here the production of the documents was the 'direct and immediate' cause of the advance of money to Bowden & Co. by the plaintiffs, and certainly the negligence of the defendants was to the prejudice of the plaintiffs, and allowed the fraud to be perpetrated upon them. It seems to me, therefore, that the defendants are estopped as against the plaintiffs, their negligence having been the immediate cause of the advance."

As we have determined that the facts found by the court below, with reference to the negligence of the corporation, are sufficient, in the absence of contributory negligence, upon the part of the purchasers of these certificates, to enable them to maintain an action, we have come now to inquire whether such findings of fact should be set aside by us on the ground that they are manifestly contrary to the weight of the evidence. The findings with reference to the negligence of the president and the Railway Company are findings of fact, and not of law. For the rule is well settled that where the question of negligence is not wholly free from doubt, the question is one of fact. (16 Am. & Eng. Encyclopedia of Law, 465-466); and that inasmuch as "what may be negligence in one case, may not be want of ordinary care in another, the question of negligence is therefore ultimately a question of fact, to be determined by the circumstances;" and a finding thereon will not be set aside in a court of error unless manifestly contrary to the weight of the evidence. *Briggs v. Spaulding*, 141 U. S., 152.

When it is remembered that the very object in requiring the signatures of both the president and secretary was, that one should act as a check upon the other in preventing frauds, and that by a signing of certificates in blank by the president, and the turning of them over to Doughty, without any supervision of his acts, the safeguard was removed, it becomes self evident that the president in thus acting, was chargeable with negligence.

And we think it is equally clear that in the failure to exercise any supervision over its transfer agents, the company itself was guilty of negligence.

Manifestly, it is impossible to lay down any fixed rule in which it would be declared in what manner or at what times supervision of a transfer agent must be had. Whether the examination should be had annually, semi-annually, monthly or weekly, must be determined by the

circumstances of the case. Nor is it necessary for us to declare in this case that an examination should have been had at any particular time during this period, or even that any examination should have been had.

The fact alone that none was had might or might not establish negligence. But when to the fact that none was had we have the additional fact that so far as the by-laws of the corporation and the conduct of its directors was concerned, there is no evidence to show that any examination was ever provided for or even contemplated at any time, we cannot avoid the conclusion that this was negligent conduct, as regards the duty of the corporation to reasonably supervise the conduct of its agents. It presents a case not merely of a want of reasonable supervision; but of a want of any supervision.

A knowledge upon the part of Doughty that an examination and supervision of his acts were certain to be had, even at a remote period, would have had a salutary and more or less preventive influence upon him; and that influence would have been greater in proportion to the certainty and frequency with which he understood these examinations would take place. But with no examination or supervision either provided for or contemplated, nothing prevented him from issuing the fraudulent stock but the signature of the president, which signature, through the negligence of the latter, he secured. Clearly then, it seems to us, the evidence in the case fully sustains the finding below, that the negligence of the company and its president enabled Doughty to commit these frauds.

But it may be said that an estoppel in pais does not arise merely from ordinary negligence, which is the failure to observe ordinary care; but only from gross negligence.

But the Supreme Court of the United States has said:

"Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence;' but after all it means the absence of the care that was necessary under the circumstances." *Milwaukee R. R. Co. v. Ames et al.*, 91 U. S., 495.

And our Supreme Court, after a discussion of the subject of the degrees of negligence, with especial reference to the term "gross negligence," says:

"A majority of the cases would seem to hold it to be a failure to exercise ordinary care." *Telegraph Co. v. Griswold*, 37 Ohio St., 311.

This tendency of the modern authorities and the reasons for it, are well expressed by Mr. Justice Bradley, in *Railroad Company v. Lockwood*, 18 Wallace, 357-382, where he says:

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply 'negligence.'"

In view of the foregoing authorities with reference to the meaning of the phrase "gross negligence;" in view of the millions of dollars that are daily involved in stock transactions in reliance upon certificates whose genuineness is certified to by the issuing officer of the corporation under the corporate seal; and in view of the seriousness of the consequences that are certain to be inflicted upon the commercial community by the issue of fraudulent certificates properly signed and sealed, are we not fully justified in declaring that the corporation is bound to exercise care to see that such certificates are not fraudulently put upon the market by its officers, and that where it makes no examination of the transactions of such officers, and neither provides for nor contemplates such examination, its omission of duty may fairly be classed as gross negligence? It seems to us that we are.

The findings of fact, therefore, with reference to the negligence of the Railway Corporation must stand, and such negligence is sufficient to create an estoppel against it.

But even though we were not prepared to affirm the findings of fact of the court below with reference to the negligence of the Railway Company, we would nevertheless be confronted with two serious questions, both of which would require a decision in favor of the defendants in error, before we would find ourselves empowered to disturb such findings.

The first of these questions is, whether the cross-petition in error filed by the defendants alleges as a ground of error these findings of the court below with reference to the negligence of the Railway Company; and the other question is whether the cross-petition in error was not filed too late to avail the defendants. The latter question grows out of the fact that the final decree was made on February 12, 1890, but the cross-petition in error was not filed until September 29, 1890, a period of more than seven months from the making of the findings and entering of the decree of which complaint is made. But we have not found it necessary to express an opinion upon these questions.

The right to complain of the negligence of another necessarily imposes a duty upon the one complaining, that he himself shall not contribute to the injury by his own negligence.

And in this case, it is urged by the Railway Company that even though it may be liable, by reason of its negligence in the matter of the issue and transfer of stock, to third persons who in good faith and for value are misled into the purchase of certificates, signed by the officers of the corporation, and sealed with the corporate seal, yet such liability does not attach where the certificates run in favor of one of the signing officers; because in such a case the interest and the duty of the officer must come in conflict, and as human experience, teaches us that ordinarily in such conflicts the result is not doubtful, the purchaser is not justified in relying merely upon the signatures of the officers and the seal, but must make inquiry whether such certificates were honestly issued and really represent, as they purport to do, genuine shares of stock in the corporation.

It was upon this ground alone that the decision of the court below in favor of the Railway Company was based, following the decision of the circuit court in the case of *Railway Company v. Third National Bank of Urbana*, 1 Circ. Dec., 109, and the decision of the general term of this court in the case of *Railway Company v. Citizens' National Bank*, 10 Dec. Re., 614. It appears clearly from the findings of the

court below that the only circumstance upon which is based its finding of contributory negligence was that the certificates ran in favor of Doughty, and were also signed by Doughty as one of the officers of the corporation whose signatures were required to attest such certificates. In every other respect the court found that the purchasers acted prudently; that they purchased the certificates through brokers for value in the ordinary course of business, without any actual knowledge of any fraud or irregularity of said Doughty in respect to or in the issue of said certificate of stock; and that the transactions of each purchaser were distinct and separate from one another; and no one of them had any knowledge of the dealings of any other.

As bearing upon the question as to what inquiry, if any, the corporation must have expected from those who purchased certificates running in favor of either its president or secretary, it is instructive to refer to those sections of the statute of the state which prescribe the rights and duties of the corporation with respect to the form of its certificates.

By section 3254 it is provided that all stockholders of corporations are without respect to their official relations to the company entitled to receive certificates of their paid-up stock in the company; and the president and secretary are imperatively required on demand to execute and deliver to each and all of such stockholders certificates showing the true amounts of the stock held by them. And by sec. 3248 it is provided that all directors and all executive officers must be holders of stock in an amount to be fixed by the by-laws. And by secs. 3249 to 3252 provision is made whereby corporations through their directors may adopt by-laws, and through their directors and stockholders may adopt regulations for the government of the company.

In view of these provisions of the statutes it may be confidently asserted:

(1.) That Doughty was required to be a stockholder in order to be secretary;

(2.) That there was no limit upon the quantity of stock he could hold;

(3.) That the form of the body of the certificate was not prescribed by the statute, but was left open to be determined by the by-laws or regulations;

(4.) That Doughty was entitled precisely the same as any other person to a certificate or certificates showing the true amount of the stock he held; and that no certificate would sufficiently evidence title to stock unless it bore the signatures of the president and secretary; and

(5.) That the corporation had the undoubted right to have prescribed a form of certificate for its officers, including Doughty, different from that issued to stockholders generally, by requiring the signatures of other officers in addition to those of the president and secretary.

In view of the foregoing circumstances there would seem upon principle to be no ground for controversy, as to what the law should be as to requiring purchasers of certificates of stock running in favor of either of these officers to make inquiry whether the issue of the certificate was fraudulent or not.

As the corporation had power to require that the ownership of the shares of the secretary or president should be evidenced by signatures of other officers in addition to those of the secretary and president; and as the corporation deliberately adopted the one form of certificate to evidence alike the ownership of shares by those who were officers and by

those who were not; it must necessarily follow as a proposition beyond dispute that the corporation regarded its interests as fully protected from the fraudulent issue of certificates by either the secretary or president, (1) by the character of the men whom it elected to fill those offices; (2) by the check upon each officer which the required signature of the other gave; and (3) by the taking from each officer of a large bond for the faithful discharge of the duties of his office. And we are clearly of the opinion that it may also be affirmed as a proposition beyond dispute, that those safeguards which the corporation, upon mature deliberation, has adopted, and regards as a sufficient protection to it from the fraudulent issue of certificates by its secretary and president, way as against the corporation also be accepted as sufficient by third persons who deal in its certificates; and that such third persons are in no way wanting in good faith towards the corporation because notwithstanding the fact that the certificates bear the genuine seal of the corporation and the genuine signatures of the corporate officers, they do not inquire of such officers whether such seal and signatures have honestly and properly been thereto attached; or that such third persons are wanting in good faith towards the corporation because they do not inquire of the corporation, as distinct from these officers, whether they are aware that such certificates have been issued and are about to be acted upon as genuine.

That the signatures of Doughty and Cook, and the genuine seal of the corporation, were considered by the corporation a sufficient guaranty which made no inquiry necessary when the certificate was in favor of either Doughty or Cook, receives the very strongest confirmation when it is considered that the corporation had made no provision for such inquiry of any of its officers other than Cook and Doughty. If inquiry was not to be made of Cook and Doughty, of whom was it to be made? Of any one of the directors? There is nothing in the constitution or by-laws or the course of business of the corporation that would give the slightest support to such a claim, nor make the answer of such single director binding upon the company. Inquiry in that direction, then was not contemplated by the corporation, and would have been unprofitable.

Should inquiry have been made of the board of directors? If so, then the transfers of stock owned by the president and secretary were to be subject to the restriction that they could only be made at the time of the meetings of the board of directors; because at no other times would there be an opportunity offered for making such inquiries.

But we look in vain through the by-laws for anything that would warrant us in supposing that the transfers of stock owned by the secretary and president were subject to any such limitation.

Inquiry, then, if made, would have to be made of Doughty or Cook. But why inquiry of Doughty if the dealing was with him? Surely his offer of the certificates as collateral security was an assurance so far as he was concerned that they were genuine. And why inquire of Cook? Was not his signature genuine, and had he not already said under that signature that the certificate was valid?

That which ought to be the law usually turns out to be the law; and the propositions just announced are fully sustained by the adjudications upon this subject.

In the case of *Titus v. Turnpike Road*, 61 N. Y., 237, the identical question here presented was decided by the court of appeals of New York. Counsel for the Railway Co. strenuously insist that the admissions

of counsel for the corporation in that case dispensed with any consideration by the court of the question of the liability of the corporation, and therefore it is of no value as an authority. However that may be, and we express no opinion at this time upon that point, it is very certain that upon the point we are now discussing there was no admission of counsel, and that the point was argued by counsel and carefully considered and decided by the court. In that case the president negligently signed certificates of stock in blank and left them with the treasurer, who filled them out in his own name, signed them as treasurer, and borrowing money on his promissory notes, pledged the certificates as collateral security. The case had been decided by a referee, and the chief justice in announcing the opinion, said:

"The referee placed his decision against the plaintiff's recovery on the ground that the general power given to the treasurer of the defendant to sign certificates of stock, did not authorize him to sign those in his own name or favor, and that as such defect appeared on the face of the certificates, upon the credit of which the plaintiff advanced his money, he had notice of it when he took them, and therefore he could not recover." \* \* \*

After referring to the statute under which the defendant company in that case was incorporated, and to the provision authorizing the making of the laws, orders, rules and regulations, not inconsistent with the laws of the state, and that shares of stock were transferable on its books, the court said further:

"In pursuance of the authority thus given, the directors, as found by the referee, passed certain by-laws by which they prescribed the form of certificates to be given for the stock of the defendant to the owners thereof, which, under a general resolution of the directors were to be signed by its president and treasurer. It appears by the case that the form of the certificate was prescribed as early as September, 1806, and that it required the signature of the president and treasurer thereto, and that the seal of the corporation should also be affixed to it. It is found by the referee that there was no by-law of the defendant making an exception to the form of the certificate, or as to the officers who were to sign it, when issued to its treasurer and president. It will thus be seen that the directors of the defendant, with knowledge that the act of the legislature incorporating it, required its president to be a stockholder, nevertheless authorized and required him to sign every certificate of stock that was to be issued. Such certificate is the only evidence which a stockholder receives of the ownership and title to the stock held by him, and if the decision of the referee was right, it would follow that there was no authority conferred upon any person to give to the president any certificate showing that he was the holder of the stock standing in his name on the books of the company, and consequently, that he could not hold any evidence of his title thereto. There is nothing disclosed by the report of the referee that there was any intention of the directors to prohibit the issue of a certificate to him in the form prescribed by them; nor was there any reason or necessity why such an exception should have been made, or why it should be implied. The president must be presumed to have been chosen with a conviction and belief that he would honestly and properly discharge the specific duties imposed on him by the by-laws, rules and regulations made by the directors, as well as those which would properly devolve on the principle officer of a turnpike corporation. The regulation prescribed for the issue of certificates did not give the right or authority to him or the treasurer alone to do it, but it required, as above stated, the signature of both of them, and in addition thereto the seal of the defendant, which is the highest evidence of a corporate act. It may, therefore, be properly assumed that, as no spurious or false certificate could be issued except by the act of its president, (its confidential officer), it was not deemed necessary to make any exception as to his power or that of the treasurer in giving the usual evidence of the ownership of stock held by either of them, and that it was intended that their certificates should be in the same form, and signed by the same officer as that issued to any other stockholder. *Ib.* pp. 242-243.



In *Western Md. R. R. Co. v. Franklin Bank of Baltimore*, 60 Md., 36, this precise question arose and was decided against the corporation. In the course of the opinion (p. 47), the court said:

"It is supposed that the facts that the agent issued these false and fraudulent certificates for his own purpose, and disposed of them himself, and that in two of the certificates the representation was that he was the depositor of the coupons, were sufficient to put purchasers or dealers on inquiry, and to deprive them of the position of being *bona fide* purchasers without notice. But to this we can not accede."

And after referring to the particular facts of the case, and to the fact that the certificates were bought in the open market, the court said:

"And such being the case, why should parties dealing in such certificates in the regular course of business, without ground of suspicion, be restricted in their right to purchase or advance upon such certificates, because they happen to be in the hands of a party who is an agent of the company, or because they happen to represent on their face that the coupons had been deposited by such person? We can perceive no good reason for such a distinction. Such facts were not sufficient, of themselves, to discredit the certificates, or to require innocent third parties to act upon the presumption that they were false and fraudulent. It was the right of the party disposing of the certificates, through an agent of the company, to own or acquire coupons or coupon certificates, and it was equally his right as of other people, on the terms proposed by the company, to deposit such coupons, and obtain a certificate therefor in the ordinary form. And if that be so, he certainly had a right to sell such certificate in the market, in the ordinary way." *Ib.* pp. 47-8.

In the case of *Willis v. Fry*, 13 Phila., 33, this question was also involved and necessarily passed upon. In that case an officer of the corporation fraudulently issued certificates to himself and borrowed money, with the certificates as collateral. The court held that the lender who had in good faith advanced the money, was entitled to recover from the corporation. See also *People's Bank v. Kurtz*, 99 Pa. St., 349, where the case of *Willis v. Fry*, *supra*, is spoken of with approval.

It thus appears that by the well settled rule of New York, Maryland and Pennsylvania, the purchasers in this case were not put upon inquiry by reason of the circumstance merely that the certificates were in Doughty's favor.

Our local courts, however, upon this question of inquiry have uniformly taken a contrary view to that which we have expressed, and which is taken by the courts of New York, Pennsylvania and Maryland. The reasons which to their minds were controlling will be found in the reports of their opinions. *Railway Co. v. Third National Bank of Urbana*, 1 Circ. Dec., 109; *Railway Co. v. Citizens' National Bank*, 10 Dec. Re., 614; ante 50.

The authorities relied upon by these courts in their decisions are not always the same; but it is not important to specify just what authorities each court relied upon. It is, we think, sufficient for the purposes of this case, to say that no authority other than the following is cited by any of these courts in support of its position:

*Clafin v. Farmers' & Citizens' Bank*, 25 N. Y., 293; *Board of Education v. Sinton*, 41 Ohio St., 504; *Farrington v. South Boston Ry. Co.*, 150 Mass., 406; *Moores v. Bank*, 111 U. S., 156; *Strong v. Straus*, 40 Ohio St., 89, and *Citizens' Savings Bank v. Blakesley*, 42 Ohio St., 654.

In the *Clafin* case the president of a bank having a general authority to certify checks upon it as good, certified in his character as presi-

dent checks by himself individually to be good; and it was held that this general authority from the bank to certify the checks of its dealers did not authorize him to declare his own to be good, and thereby charge the bank with the amount thereof.

In the case of *Titus v. Turnpike*, *supra*, the court of Appeals of New York distinguished that case from the *Claffin* case, and said:

"Presumptively, the intention of the bank in giving the general authority did not include such a case, one out of the ordinary course of business and contrary to business and legal rules, and one entirely unnecessary to the ordinary course and management of the business of the company, \* \* \* but, in regard to the certificates of stock, they are the necessary parts of the machinery by which the business of every corporation is carried on. \* \* \* In the case at bar the resolution does not, as in that case, authorize the making of contracts for the company, but it directs the performance of a mere ministerial act necessary to the orderly conduct of its business in regard as well to the officer's stock as to that of other stockholders." *Ib.* pp. 243-4.

The court further said:

"There is another and a very material distinction between that case and this. The power there conferred was given to the president alone, and was exercised if intended to be exercised without the seal of the bank; but here the signature of the treasurer alone was not sufficient. That of the president, and, in addition to both, the corporate seal of the defendant was required to be affixed. The certificates presented to the plaintiff, on the faith and credit of which he parted with his money, conformed to all those requisitions. The ownership of the stock by the treasurer was, therefore, not certified by the party in interest alone; whereas the certificate by the president of the bank, in his official capacity, that his individual check drawn on it was good, was made by the same person who was to receive the benefit of it, and was signed by no other officer of the institution. That difference clearly distinguishes the case of *Claffin*, *supra*, from the present, not only in the character of its material facts, but in principle. It follows from what has been said that the first conclusion of law by the referee that the general power given to the treasurer did not authorize him to sign certificates in his own name and favor was erroneous, and consequently the second, based thereon, that this defect appearing on the face of those taken by the plaintiff charged him with notice of their invalidity, was without foundation, and therefore also erroneous." *Ib.* pp. 244-5.

We think the inapplicability of the *Claffin* case to the present case is so clearly pointed out by the same court which decided it, that further comment upon it by us at this time would not be profitable.

The case, however, upon which our local courts have placed the greatest reliance is that of the *Board of Education v. Sinton*; and we feel it our duty therefore, to carefully examine that case with especial reference to the doctrine of inquiry which it has declared.

In that case the Board of Education of the Village of Westwood in Hamilton county, being authorized by a special act to issue its bonds to an amount not to exceed the sum of \$20,000.00, issued the same to the full extent of its authority, payable to— —or bearer; and thereafter took up and paid certain of such bonds, and left them with its treasurer, Davis, who also was a member of such board, (and whose name as one of the members of the board was signed to the bonds), with instructions to cancel them. In violation of these instructions, and before the bonds so paid and taken up had nominally matured, he negotiated them as collateral security for a loan which he obtained for himself from Mr. David Sinton of this city. Mr. Sinton supposed Davis was the owner of the bonds, and made no inquiry in regard to them.

According to the syllabus, the court only decided three questions, *viz.*:

1. The payment of the bonds by the board extinguished them, and they were incapable of being re-issued.

2. There was no negligence on the part of the board in not seeing that its treasurer complied with its instructions to cancel the bonds.

3. Mr. Sinton was guilty of contributory negligence in taking the bonds without inquiry.

A fourth question apparently decided by the court, although not reported in the syllabus, was, that even if there had been negligence on the part of the board, it was the crime of Davis and not such negligence that was the cause of the injury.

The part of the decision which relates to the question of contributory negligence is found at the close, where, after referring to the claim of counsel that the board was estopped by its negligence to set up the invalidity of the bonds, it says:

"But a conclusive answer to this claim of estoppel is found in the fact that Sinton is not an innocent holder. The bonds disclosed on their face that Davis was one of the directors; and as such might well have possession of the paper without the right to dispose of it on his private account. Under these circumstances the duty of inquiry was put upon Sinton, and having taken the bonds without inquiry, he was guilty in law of contributory negligence."

In other words, the face of the bonds was consistent with their holding by Davis either as owner or as one of the directors; and it was therefore incumbent on Mr. Sinton, before he received them as collateral security for an individual loan of Davis, to inquire as to the character in which Davis had possession of them.

But in the case at bar there was no ambiguity upon the face of the certificate as to the character in which Doughty held it, whether as an owner or trustee. The language of the certificate declared he was the owner; that he was entitled to the shares represented by it; and was utterly inconsistent with his holding it in any other character.

For these reasons we are clearly of the opinion that the Sinton case is not in point upon the question of inquiry in the case at bar.

And its want of applicability as an authority becomes more manifest when it is observed that in comparison with the case at bar, it was in every essential feature a radically different case, and one in which fundamentally different principles are applicable. Thus,

(1.) Davis never had been and was not at the time clothed with authority either in fact or appearance to sell bonds for or on behalf of the board of education, while Doughty was the custodian of the certificates and seal of the company, and under both the statute of the state and by-laws of the company was, in connection with the president, empowered to execute and issue certificates not only to strangers, but to himself.

(2.) The board of education was a public corporation, and had only those powers conferred upon it by statute; while the railway company is "a trading corporation whose capacity within the general scope of their business is about as free as that of a natural person."

(3.) The records of a board of education are open to the public; while those of a trading corporation are not.

(4.) The board of education was not guilty of negligence, while the railway company was.

The cases of *Moore v. Bank*, and *Farrington v. South Boston Ry. Co.*, supra, present substantially similar facts; but substantially different facts, as it seems to us, from the case at bar.

In the first case the plaintiff, Mrs. Moores, loaned money to Robert B. Moores, her brother-in-law, who was also cashier of the defendant bank. Moores did not show her any certificate of stock in his name, but she accepted his word that he owned stock. He filled up in her favor a certificate which had been signed in blank by the president and left by him to be used if needed in the president's absence, and delivered it to her as security for the money loaned. The court held she could not recover from the bank, because Moores had acted in the matter as her agent, and because the omission of Moores to show her a certificate of stock in his name, put her upon notice to inquire whether the necessary step of surrendering an old certificate which was necessary to make her certificate valid, had been complied with. The court said:

"The very form of a certificate was such as to put her upon her guard. She was not applying to the bank to take stock as an original subscriber or otherwise; but she was bargaining with Robert B. Moores for stock which she supposed him to hold as his own. She knew that she had not held or surrendered any certificate, and she never asked to see his certificate or a transfer thereof to her; and he, in fact, made no surrender to the bank or transfer on its books. She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent, to see the proper transfer thereof made on the books of the bank. Having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which were to be fulfilled by the former owner and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity."

In the Farrington case, the plaintiff, Farrington, loaned money to Reed, who was the treasurer of the defendant company, and who filled up in the name of Farrington a blank certificate, which had been signed by the president and left with him, and gave the same to Farrington to secure the loan. Reed owned no stock, and exhibited to Farrington no certificates of stock, except that filled up by him as aforesaid.

In the decision of the case the court said that the case could not be distinguished in principle from *Moores v. Citizen's National Bank*, 111 U. S., 156. The court also gives an additional reason for its decision, that:

"The genuine signature of the president of the corporation upon the certificate was the only fact on which the plaintiff had a right to rely; but as the president was not attending personally to the issue of this certificate, it was evident to the plaintiff that Reed might possibly be issuing for one purpose a certificate signed by the president for another."

In the Farrington case, however, the court does say:

"We think that it is a safer or more reasonable rule to hold that a person taking in pledge a certificate of stock newly issued in his name, by an officer of a corporation, as security for the private debt of the officer, should be required to investigate the title to the stock, if the officer is one who has the power, either alone or with others, to issue stock certificates, than to hold that such a person can rely upon a certificate so issued to him in the absence of actual notice or knowledge, that it has been fraudulently issued."

The court supports this statement by no authority, and the reasons upon which it is based seem to us insufficient.

The difference between the Moores and Farrington cases and the case at bar is radical and manifest.

(1.) There was no relationship of agency between Doughty and any of plaintiffs in error.

(2.) There was not only exhibited to them certificates of stock in Doughty's name, but they loaned their money on the identical certificates so exhibited.

(3.) The issue of the certificates had taken place before the subject of a loan from the plaintiffs in error was contemplated by them.

(4.) The certificates were issued attached to notes, and offered by brokers in the open market, through whom the plaintiffs in error, for value, in good faith, and with no circumstance to excite suspicion, purchased them.

The case of Strong v. Straus, and Citizen's Savings Bank v. Blakesley, supra, were only cited upon the question as to whether the inquiry, if made here, would have been useless. But as we are of the opinion that no inquiry was required, it is not necessary to consider the question whether it would have been useless, and therefore not necessary to examine those cases.

As to that part of the nineteenth finding of fact which declares :

"And the court further find that if any of the parties defendant, in the purchase of the foregoing notes, had made inquiry, as to the genuineness of the certificates pledged to secure any one of said notes, such inquiry would have disclosed the fraudulent character of such certificates."

We are of the opinion that the exception of the plaintiff in error is well taken.

As the finding does not indicate of whom the inquiry should be made, it would be difficult to review it if the evidence satisfied us that the inquiry, if made of certain officials, would have had the result declared, but if made of other officials would not have had such a result. But we are of the opinion that the evidence in the case will not warrant a finding of fact as to what the result of an inquiry would have been. As no inquiry was ever made of any one connected with the corporation, it seems to us that a statement as to what would have happened if inquiry had been made is a mere speculation. We think the evidence fails to show whether investigation would have followed inquiry or not.

It will be observed that in our decision of this case we have omitted a reference to some of the leading cases where the validity of spurious certificates, fraudulently issued by an issuing officer, but bearing the issue was determined against the corporation; or that where reference has been made to them it has only been upon the subject of inquiry.

These cases and their merits as authorities, would necessarily have come under review here had the case not been determined upon the ground of negligence, and we had found it necessary to examine the other two grounds previously referred to, upon which the plaintiffs in error insist that they are entitled to recover.

The cases omitted will all be found to involve the question of the validity of a fraudulent issue, where the element of negligence upon the part of the corporation was not present, or, if present, was not considered by the court; and as the reasoning upon which those decisions are based is so earnestly assailed by counsel for the Railway Company, a citation of the cases would necessarily have involved an independent examination by us of such reasoning. In such case, this opinion now extended

to great length (but which, in justice to the interests involved, and the questions raised, we could not well have shortened), would have been unpardonably lengthened without any justification; because, whether we had concluded to follow these cases or not, our decision in this case, by reason of the element of negligence which is present in it, would have been the same.

Without now expressing our opinion upon the merits of those authorities, we may be permitted to observe that, whether the reasoning upon which they are based is correct or not, it is undeniably true that in New York, Maryland and Pennsylvania the decisions of the courts of highest resort have adopted the broad principle that a lender of money or a purchaser for value who comes into possession bona fide of a certificate of stock issued by the issuing officers, and bearing the genuine signatures of such issuing officers, and the genuine seal of the corporation, is entitled to compel the corporation to transfer the stock to him purported to be represented by such certificate, or to respond in damages for the default.

And in this statement we do not overlook the case of the Mechanics' Bank, 13 N. Y., upon which counsel for the Railway Company rely. We are not now expressing an opinion upon the merits of these authorities, and it is admitted, even by such counsel, that the Titus case in the 61 N. Y., is directly in conflict with the Mechanics' Bank case, and must necessarily, as long as it stands, overrule the latter.

The cases to which we refer are the following:

*Tome v. Parkersburg R. R.*, 39 Md., 36; *western Maryland R. R. v. Franklin Bank*, 60 Md., 36; *Willis v. Fry*, 13 Phila. (Penn.), 33; *Bank of Kentucky v. Schuyllkill*, 1 Parson's Select Cases, 180; *People's Bank v. Kurtz*, 99 Penn. St., 344, 349; *Titus v. Great Western Turnpike Co.*, 61 N. Y., 237; *Bruff v. Mali*, 36 N. Y., 200.

The conclusions which we have reached, therefore, in this case, as to the liability of the Railway Company would certainly be supported by high authority, even if the element of negligence were not present. But with that element in the case, we have been unable to find any ground upon which to base a decision in favor of the Railway Company.

The judgment of the lower court will therefore, be reversed, and the court proceeding to render such judgment as should have been rendered in the court below, it is ordered that the plaintiffs in error recover from the Railway Company upon their cross-petition below, the market value of the stock represented by their certificates as such market value existed at the time of the demand made by plaintiffs in error upon the Railway Company, together with interest thereon from the date of such demand.

HUNT, J. and MOORE, J., concur.

Kittredge & Wilby, John W. Warrington, for plaintiffs in error.

Wm. M. Ramsey, Harmon, Colston, Goldsmith & Hoadly, for defendants in error.

## RIGHT OF WAY.

47

[Hamilton Common Pleas.]

**\* METHODIST PROTESTANT CHURCH V. FLORENCE E. LAWS.**

1. A right of way tract of land conveyed for burial and "other purposes," after being used a long time for access to the burying ground, may be enlarged so as to become a means of access to streets laid out by the owner on an adjoining subdivision of land for residence purposes.
2. A gate erected by the owner, at one end of the right of way, when the use of the land for a cemetery began, may be removed by him, if it interferes with the subsequent use to which he puts the right of way.

WILSON, J.

There are two points in this case:

1. Has the right of way of the plaintiff over the lot owned by the defendant been lost?

On the twenty-seventh day of June, 1833, Peter H. Kemper, for a valuable consideration, conveyed a tract of land to the plaintiff, its successors and assigns forever, for a place of burial and other purposes, together with the use forever of a road thirty feet wide from opposite the center of the tract conveyed through eastward over the lot now owned by the defendant to the Cincinnati and Springfield Turnpike Road. Plaintiff's property was used exclusively for burial purposes from 1833 until August 1, 1889. During that time the right of way was used simply for such access as is required for grounds used for burial purposes. On August 1, 1889, plaintiff obtained from the court of common pleas of Hamilton county an order for the sale of its property; under said order plaintiff has subdivided the tract into lots for residence and building purposes and has dedicated and opened public streets through said tract; one street has its eastern terminus at the west end of the road over defendant's lot.

The defendant claims that the right of way over her land was lost when the plaintiff ceased to use its property for burial purposes. The tract of land was conveyed to the plaintiff, its successors and assignees, for a place of burial and "other purposes." "Other purposes" means any purpose, other than a place of burial, to which the plaintiff, its successors or assigns, might see fit to put the property. There is no condition or limitation as to the purposes for which the tract may be used. Nor is there any restriction placed upon the right of way. It is appurtenant to the plaintiff's lot, and goes with it, to be used as a means of access for any purpose for which the lot might be used. "Where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which, access would be required at the time of the grant." 5 Ex. Div., 254; 100 Penn. St., 42; 59 N. H., 317.

The defendant also claims that there has been a loss of the right of way because of the increased burden placed upon her land by the change in the use of the plaintiff's property. There having been no restriction placed on the right of way at the time it was granted to the plaintiff, and it being appurtenant to plaintiff's property to be used as a means of

\* Considered on appeal and full opinion given in 4 Circ. Dec., 562.

access for any purpose for which the property might be used, the doctrine of increase of burden does not apply. *Kneisel v. Krug*, 8 Dec. Re., 581.

2. Had the plaintiff a right to remove a gate which was at the entrance to its lot and at the western terminus of the right of way?

When the use of the lot for burial purposes began, plaintiff erected a fence around it, and placed a gate at the entrance, which was at the west end of the right of way. In 1885, defendant agreed with plaintiff to improve the road over her lot. To make such improvement, it was necessary to take down the gate; she agreed to replace it. The consideration of the agreement was the dismissal of an action which plaintiff had commenced, to enjoin defendant from interfering with the right of way after August 1, 1889, plaintiff removed the gate.

The plaintiff had erected the gate upon its own ground, and certainly had the right to remove it, unless prevented by the agreement of 1885. Giving to that agreement its greatest force by supposing that the effect of it was to place the parties, as to the gate, in the same position in which they would have been, if the defendant had originally erected the gate on her own ground, would the plaintiff have the right to remove it?

Whatever is necessary for the reasonable and proper enjoyment of a right of way passes as incident to the grant. Whether the owner of the servient property can keep gates at the termini of the right of way depends upon the circumstances of each case, and is determined principally by the use to which the dominant property is put. 45 Md., 337.

Taking into account the change in the use of plaintiff's lot after August 1, 1889, the necessity for more frequent access over defendant's land, caused by the subdivision of the property into lots for building and residence purposes, the opening up of streets, the grading of lots and streets, the gate would interfere with the reasonable and proper use of the right of way, and the plaintiff would have been justified in removing it, even if the defendant had originally erected it upon her own lot.

*Archer & McNeil and Matthews and Cleveland*, for plaintiff.

*Ramsey, Maxwell and Ramsey*, for defendant.

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### SETTLEMENT OF ESTATES.

[Cincinnati Superior Court, Special Term, December, 1892.]

CANDLER, ADMR., v. VON MARTELS.

Where sureties of a delinquent administrant are compelled to pay, they are entitled to a set-off on the claim against them, equal to the statutory fees which were disallowed the administrant on account of his dereliction.

MOORE, J.

The plaintiff sues for \$629.89, the amount found due by the probate court from E. R. Von Martels on account of losses to the Candler estate of which he was formerly administrator. Von Martels' sureties are made parties defendant, and claim that they are entitled to a set-off upon the claim against them equal to the statutory fees which were disallowed to Von Martels by the probate court on account of his dereliction.



Held, that the sureties were entitled to such a set-off. The decision was based upon the following principle set forth in Woerner's 'American Law of Administration.'

"The principle upon which compensation is refused is that, where the estate has suffered loss by the dereliction of the executor or administrator, the loss will not be enhanced by allowance of commissions. But where the loss arising out of the misconduct is made up to the estate, so that the beneficiaries get the benefit of a vigorous and efficient administration, it seems neither just nor logical that a bonus should be granted to them in the shape of the commissions denied for the administrator, thus increasing the burden which in such cases usually falls upon the delinquent's sureties."

E. Potter Dustin, for plaintiff.

J. H. Bromwell and Max B. Day, for the sureties.

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### MARRIAGE BROKAGE CONTRACT.

49

[Hamilton Common Pleas.]

ANONYMOUS.

An agreement to pay a sum of money for services in procuring a husband are against public policy and void.

Suit was brought by a woman against another to recover on an alleged contract by which the defendant had agreed to pay the plaintiff a certain sum of money for her services in procuring a husband for defendant.

C. M. Lotze, Esq., as attorney for defendant, demurred, raising the point that such contracts cannot be enforced by courts for the reason that they are against public policy, citing Greenwood on Public Policy, Pollock on Contracts, and Parsons on Contracts.

The latter, on page 74, volume 2, states "that such contracts are void both in law and equity, as against policy and morality. Courts in England are very hostile to any contract of this nature and effect, particularly if made with a guardian or a servant, or one to whose selfish influence the party would be exposed. Such a contract is set aside without reference to the propriety or expediency of the marriage."

Pollock, page 306, says: "Marriage is a thing in itself, encouraged by the law; the marriage contract is moreover that which of all others, should be the result of full and free consent. Certain agreements are therefore treated as against public policy, either for tending to impede this freedom of consent, and introduce unfit and extraneous motives into the contracting of a particular marriage, or for tending to hinder marriage in general. The first class are the agreements to procure or negotiate marriages for reward, which are known as marriage brokerage contracts. All such agreements are void, and services rendered without request in procuring or forwarding a marriage (at all events, a clandestine or improper one), are not merely no consideration, but an illegal consideration for a subsequent promise of reward, which promise, even if under seal, is therefore void.

The Australian code agrees with our law.

In the Roman law these contracts were good apart from special legislation; they were limited as to the amount, though with disapproval, by a constitution in Greek."

Greenwood says, page 478, "that any contract to do anything in consideration of the promisee's consent to the marriage of any one, or of his efforts in procuring a marriage for the promisor or a third person, is void." He gives a large number of cases in both the eastern and western states sustaining this view. It is well that such is the law; otherwise, divorces would be even much more numerous than they now are.

The court agreed with this view of the law, as claimed by the defendant's counsel, and sustained the demurrer, dismissing the case at plaintiff's costs, and no exception was taken to the decision by plaintiff.—Editorial.

## 50 NEGLIGENCE IN BOARDING A STREET CAR.

[Cincinnati Superior Court, Special Term, January, 1893.]

**BROOKS, ADMR., V. MT. AUBURN CABLE CO.**

1. A person is guilty of contributory negligence in boarding a rapidly moving car, without signaling it to stop.
2. Such person is guilty of contributory negligence, after getting upon the running board of the car, in not entering at the door nearest him.
3. Such person is not a passenger while upon the running board, and is not entitled to the highest degree of care from the company, to avoid injuring him.

The decedent, Maus, permitted a cable train to pass him on the street corner without signaling it to stop. He then ran after the train, and sprang upon the running board of the grip car, but for the moment made no attempt to enter the car. On account of the narrowness of the street, the up and down tracks are very near together at this point. A train was approaching on the up track and within view. As it came nearer, the decedent perceived he would be knocked off if he remained where he was, and he attempted to get inside, but evidently became confused, went to the wrong door, and was knocked off and killed before he could return to the proper door. When the gripmen discovered the decedent's peril they did all in their power to stop, but it was then too late. The jury returned a verdict for the administrator, fixing the damages for the wrongful death at \$1,250.

The court by Smith, J., held:

"First—The decedent was guilty of contributory negligence in boarding a car moving at the rate of ten miles an hour, without signaling the car to stop, and with another car but a short distance away, approaching at the same speed on an adjoining track in an opposite direction.

"Second—The decedent was guilty of contributory negligence after he came upon the running board, in not entering the door nearest to him which he could easily have entered, and which ordinary prudence would have suggested he should enter.

"Third—By reason of the circumstances under which the decedent went upon the car, he was not a passenger within the legal sense of that term while upon the running board in the act of entering the car, and was not therefore entitled to the highest care from the company to avoid

injuring him. The company, however, was compelled to so exercise ordinary care after the decedent came upon the running board to avoid injuring him.

"Fourth—The evidence, I think, discloses beyond dispute that from the moment the gripmen of the two trains were aware that Maus was not going into the nearest door they did everything that ordinary prudence demanded they should do in order to stop the cars.

"Fifth—Perhaps in the exercise of the highest care the cars should have been stopped the moment the decedent was known by the gripmen to be upon the running board, but in the exercise of ordinary prudence upon their part I think that until there was some evidence to the contrary they were justified in supposing that one of the age and actions of the decedent would exercise such discretion as a prudent person in his situation would exercise.

Motion for new trial granted.

Porter & Rendigs, for the administrator.

Smith & Martin, for the motion.

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## JURY TRIAL.

51

[Superior Court of Cincinnati, Special Term, December, 1892.]

### \*ROOT V. MEADER, TRUSTEE.

The right to demand a jury does not exist in suits against an assignee to enforce the allowance of a claim.

HUNT, J.

The right to demand a jury does not exist in a suit to enforce the allowance of a claim against the assignee of an insolvent debtor. This was an action to enforce the allowance of a claim by the assignee of an insolvent debtor corporation, under the provisions of sec. 6352 of the Rev. Stat. The statute provides that creditors shall present their claims within six months after the publication of the notice of such assignment unless further time is allowed by the court, and the assignee or trustee shall indorse his allowance or rejection thereon, and claimants whose claims are rejected shall be required to bring suit against the assignee or trustee to enforce such claim within thirty days after the same shall have been rejected, in which, if he recover, the judgment shall be against the assignee or trustee that he allow the same in settlement of his trust with or without the costs, as the court shall think right.

The case came up on a motion for a trial by jury. In deciding the case the court say:

"Section 5130 provides how issues are to be tried. Issues of law must be tried by the court, unless referred as regulated by the act, while issues of fact arising in actions for the recovery of money only, or of specific real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered. It can not well be claimed that this is an action for the recovery of money only. The judgment could not be enforced by execution. The right to participate in trust funds could be enforced by suits in equity, prior to the adoption of the

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\*This judgment was affirmed by the Circuit Court; opinion 5 Circ. Dec., 61.

code of civil procedure, and it has been held that the civil action of the code is a substitute for all such judicial proceedings as were previously known, either in an action at law or suits in equity. The court, in proceedings of this character, can adjudge only that this claimant is entitled to participate to the extent of his claim in the distribution of the trust estate. The principle has been laid down that an action to enforce the allowance of a claim against the assignee in insolvency, under the statute, is appealable, and that therefore the right to demand a jury did not exist. *Gordon v. Walton*, 2 Circ. Dec., 246. It cannot be doubted that suits in equity to establish the right to participate in trust funds were well known prior to the adoption of our code of civil procedure, and "the civil action of the code is a substitute for all such judicial proceedings as were previously known either as actions at law or equity." 32 Ohio St., 236.

Nor is the contention of counsel for the motion tenable under the 46 Ohio St., p. 27, which is cited. It is true that the right to trial by jury does not depend upon the principles upon which relief is asked, but upon the nature and character of the relief sought. When the relief sought is a money judgment only, and all that is required to afford plaintiff a remedy, it is immaterial whether his right of action is based upon what were formerly regarded as legal principles. The remedy in such cases must be found in the civil action of the code, and in it trial by jury is given on all issues of fact when the relief sought is a money judgment only. The relief here sought is not a judgment for money only. If there be a recovery, it would be against the assignee that he allow the claim in settlement of his trust, with or without the costs, as the court shall think right. Sec. 6352, R. S.

"It is the judgment of this court that a suit to enforce the allowance of a claim by the assignee of an insolvent debtor, is a civil action in which the right to demand a jury does not exist. *Merchants' National Bank of Dayton v. Little, Assignee*, 2 Circ. Dec., 496.

"The motion will be overruled."

Thomas B. Paxton, for motion.

Aaron A. Ferris, contra.

## 52

## CORPORATIONS.

[Columbiana Common Pleas, December 12, 1892.]

**\*D. P. CRONIN ET AL. V. POTTERS' CO-OPERATIVE CO. ET AL.**

1. Where a corporation organizes under a perpetual charter a preliminary agreement to form a corporation and obtain a charter for ten years only is waived.
2. A by-law unanimously agreed to that the corporation shall be dissolved at the end of ten years, can be changed by the majority of the stockholders, and, hence, is a dead letter, if the majority refuse to carry it out.
3. A court of equity has not the power, in the absence of statutory authority, to dissolve or wind up a corporation at the suit of a stockholder.

OPINION on demurrer to petition.

\*This case was dismissed in the Supreme Court, October 2, 1894, for failure to file a printed record, and motion to reinstate overruled, October 30, 1894.

NICHOLS, J.

This case is before the court on general demurrer to the petition.

The plaintiffs are stockholders, owning a little less than one-third of the capital stock of the Potters' Co-operative Co., a corporation organized under the laws of Ohio, and they bring this action as such stockholders against the corporation and the rest of its stockholders, and ask that the defendants be enjoined from continuing the business of said corporation; that necessary proceedings be taken to wind up the same; that a receiver be appointed to take charge of the assets of the corporation, settle its business, pay its debts, distribute the net assets among the stockholders, and for all other proper relief.

As the basis for the relief prayed for, it is alleged in substance, in the petition, that in August, 1872, the plaintiffs and certain other parties named, agreed in writing with each other, to organize a corporation to be called "The Potters' Co-operative Co.," to be located in East Liverpool, this county, for the purpose of engaging in the manufacture of earthenware; that it was agreed in said writing that the capital stock should be \$50,000, divided into 500 shares; that said corporation should be formed for ten years only; that the several parties signing this writing should subscribe the several amounts specified therein to the capital stock, and should take and pay for the same at their par value in cash.

It is further averred that after the making of this agreement, five of the subscribers of this writing, acting for all of them, and for the purpose of carrying out the agreement, on the twenty-eighth day of August, 1882, executed articles of incorporation, according to law, and such proceedings were had that they became duly incorporated under the laws of this state, by said name. But, it is averred, by oversight and inadvertence in drawing and executing the articles of incorporation, they failed to show that said corporation was only organized for said term of ten years, or to state any period for the continuance of the same.

It is alleged that the corporation was duly organized—that all the parties who had signed the original writing took and paid for shares in accordance with the original agreement—that after organization, by-laws were adopted by the unanimous vote of all the stockholders; that one of the by-laws so adopted provided—in accordance with the terms of said original written agreement, that said corporation was organized for the period of ten years only—that this and other by-laws were written out in full in the minute book of the corporation, signed by all the stockholders; that the same has never been changed and is still in full force and effect.

It is alleged that the corporation, after its organization, at once engaged in the business provided in the articles of incorporation, and ever since has been and still is engaged in the same; that the stock of the corporation is now owned by the plaintiffs and the individual defendants in certain amounts set forth—that all said parties were parties to said original written agreement or obtained the stock now held by them with full notice of all the before mentioned facts. That no dividends were declared or paid until January of the present year, when a dividend of ten per cent. was declared by the old board of directors, and this against the protest of the president, McNicol, notwithstanding a clear surplus of \$15,000 in bank. That the individual defendants having obtained the majority of the capital stock, in January last, at the annual election elected as directors, two of the plaintiffs and five of the defendants, who are now the board of directors. That said board re-elected said defendant Mc-

Nicol, president and treasurer, and another of said defendants as secretary. That McNicol had always been president and business manager. That said defendants now and for ten months past, openly repudiate the said written agreement and by-law providing that said corporation was only organized for the period of ten years, and insist that said corporation is unlimited in duration, and that, having a majority of stock, they will continue to carry on the business at their pleasure for any period they choose, notwithstanding the aforesaid limitation, and the protests of the plaintiffs. That McNicol openly proclaims that no further dividends will be declared, although the fact is and he admits that there is a large surplus, and the corporation is doing a good business. That said defendant directors are managing matters in their own interest, and especially in the interest of McNicol, whose salary they have recently doubled, making it \$3,600 per year, which is charged to be unreasonable and exorbitant. That they utterly disregard the wishes and rights of the plaintiffs as stockholders. That the president and secretary, having custody of the book, mutilated it and tore from it the by-law before mentioned, to enable them to carry out their purpose or repudiate the limitation as to the term for which the corporation was organized, and to destroy the evidence of the same. That the period for which the corporation was formed has expired, and the plaintiffs have notified the defendants that they insist on said agreement and by-law being carried out and the business of said corporation being wound up and terminated, as therein provided; but the defendants wholly refuse to regard said agreement and by-law, or to comply with its said provisions.

On the argument of this demurrer, it was said by counsel for plaintiffs, that this action is not brought under any statute to dissolve and wind up the corporation; that its aim is to compel the stockholders to comply with the contract made with each other, in writing, before its organization, by the contract of subscription, and after its organization by the by-law adopted in conformity with the prior contract, to wind up the corporation at the end of ten years.

It is a private suit by stockholders who were parties to the alleged contract, brought against the corporation and the rest of its stockholders, to enforce the agreement which all the stockholders are said to have entered into, as a condition to the subscription of the capital stock.

And it was said that, as grounds for a statutory dissolution did not exist, and as plaintiffs own less than a majority of the stock, they are powerless to carry into effect said agreement, as against the defendant stockholders, who are in the majority and who control the corporation and refuse to perform the contract.

So the plaintiffs claim they are without remedy, other than such relief as they may be entitled to, on the facts stated, under the general equity powers of the court.

If the court correctly understood the points made by counsel for plaintiffs in his very able argument of the questions raised by this demurrer, he contends that a case is made, on the facts stated, which entitles them to the relief demanded, along either of two different lines, and on each line in either of two ways.

The first line of action which, it is claimed, is authorized by law on the facts stated, is by means of a degree directly against the corporation itself, either, first, by dissolving it and winding up its affairs, or if a dissolution of the corporate entity is not within the general equity jurisdiction of the court, then by winding up its affairs as a dissolved corporation,

treating it as dissolved, in favor of the plaintiffs, by force of the maxim that equity considers that as done which the parties agreed to do, and which they ought to have done.

The other line of action which is claimed to be authorized by law on the facts stated, is by means of a decree, not directly against the corporation itself, but in personam, aimed directly at the stockholders, and requiring them specifically to perform said contract, either, first, by themselves proceeding under the statute to dissolve the corporation and wind up its affairs; or, second, by their own action to dissolve it and wind it up, under and by virtue of the common law power which it is claimed they possess so to do.

All these propositions are controverted by counsel for defendants. The case has been very ably argued on both sides, and the court has endeavored to give the matter careful attention.

It has not been claimed, nor could it be successfully maintained, that the court has power to reform the articles of association by correcting the alleged mistake in the articles of incorporation, to make them conform to the original agreement. The articles of incorporation constitute the charter, or part of it, granted by the state, and the provisions contained therein cannot be changed, added to or detracted from by a court, on any such idea as that a mistake has been made in the terms of the organic instrument.

Proceeding now to a consideration of the propositions which are relied on in this case, and in the order in which they have just been stated, an examination of the authorities shows that it is a well-settled rule that a court of equity, in the absence of statutory power, cannot decree the dissolution of a corporation. It is as powerless to do this in the exercise of its general equity jurisdiction as it is to decree the dissolution of the marriage relation where that relation in fact exists. Where a court of equity has such jurisdiction, in either case, it is of statutory origin. *Verplank v. Mercantile Insurance Company*, 1 Edw. Ch. Rep., 83; *Morawetz on Corporations*, sec. 657, (1st ed.); *Cook's Stockholders*, sec. 629, (2 ed.); *High on Receivers*, sec. 288, (2 ed.); *Denike v. N. Y. & R. Lime Co.*, 80 N. Y., 599, 606.

It is useless to multiply authorities upon this point. It is an established rule of law that a court of equity cannot decree the dissolution of a corporation, and thereby destroy the corporate entity, brought into being by the legislative department of the state.

The question next arises: Can a court of equity, during the life of the corporation, in the exercise of its general jurisdiction, wind up the business of a corporation and sequester its property and effects on the application of a stockholder as such?

This question must also be answered in the negative.

In the case of *R. R. Co. v. Duckworth*, 1 Circ. Dec., 618, it is held by the circuit court of the first circuit that "in the absence of statutory authority, a court of equity has no right, at the suit of a stockholder, to take any steps for the sole purpose or the primary object of which is to wind up the affairs of the corporation."

The court refers in this case to the well-settled jurisdiction of a court of equity over persons acting in a trust capacity; that it may enjoin any and all conduct of the directors of a corporation in violation of the trust, or of the law, at the suit of a stockholder; but the court holds that an action can not be maintained by a stockholder for the sole purpose of winding up the affairs of the corporation in the absence of a statute conferring

such authority. And this seems to be a well-settled rule. See *Neale v. Hill*, 16 Cal., 145; *High on Receivers*, sec. 288 (2 ed.). Opinion of *Andrews, J.*, in *U. S. Trust Co. v. Ry. Co.*, 101 N. Y., 478.

The next question is this: Is a case made which will authorize winding up its affairs as a dissolved corporation, treating it as dissolved, in favor of these plaintiffs, by force of the maxim that equity considers that as done which the parties agreed to do, and which they ought to have done?

All the parties entered into a preliminary agreement that the corporation contemplated should be formed for ten years only. The corporation which was formed was unlimited as to duration; but, after it was formed in this way, all the stockholders assented to and adopted what is termed a by-law, which provided that the corporation was formed for ten years only. This was signed by all the stockholders and was adopted, it is alleged, to carry out the terms of the original agreement, entered into by the prospective stockholders in that regard. This by-law, it is alleged, has never been repealed, is still in full force, and the stipulated time—ten years—has elapsed. Under these circumstances, can the corporation be treated as dissolved for the purposes of this action?

There is no doubt that manufacturing or trading corporation may voluntarily dissolve and wind up its business at any time.

The question as to what becomes of the franchise to be a corporation, where there is a voluntary surrender of it unaccepted by the state, is an idle inquiry. It is an abstract question which cuts no figure in the winding up of corporations purely private, such as this, formed solely for the benefit of the persons composing it.

This proposition is so well settled that no authority need be cited in support of it.

The trouble with the proposition now under consideration is, that the stockholders have not taken any action in the direction of an actual dissolution or winding up of this corporation. It still exists and is actively engaged in the prosecution of its legitimate business, under the management and control of its officers and agents. The law under which it was created impressed upon it at its birth capacity for unlimited duration. The properties or capacities of a corporation are prescribed by law, and the intention of the incorporators unexpressed in the articles of incorporation, is not an element in its organization, and could not limit or control the incidents which the law attaches to it when brought into being. *State v. Taylor*, 25 Ohio St., 282.

It is true, however, that it was in the power of these stockholders at all times to bring this enterprise of theirs to an end and wind up the corporation. They had the power to do that which it is claimed they agreed they would do. Should it be treated as done for the purposes of this action on the ground that equity looks upon that as done which ought to be done?

This maxim lies at the foundation of many of the great doctrines of equity. For the purpose of reaching exact justice, equity often considers that property has assumed certain forms which it ought in justice to take, or that parties have performed certain duties which they ought, in justice, to fulfill, and will regulate the enjoyment and transmission of estates and interests accordingly. As where a testator has imperatively directed land to be turned into money or money into land, equity considers that the conversion has taken place, for certain purposes and in favor of certain parties.



But in all such cases a court of equity could and would require actual performance of the directed act on proper application of the party entitled to such performance.

If a party cannot, by the rules of equity, come into court and demand performance, surely, as to him, the law will not apply the maxim and treat the matter as performed in his favor. If he was never entitled to relief by decree for performance, he is not entitled to the benefit of the maxim. The court will not treat that as done which it never could have ordered to be done, if the proper parties and the subject-matter had been before it.

If this reasoning is sound, it follows as a necessary consequence, that this maxim cuts no figure in disposing of this demurrer. For, unless the court has the right, on the facts stated, to decree specific performance of the alleged contract, it cannot treat the thing agreed to be done as done; and if the court has the right to decree specific performance on the facts stated, then the demurrer should be overruled for that reason alone, and the maxim, if applicable at all in the case, would bear only on the form of the remedy, and not on the right to relief.

Now, this brings up for consideration the other line of action, before mentioned, which plaintiffs claim is open to them, which is, that the court, on the facts stated, by means of a decree in personam, aimed directly against the stockholders, should require them specifically to perform the said contract, by requiring them to proceed under the statute to dissolve the corporation and wind up its affairs, or else require them, by their own action, to dissolve and wind it up under the common law power which they have to do this.

It is a familiar principle that equity proceeds in personam, and not necessarily in rem. It was against the person that the jurisdiction of the court of chancery was originally acquired, acting upon the conscience of the defendant. *Bispham's Eq.*, sec. 47.

And the specific performance of contracts is a well recognized and extremely important head of equity jurisprudence.

Against the right to relief in the way now under consideration it is urged, among other things, that the supposed obligation, if any there was, arising out of the alleged contract, attached only to the individuals who entered into it, and did not bind the corporation which was not a party to it, and which exists as a person, in law, distinct from the persons who compose it.

There is no force in this suggestion. For in equity the stockholders may be viewed as the corporation and treated as the equitable owners of all the company property and effects (subject of course to the claims of creditors), and the fiction that the corporation is a legal person, distinct in law from its stockholders, must not be allowed in a court of equity, to defeat the ends of justice, by preventing the enforcement of the rights and obligations which may arise out of a valid contract duly entered into by all the real parties who form the company, where the contract had for its subject-matter the company property, which in equity belonged wholly to the contracting parties. And where the due enforcement of such a contract can be attained only by the specific performance of it, it would seem that a court of chancery should so order, on the plain principles of equity; *Morawetz on Corp.*, sections 381 and 211 (1st ed.).

The legal fiction that the corporation is a person, distinct from its members, is said by Taylor on Corporations (sec. 51), to be "a stumbling

block in the advance of corporation law, towards the discrimination of the real rights of men and women."

Our Supreme Court, in the recent case of *The State ex rel., Att'y Gen. v. The Standard Oil Co.*, to be reported in the 49 Ohio St. Rep., speaking through Minshall, J., say: that this "legal entity" is a mere fiction existing only in idea. That like all fictions of law it was invented for convenience and to subserve the ends of justice. But when urged to an intent and purpose not within the reason and policy of the fiction, it has always been disregarded by the courts—citing *Broom's Legal Max.*, 130, and further citing the language of Lord Mansfield, in *Johnson v. Smith*, 2 *Burrows*, 962, as follows: "A fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted."

And, the Supreme Court further say in the case just quoted from, that "this fiction has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and the stockholders, in their capacity as individuals."

If the "corporate entity" fiction is only to be treated as a fact for the purpose and in the respects just stated, it is clear that it can not stand in the way when all the stockholders undertake to deal with what is their own in any manner which does not contravene the rights of creditors. For the state, which is said to be a party to the contract whereby a corporation is formed, is only nominally so, in corporations of the class to which this belongs. The action of the state in the formation of such corporations is permissive only, and their continuance after they are formed is not made mandatory by law.

As said by Taylor in his work on *Corporations* (p. 313), "there is no valid reason why an ordinary stock corporation, charged with the performance of no public duty, should not be allowed to close up its business at any time and dissolve." And that "the idea of the necessity of the acceptance of a surrender of franchise on the part of the authority granting them seems intimately connected with the old doctrine—now certainly a thing of the past—that on the dissolution of a corporation all its debts were extinguished."

It now becomes necessary to determine what legal obligations, if any, arose out of what was done by these parties in entering into the preliminary written contract, and by the subsequent adoption of the so called by-law. What was the legal effect of all this as the same is set forth in the petition?

The original written contract was simply an agreement by and between the parties thereto, as prospective stockholders, that they would avail themselves of the permission given by the laws of this state to form corporations, and form a corporation for ten years, to which, when formed, for the purposes and time specified, they would subscribe specified amounts of stock.

To carry out the provisions of this preliminary agreement five of their number, acting for all, took the necessary steps and procured a certificate of incorporation, differing from that which all had agreed they would solicit and obtain, in this, that it was unlimited as to the time the corporation might exist. It is said that this was by mistake. But it appears that they all accepted it as it was granted, and having accepted a franchise from the state, they must be held to have known the terms of

the grant. They were not bound to accept it. They could have refused to become members of this corporation.

It is not necessary to determine whether or not a certificate of incorporation for a limited time, as contemplated by their agreement, might have been obtained under the laws of this state. For, if it could not, they had contracted to do what could not legally be done, and if it could be obtained in that form, then they voluntarily did a different thing. The original agreement did not bind them to subscribe stock to this corporation. But they accepted the certificate and organized under it, and in so doing must be held as waiving or abandoning that provision of their preliminary agreement which was in conflict with the certificate, and as relying upon such rights and powers as the law would give them as members of the corporation to bring their enterprise to a close whenever they determined to do so.

It was not stipulated in the preliminary contract that the parties thereto should dissolve and wind up the corporation to be formed at the end of ten years, but the contract was, in explicit terms, that they would form a corporation for ten years only.

Clearly, the plaintiffs are not entitled to the relief demanded by reason of the original contract alone, for the reason that they waived or abandoned the provision in question by accepting the certificate of incorporation, as it was issued to them, and the further reason, that a decree ordering the parties to dissolve and wind up the corporation which was formed, would not be a specific performance of the contract in fact made to form a corporation for ten years only.

But the plaintiffs do not rest their claim for relief on this original contract alone, but allege in their petition that after the organization of the corporation by-laws were adopted, one of which provided that the corporation should continue for the period of ten years only.

It remains to consider the effect of this subsequent action of the parties in connection with their previous action.

Before this subsequent action was taken they had been discharged, as before shown, from all obligation, if any existed, arising out of the original contract to take and pay for stock in the corporation as in fact formed. They voluntarily entered into a new obligation and assumed the status of stockholders.

And in assuming this status they brought themselves under the obligations of another contract, purely statutory, which must be clearly distinguished from the preliminary contract which had existed between them as individuals, by which they had agreed to become stockholders at a future time in a certain corporation to be formed; Morawetz on Corp., sections 267 and 255, (1st ed.).

And it may be further stated in this connection that the preliminary contract to form a corporation becomes merged in the subsequent statutory contract, by which the corporation is formed as to all matters embraced in and covered by the statutory contract.

Opinion of Vice Chancellor in *Ferris v. Strong et al.*; 3rd Edwards Chancery Rep., 128.

"The contract by which the stockholders of a corporation are bound together is a purely statutory contract." Morawetz on Corp., sec. 257 (1st ed.).

"And the contract by which they are bound together is set forth in a charter or in articles of association agreed to in pursuance of a general incorporation law;" Morawetz on Corp., sec. 255 (1st ed.).

So the terms of this contract which binds the stockholders together, are to be looked for and found in the provisions of the articles of incorporation and of the general law under which they became incorporated, and are not to be sought for in their preliminary agreement, which has become merged in or superseded by the statutory contract as to all matters falling within its scope. The grant by the state of the privilege of becoming a corporation, if accepted, must be accepted as granted. And the acceptance of this privilege by those to whom it is granted by the state, is made upon an express contract with the state, and an implied contract as between themselves, that the privilege shall be held and exercised under the rules of the general law of the state which authorizes corporations and regulates and governs them.

The internal organization of corporations is provided for in the general law of the state, and this internal organization has a very important bearing on any question concerning the relation of the stockholders to each other, as well as to the corporation itself; Morawetz on Corp., section 382 (1st ed.).

The internal organization of corporations as provided by statute, is such that the corporate powers, business and property of corporations are exercised, conducted and controlled by a board of directors elected by the stockholders. Revised Stat., sec. 3248.

Subject to the restriction that they be not inconsistent with the constitution and laws of the state, the board of directors may adopt a code of by-laws for their government, and the corporation may adopt a code of regulations for its government. And the regulations which the corporation is authorized to make may be adopted or changed by a majority of the stockholders at a meeting held for that purpose, notice of which has been given in the manner described. Revised Statutes, sections 3249, 3250, 3251.

All the statutory provisions quoted, and many others not referred to, attached to this corporation when brought into existence by the action of the parties in this case, and must be regarded in determining their rights and obligations to each other when they assumed the status of stockholders.

The rules of law governing the organization are such that each person by becoming a member thereof must be held to have agreed that a majority of the members shall have power to bind him so long as they act within the scope of the powers conferred on the corporation. The voice of the majority is the voice of the corporation and of all its members. Morawetz on Corp., sec. 83 (1st ed.).

Any regulation or by-law which they have power to adopt, may be altered or repealed by a majority at a meeting duly convened.

The fact that it may have been unanimously adopted does not place it beyond the reach of a bare majority.

The majority have it in their power to repeal the by-law in question by proceeding in the regular way; but it is alleged in the petition that this has not been done, and that the by-law is still in full force and effect, and the plaintiffs in this case are asking the aid of the court to enforce the terms and provisions of this by-law, or else to require the defendant stockholders themselves to observe it.

It has already been shown that the court has no power to do this by a decree aimed directly against the corporation itself. If it can be done at all, it must be by means of a decree against the individuals who are the

members of the corporation requiring them as stockholders to do the thing desired.

Before the individuals who are the members of this corporation can be ordered to do this, it must at least appear that they are under legal obligation, as individuals, to do it.

Against them as members and agents of the corporation no case is made for the relief demanded in the petition. They are not asked to account as agents of the corporation for fraudulent management or for any breach of trust. It is not claimed that they are exceeding their corporate powers. The court is not authorized to interfere with the management of the affairs of a corporation while its regular agents are acting properly within the scope of the powers conferred on them by the corporation through its charter. *Morawetz on Corp.*, sec. 387 (1st ed.).

The court cannot, at the suit of plaintiffs as stockholders against the defendants as stockholders, so far intermeddle with the affairs of this corporation as to require the observance of this by-law, especially as it appears on the face of the petition that a very large majority are hostile to the by-law and treat it as a dead letter; for the corporation has an internal organization of its own, through which it must be allowed to work out its own purposes without interference from the court at the suit of a dissatisfied stockholder, unless it should become necessary to take judicial action to keep it within the scope of its powers or to call to an account some officer or agent for dishonest management or breach of trust or for some other like purpose for which a stockholder under certain circumstances may be entitled to relief.

Then, if specific performance of the matter in question can be had against these defendants, the decree must be based alone on an individual legal obligation of the defendants to perform it.

For the reasons before stated no such obligations arise out of the original agreement.

Are such obligations imposed by reason of the action subsequently taken?

In adopting the by-law they were acting as stockholders at a meeting of the members of the corporation, exercising the powers conferred on them by law. It was recorded on the minute book of the corporation along with other by-laws adopted at the same time, and was signed by all the members.

It is difficult to see how this would give it, as a by-law, any greater force than it would have if it had been adopted by a majority only, and had only been attested by the officers of the meeting.

They had voluntarily become members of an association which was subject to the rule of the majority, and which might repeal any by-law it might enact, and which had an internal organization of its own, given it by law, through which the will of the majority could be manifested, and its will executed for all the purposes of the organization, and through which the whole enterprise must be worked out, and through which it may be brought to a close at any time, or continued indefinitely.

Considered as a by-law, it can only be treated as a declaration of intention at that time to continue the enterprise for ten years only, and like any other by-law, subject at all times to change or repeal at the will of the majority properly expressed.

It derived no additional force from the previous agreement, for that was not legally operative at the time for the reasons before stated.

It was called a by-law, having been adopted by the stockholders'

meeting; it was treated as such, and recorded in the minute book of the corporation. But it is not necessary to determine whether it was a valid by-law or not. The question is, did it impose on those assenting to it an obligation such that its provisions can be enforced against these defendants who refuse to observe it?

It is clear that in adopting it they were not acting and contracting with each other as individual equitable owners of the property of the corporation, nor binding themselves individually to the performance of anything.

Before the adoption of this by-law they had already become stockholders, and were acting as such in adopting it, having already paid, or incurred the obligation to pay for the stock subscribed; no new right became vested, nor any new obligation incurred by reason of this by-law.

It has none of the elements of contract, nor is there anything to operate by way of estoppel. No subsequent action was taken on the faith of this by-law. Their rights and their obligations had become fixed before its adoption.

These parties had intended originally to form a corporation for ten years only. They voluntarily did a different thing, and so were not under a legal obligation, and never had been, to adopt this by-law, or do what it provided for. They adopted it, it is alleged, to carry out their original intention, and, it would seem, under the circumstances stated, that they were under a strong moral obligation to observe the prior understanding. But there was no prior legal obligation, and a mere moral obligation, however strong, is not a sufficient consideration to support a contract. Bishop on Contracts, sec. 44; Swan's Treatise, page 517.

The conclusion now reached renders it unnecessary to consider other questions which would arise if this by-law could be considered as a contract between these parties.

The resolution remains unrepealed, but is a dead letter because the majority will not execute it.

For the matters complained of, the plaintiffs must seek relief by looking to the corporation itself, of which they are a part, and work it out by the means and through the instrumentalities provided by law, in the organization of corporations for their control and management.

The court is not authorized by any proceeding operating either directly or indirectly upon this corporation or its members, to control those rightfully in charge of it for the purpose of coercing them into a policy which they approved of ten years ago, when this resolution was adopted, but which, it seems, they do not approve of now, in the light of their experience and of subsequent events.

Adopting the language of the chancellor of New Jersey in a recent case—if the stockholders in a corporation disapprove of the company's course of action while keeping within the limits of their charter, without fraud, their remedy is to elect new officers or sell their shares and withdraw.

The refusal of these defendants to observe this by-law, under the circumstances set forth, in morals, may be a breach of good faith, but it is not the breach of a legal contract.

The maxim quoted in argument, that "there is no wrong without a remedy," is almost worthless for practical purposes, for the law easily vindicates the maxim by denying that a legal wrong exists when it furnishes no remedy.

Demurrer sustained.

Hon. J. A. Ambler, for plaintiffs.

Gen. Asa W. Jones, for defendants.

**ASSIGNMENT OF CREDITORS.****61**

[Hamilton Probate Court, 1893.]

**IN RE ASSIGNMENT OF EASTON AND CLARK.**

Interest should be allowed a creditor whose claim has been rejected by the trustee, but subsequently allowed in the common pleas court, and that judgment affirmed in the circuit court. Judge Ferris held that the creditor was entitled to his dividend and interest upon same from the date of the declaration of such dividend. He cited the case of *Armstrong, Receiver of the Fidelity Bank, against American Exchange Bank of Chicago*, 133 U. S., page 433, as authority. There being funds of the estate in the hands of the assignee, he directed that so much of the same as was necessary should be applied to the payment of the dividend and interest. This point is new in this state so far as we are aware. Judge Ferris argued that if the other creditors were paid their dividend and enjoyed its benefits, then the creditor who had been denied the use of the money rightfully belonging to him should be paid as of date when the others were paid. The only way to do this and maintain equality among the creditors was to order that interest should be paid on the dividend so withheld.

**FERRIS, J.**

The probate court passed on the question, whether or not interest should be allowed a creditor whose claim had been rejected by the trustee, but subsequently allowed in the common pleas court, and that judgment affirmed in the circuit court. Judge Ferris held that the creditor was entitled to his dividend and interest upon same from the date of the declaration of such dividend. He cited the case of *Armstrong, Receiver of the Fidelity Bank, against American Exchange Bank of Chicago*, 133 U. S., page 433, as authority. There being funds of the estate in the hands of the assignee, he directed that so much of the same as was necessary should be applied to the payment of the dividend and interest. This point is new in this state so far as we are aware. Judge Ferris argued that if the other creditors were paid their dividend and enjoyed its benefits, then the creditor who had been denied the use of the money rightfully belonging to him should be paid as of date when the others were paid. The only way to do this and maintain equality among the creditors was to order that interest should be paid on the dividend so withheld.

Ex-Governor Foraker represented the creditor, and Kramer & Kramer representing the trustees.—(Editorial.)

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**CORPORATIONS—PLEADING.****61**

[Superior Court of Cincinnati, Special Term, January, 1893]

**CINCINNATI GAS LIGHT AND COKE CO. V. DODDS.**

Where the plaintiff, a corporation, describes itself as such in the caption of the petition, but in the body there is no averment of corporate capacity to sue, it is good as against a demurrer.

**HUNT, J.**

A proceeding to recover the possession of certain real estate in the city of Cincinnati, under section 5781, of the Rev. Stat., the petition simply alleges that the plaintiff has a legal estate in and is entitled to the possession of the real estate in question. There was a demurrer to the petition on the ground that there was no averment of the corporate capacity of the plaintiff to sue. The court held, that under the code in order to raise the question on demurrer the incapacity must appear on the petition. At common law, a corporation, when it sues, need not set forth its title in the declaration, but if issue be taken, it must show by evidence upon the trial that it is a body corporate, having the right to sue in the character and capacity in which it appears in court. The code does not require the title of the plaintiff to sue to be more specifically

set out than was required at common law. Demurrer, therefore, was overruled. *Smith v. The Bank of Kentucky*, 12 Ohio, 151; *Smith v. The Weed Sewing Machine Company*, 26 Ohio St., 562; *Bank of Michigan v. Williams*, 5 Wend., 482.

Charles B. Wilby, for demurrer.

E. A. Ferguson, contra.

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[Hamilton Common Pleas.]

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**GEORGE HAFFER V. C., H. & D. RY. CO.**

For opinion in this case, see 4 S. & C. P. Dec., 487.

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[Hamilton Common Pleas.]

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**WM. GROSS V. CINCINNATI (CITY).**

For opinion in this case, see 4 S. & C. P. Dec., 393.

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[Lucas Common Pleas, April Term, 1892.]

93

**IN RE ESTATE OF ELIJAH G. CRANE.**

For opinion in this case, see 4 S. & C. P. Dec., 398.

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**SERVICE OF SUMMONS—DIVORCE.**

[Hamilton Common Pleas, 1893.]

**HOLLAND V. HOLLAND.**

Service made on a nonresident, under sec. 5052, Rev. Stat., by a sheriff in another state, duly authorized and deputized, is valid.

WILSON, J.

In an action for divorce, the service was made on the defendant, a non-resident of the state, by the sheriff of Dearborn county, Indiana, of a copy of the petition, said sheriff having been authorized and deputized by the sheriff of Hamilton county to make said service, by indorsement on the original summons, an affidavit for service by publication or by personal service outside the state having been filed prior to such indorsement by the sheriff of Hamilton county, Ohio. The sheriff of Dearborn county, Indiana, made a return of the manner and time of service, indorsing the same on the original summons, verifying it before a notary public of that county, and returned it to the sheriff of Hamilton county, Ohio, who indorsed on the writ that he had served the defendant in accordance with the above affidavit. The court held that this was a good service on the defendant, and the testimony showing that the plaintiff was entitled to a divorce, granted her a decree.



[Superior Court of Cincinnati.]

EXRX. OF ROBERT HAMILTON V. ROYAL INS. CO.

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For opinion in this case, see 4 S. & C. P. Dec., 437. See also *Ib.*, 407.**MUTUAL INSURANCE.**

III

[Richland Common Pleas.]

**MANSFIELD & HAHN, TRUSTEES, V. WOODS, JENKS & CO.**

1. A member of an insolvent corporation cannot, when called upon to pay his proportion of the indebtedness, set up that it was not properly organized to do business, or had not complied with the law.
2. After a party has had the benefit of the insurance, and the corporation becomes insolvent and goes in the hands of a receiver or trustee, a member cannot set up fraud as a defense after the rights of innocent creditors have intervened.

WOLFE, J.

The petition alleges that the Buckeye Mutual Fire Insurance Co. was incorporated under the laws of Ohio. That in February, 1891, under proceedings in the Supreme Court of Ohio, it was ousted from further doing business; that it was insolvent, with no assets except premium notes and contingent liability policies; that W. M. Hahn and Edwin Mansfield were appointed trustees by the Supreme Court to wind up the affairs of the company and to levy assessments and collect money sufficient from the members and policy-holders to pay its debts; that an assessment was levied against all persons holding policies during the year 1890 for losses and expenses occurring that year; that the total amount claimed against defendant on its several policies was \$777.69, with interest since July 1, 1891.

Defendant answers and sets up the following defenses:

First—General denial.

Second—Did not organize to do business on the contingent liability plan according to law.

Third—False statements to the insurance commissioner as to the company's standing.

Fourth—Company represented at issuing policies that one cash payment would end liability.

Fifth—That company did business in other states without authority so to do.

Sixth—That said company did business on both contingent liability and premium note plan, and that the same was illegal.

Seventh—Defendant pleads a set-off for premiums paid and unearned.

Eighth—Defendant pleads that the premium note sued on in the seventh cause of action was surrendered, and that all due on that policy was paid at that time.

The reply is substantially a general denial.

All the assessments sued on except one were on what is called the contingent liability—that is, there was a clause in the policy which makes the holder liable not to exceed five times the annual premium paid, which clause reads as follows:

"And by an agreement by the assured created by accepting this policy to pay this company such further sum, if required, as may from time to time be assessed against the holder hereof, provided such calls shall not exceed in the aggregate five times the annual premium on this policy."

A jury was waived, and the cause tried to the court.

Plaintiff offered proof tending to show the incorporation of the company, their appointment as trustees, the indebtedness, the assessment and notice thereof to defendant, the acceptance of the policies by defendant, and the amount due, and rested.

The defendant then offered evidence to sustain all affirmative defenses except the eighth. The testimony being objected to, was excluded.

The real question decided is whether or not, admitting the allegations of the answer to be true, it constitutes a defense to plaintiff's claim.

In order to determine this question, it is necessary to ascertain the legal status of a person taking out and accepting insurance in a mutual company. Rev. Stat., sec. 3650 provides: "Every person who effects insurance in a mutual company, and continues to be insured, his heirs, executors, administrators and assigns, shall thereby become members of the company during the period of insurance, and shall thereby be bound to pay for losses and such necessary expenses as accrue in and to the company, in proportion to the original amount of his deposit note or contingent liability, etc.

It was seen that under this law, as soon as defendant effected this insurance and accepted these policies, it became a member of the corporation, a stockholder of the corporation, and liable in the same manner as a stockholder of other corporations.

The clause in the policy limits the liability not to exceed five times the annual cash premium paid on the policy. This is in accordance with sec. 3634. As the defendant effected insurance in the company and under the law became a member and a stockholder of the same, can it defeat this action, with any of the defenses herein set up? I think not, for two reasons:

First—A member of a corporation cannot, when called upon to pay his proportion of the indebtedness, set up that it was not properly organized to do business, or had not complied with the law.

Second—After a party has had the benefit of the insurance, and the corporation becomes insolvent, and in the hands of a receiver or trustee, a member cannot set up fraud as a defense after the rights of innocent creditors have intervened.

As to the first proposition:

In the case of the Trumbull County Mutual Insurance Co. v. Harner, 17 Ohio, 407, the defense was that plaintiff had not complied with its charter, and the court say: "A member of a mutual insurance company, when sued upon an assessment upon his deposit note to pay a loss occasioned by fire, cannot set up as a defense that he and his associate corporators have neglected to comply with the provisions of the charter."

Again, on page 408, the court say: "The objection in this instance is urged by one of the corporators and one of the insured, and we doubt not, had he sustained loss by fire, he would have as strenuously insisted upon his policy as he now opposes the payment of the amount assessed upon his deposit not to pay a loss occasioned by fire to his neighbor

\* \* \* we consider a corporator when called upon to respond to the obligations of the corporation to be estopped from denying its existence in order to escape responsibility."

In the case of *The Newburg Petroleum Co. v. Weare*, 27 Ohio St., 344, the court say: "Persons entering into a contract with such foreign corporations concerning property or rights in property appropriate to its business in Ohio will be estopped, after dealing with said corporation, recognizing by their acts its validity, and receiving the benefits of the contract, from denying the power of the corporation to make the contract in an action on the contract."

See also: *May on Insurance*, sec. 552, p. 884; *Lucas v. The Greenville, etc., Association*; 22 Ohio St., 339.

The case of *Rundle v. Kennan*, 48 N. E. Rep., 511, holds that even if the company agreed in writing that there would be no further liability, and there was nothing in the contract making the assessed liable, yet when the law provides that every person effecting insurance in the company shall be a member, he is liable to future assessments for losses and expenses.

I conclude the law to be well settled, that a member of a corporation, when sued by it to pay claims due a third party, cannot set up that it did not comply with the law in making the contract; but even if a defense of this kind could be made against the company, it cannot be made against the trustee of an insolvent corporation, when attempting to collect money enough to pay claims held by insured third parties. Where the policy holder has been induced to become a member by the fraudulent representations of the company, the contract is not void, but only voidable as between the assured and the company, and where he retains the contract until the rights of innocent parties have intervened, he certainly is too late to avoid the contract, and is estopped from so doing.

When the receiver or trustee of an insolvent corporation sues to recover the amount unpaid on subscription, it is then too late to plead that the subscription was induced by fraudulent misrepresentations. *Taylor on Private Corporations*, sec. 523.

"Where the rights of innocent third persons have intervened, and it is essential to their protection that a contract, otherwise vitiated by fraud and therefore voidable, should be sustained, equity requires that such contract be upheld." *Dettra v. Kestner*, Sup. Ct. Penn., ante 625. See also opinion of Judge Buchwalter in *Mansfield & Hahn v. Cin. Ice Co.*, ante 617.

As to the defense that the premium note described in plaintiff's seventh cause of action had been surrendered, the court find that no settlement for defendant's proportion of losses had been made.

Judgment is accordingly rendered for plaintiff on each cause of action for the whole amount therein claimed.

Skiles & Skiles, and Lewis Brucker, for plaintiff.

Jenner & Tracy, for defendant.

## MECHANIC'S LIENS.

[Summit Common Pleas, January Term, A. D. 1893.]

CREECH & LEE V. P., A. & W. R. R. CO. ET AL.

Section 3, 86, O. L., 120, passed March 20, 1888, (Sec. 3231-3, Revised Statutes), is void, because in contravention of the constitution, in this, that it attempts to place a limitation upon the judicial power of the state, and deprives a party of his property without remedy by due course of law.

Hearing on motion to strike out irrelevant matter in petition.

VORIS, J.

We are asked in substance to give judicial effect to the three first sections of the act passed March 20, 1888, Ohio Laws, vol. 86, p. 120, being Rev. Stat., 3231, 1, 2 & 3, Smith & Benedict edition. As we construe the act, we think that our determination of sec. 3, will cover the ground sought by counsel to be adjudged by the court.

This statute undertakes to provide a speedy—might say heroic remedy for claims asserted by persons who perform common or mechanical labor, or furnish material for a railroad. It provides that such party shall have the first, immediate, and absolute lien on the whole of the property—this comprehensive term being used in the remedial parts of that statute wherever it is sought to apply the remedy, as I remember.

Sec. 3—"Any construction company, contractor, mechanic, laborer, or person contributing supplies or material to any work named in section one (1), of this act, shall at the time of filing the sworn statement of account as provided in section two (2) of this act, file a good and sufficient bond of indemnity for an amount equal to the amount claimed, which bond shall be approved by the probate judge, and shall be so conditioned as to save and protect the defendant in any case arising under this act and shall then be entitled to a decree of the common pleas court, enjoining and prohibiting the operation, use or occupancy of the property created in whole or in part by the party or parties asking for said injunction; and the said injunction shall not be dissolved until the court is satisfied that the claim has been adjusted and paid in full."

Section 2, provides that, "When it shall be deemed necessary for any such parties to secure their claims against any railroad for work done or material furnished, they shall file a sworn, itemized statement within thirty days after said work was performed, or material furnished, showing the balance due and claimed for labor or material furnished, with the recorder of the county or counties within which said work was done, or material furnished," etc.

It is alleged that section three of this act is in violation of the constitution, in this that the legislature undertakes by it to control and restrain the judicial discretion of the court, when called upon to determine the rights of the parties growing out of the provisions of the act. That is, instead of being an act within the legislative power of the general assembly, it is the assertion on its part, of judicial powers, and deprives the court of the judicial discretion to determine the rights of the parties, making it obligatory upon the court, upon the ex parte claim, affidavit and bond being filed, and approved as provided for in the first and second sections of this act, to judicially decree that the party so asserting such claim, shall then be entitled to an injunction enjoining and prohib-

iting the operation, use or occupancy of the property, created in whole or in part by the parties asking such injunction.

Is section three subject to this imputation? If the practical effect of the act is to deprive the owner of his property without remedy by due course of law, or if fairly construed, it so encroaches upon the judicial power of the state, it should be declared void, so far as it has such effect. That the injunction provided for, deprives the owner of his property, cannot be successfully controverted. Does it do this without the remedy of judicial procedure; that is, by due course of law? The act, as we construe it, does enforce a method of judicially depriving the adverse party of the operation, use and occupancy of his property, without a judicial trial and the determination of the rights of the contending parties. The allowance, continuance and dissolution of the injunction provided for by the act, are essentially judicial acts, and exclusively such, and imply an exercise of the highest powers of the judicial office;—are denominated the extraordinary powers of the court. What could be higher than when the injunction prohibits the operation, use or occupancy of a railroad system by its owner, with no specific mode provided for its operation, use or occupancy pending the injunction, which may be prolonged, by virtue of this section, until chaos overwhelms its business operations? What semblance of a hearing, defense or adjudication is provided for, or admissible under this act? The act does not give an answer.

Must the court grope its way in darkness, or sua sponte, create a power by which to judicially operate the system until the statutory conditions may have been satisfied? The act is mandatory upon the court, the ex parte jurisdictional conditions named in the act having been complied with, to decree the injunction, "enjoining and prohibiting the operation, use, or occupancy of the property created in whole or in part by the party asking for the injunction; which injunction shall not be dissolved until the court is satisfied that the claim has been adjusted and paid in full." This is the language of the act. This statutory procedure is wholly ex parte, and arbitrarily entitles the claimant to the injunction and its condemnatory consequences, and excludes the court making the decree from the exercise of any discretion in the matter of allowing, or dissolving the injunction; in effect, commanding a specific decree at the hands of the court, the adverse party having had no day in court, no hearing, no opportunity to make a defense, no judicial determination of the rights of either party, and no remedy against this arbitrary procedure, until the court is satisfied that the ex parte claim has been adjusted and paid as aforesaid, during all which time, the railroad company cannot have the operation, use or control of its railroad. How long a time that may be, is a significant question, more readily asked than correctly answered. The ordinary modes of litigation are not so exceedingly energetic that we can say that justice will be speedily adjudged. They are long enough at best. But during the time the adjustment is progressing, it makes no difference whether it is a claim of great or trifling moment, whether, in justice, it has any existence at all or not, the decree provided for in section three must go forth, suspending the functions of the railroad, until the court is satisfied of the adjustment and payment as provided in this section. Such an exercise of judicial powers is but an absurdity; the court held powerless to relieve the adverse party from such a hazardous injunction as the one provided for in this section, and during the whole time it may take for the court to become satisfied by some mode of

judicial procedure binding upon the court—this is necessarily implied—that the claim has been satisfied and wholly paid; that is, the time it will take to determine the disputed rights between the party asserting it, and the party denying its existence. It may result in protracted and very doubtful litigation; the doubts all the while may be against the validity of the claim.

No just conception can be formed of the exercise of judicial powers that does not imply a hearing and the right to defend before adjudication, upon equal terms with the party instituting the proceeding. "Due course of law" means nothing short of this. A statute violating the right of the owner to the operation, use and control of his property without such a trial, would be as obnoxious to the common sense of mankind and the constitution, as would the judgment of this court intentionally announced against the recognized law of the land. This view is overwhelmingly sustained, both by authority and reason. It must be remembered that the act specifically provides that the injunction shall not be dissolved until the court is satisfied that the claim has been adjusted and paid in full. What claim? Evidently that filed with the recorder, and asserted as the grounds for the decree of injunction. An adjustment, where the claimant has all the machinery of the court at his command on his mere *ex parte* application, and beyond the power of the court to give relief until it is satisfied the claim has been adjusted and paid in full, appears to us to be a rank denial of justice, and wholly unjudicial in mode and essence. You may not be guilty, but we will hold you so, until you prove yourself innocent, is the effect of this act. When, or how is this disputed matter to be adjudicated, depends much upon the disposition or ability of the adverse party to bear imposition and the sense of justice of the claimant when he feels that he holds his adversary by a firm grasp on the throat.

If this section invades the jurisdiction of the court, so as to deprive it of the exercise of its judicial discretion, in so far as it does this, the act is clearly in contravention of the constitution. Any limitation upon the freedom of the judiciary, in the exercise of the judicial powers vested in it by the constitution, in the judicial determination of the rights of litigant parties, by the legislative branch of the government, asserted in the form of laws, formally enacted, or otherwise, can have no binding effect upon the courts.

Article four (4), section one (1), of the constitution vests the judicial power of the state in a Supreme Court, circuit court, court of common pleas, etc. Article two (2), section one (1), vests the legislative power of the state in a general assembly, which shall consist of a senate and house of representatives. These sections are identical with the provisions of the constitution of 1802, so that any construction given to the constitution of 1802, in respect to the jurisdiction of the two bodies, would equally apply to the constitution now in existence. As far back as the 17th Ohio Reports, 225-8, the Supreme Court held, as announced by Reed, J.: "So far as it" (an act of legislation) "assumes to encroach upon the province of the courts, (and assumes to give construction to existing acts) to govern the decisions of the courts, as to causes now pending, it is judicial; and as the constitution confers judicial power upon courts, and withholds it from the legislature, to that extent, such an act will be inoperative." It is true that the announcement of the Supreme Court in that case, is not wholly analogous, but we think the distinction between the legislative and judicial power is truly stated.

"The general assembly, like the other departments of government, exercises only delegated authority, and any act passed by it, not fairly falling within the scope of legislative authority, is as clearly void as though expressly violated." *R. R. Co. v. Commissioners*, 1 Ohio St., 77.

It seems to me very plain, that upon *ex parte* jurisdictional facts only, to require the court, *nolens volens*, to allow the injunction provided for by this act, the propriety of which is contested, and which the court has no power to modify or vacate, except upon the conditions named in sec. 3, is an unwarranted assertion of power by the general assembly that deprives the judiciary of the very essence of its judicial power, which is to hear and determine upon the merits of the matters in contention between the parties.

This suggests itself to the court, perhaps, more forcibly than it would to members of the bar, for the different departments of the government are naturally jealous of the powers they think they are required to exercise, and are very jealous of any interference by any co-ordinate branch of the government. What discretion does this act leave with the court? Counsel for plaintiff answer, that the remedy provided by this act is cumulative; that the code of civil procedure is operative. There is no reference made in this act, to the general legislation of the state. We think the provisions of this act, making the filing of the statement sworn to by the party with the county recorder, and the bond with the approval of the probate court, filed, where (?), as the foundation by which this court shall by its decree allow an injunction, is a significant inhibition against the court's proceeding in the ordinary course of procedure. It makes those conditions jurisdictional, and then vests absolutely the party with the right to have the injunction, and an injunction that the court cannot dissolve until there is an adjustment and payment of the matter claimed by the other party. What property? How much? Shall it be such as is set forth in the claim and affidavit filed with the county recorder? Shall that only be held by the decree of injunction? Or shall all the railroad property of the corporation be held? I am very strongly inclined to think that the language implies that it may be an injunction upon the system within the state. The very inconsistency of the act—but that is not a matter for the court, other than when it undertakes to determine the effect of the legislative enactment,—the very inconsistency of undertaking to collect a claim, or authorize a party to collect a claim, and then enjoining the party, who owns the property—and it may be a vast system, as railroad property,—by putting an absolute restraint on them, depriving them of the control, or the use and occupancy of that property, pending the determination of the question, is so practically inconsistent, that the court will inquire, and it will inquire carefully, what the legislative intent is in the premises, and will not extend liberality of construction to an act that has such apparently unjust, far-reaching and disastrous consequences in it, as this may have.

We cheerfully recognize that it is the duty of the court to construe the enactments of the general assembly liberally, in order to save them from constitutional infirmity. We know of no more salutary performance of our official duties, than to do so. But there can be no presumption in favor of legislative exercise of judicial power, no more than there could be in favor of the courts undertaking to exercise legislative power. The court must determine for itself the constitutional powers vested in the judiciary. Where there is a clear invasion of the powers of either of these co-ordinate branches of the government, by the other, it is the

Summit Common Pleas.

judicial procedure binding upon the court—this is necessarily that the claim has been satisfied and wholly paid; that is, the party takes to determine the disputed rights between the party and the party denying its existence. It may result in protracted and doubtful litigation; the doubts all the while may be as to the validity of the claim.

No just conception can be formed of the exercise of a right that does not imply a hearing and the right to be heard. A "course of law" means nothing short of this. A trial, such as a trial, would be as obnoxious to the rights of the owner to the operation, use and control of the property, and the constitution, as would the judgment pronounced against the recognized law of the land, overwhelmingly sustained, both by authority and precedent. It is remembered that the act specifically provided that it should be dissolved until the court is satisfied that the claim is paid and paid in full. What claim? What right? What is asserted as the grounds for the judgment, where the claimant has no right to demand on his mere ex parte application to the court to give relief until it is paid in full, appears to us to be a usurpation of the judicial in mode and essence. You so, until you prove or how is this dispute to be disposed of? In the sense of justice of the law, by a firm grasp of the law.

If this section of the exercise of the right is clearly in violation of the freedom of the plaintiff by the defendant par

they had authority, which they did not possess, for the defendants, and the latter afterwards, with full knowledge, by words or acts, or by the same means, waived the right to the services which were being rendered under their immediate supervision, they are liable for their reasonable value. The admissions of the alleged agents affirming their authority to employ the plaintiff, although not in themselves proof of the agency, may be considered with other evidence tending to prove the agency.

the testimony of attorneys who testified to their opinions touching the value of the services is not conclusive upon the jury. But it should be considered, and its use is to aid the jury in ascertaining reasonable worth of the services. In estimating the reasonable value of the services, the amount of property involved in the will case, in which the services were rendered, the pecuniary advantage or disadvantage of the services to the defendants, the successful termination of the will case, the time and labor employed and done, and the skill, learning and ability of the plaintiffs, as attorneys, should be considered by the jury.

Pugh, J., (charging the jury.)

In this case the plaintiffs sue to recover the reasonable value of alleged professional services, services rendered as lawyers to the defendants.

These services consisted in learning and preparing the facts, and ascertaining and preparing the law for, and prosecuting and trying, a case in this court to set aside the last will and codicil of James Ohlen, deceased; and preparing for and arguing a motion for new trial in this court, and preparing for and arguing the case in the circuit court of this

MOLLAND ET AL.



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other work done by them in the line of their duty, as at-

attempted to state all of the services which, as they assert, You have heard them testified to by the witnesses.

on, the plaintiffs estimate the value of their services at the defendants credit for \$500, and pray for judg-

dants. Three of them, James H. and Frank X. way, make no defense, so that no matter what to the others, your verdict must be against

ts, Kate E. Holland, Sarah J. Hanson suit of the plaintiffs, denying, by their the petition of plaintiffs. This denial proving, by a preponderance of the entitle them to a recovery. A pre- mean the larger number of the wit- testimony, judged by the impres-

ver could not maintain a suit to leave the question whether amount, to his own sense of justice his clients. But that never was, is not yers, in common with every other class of ight to bring suits to recover the price of their is and clients stand upon an equality of legal right

the allegations of their petition it was competent for the ants to establish their case in either of two ways.

First—They had the right to prove a special agreement by which they were expressly employed to render the services in question. This is designated an express contract. To constitute such a contract between these parties it was necessary that the minds of both should have met; one party could not make the contract alone; both must have understood the contract alike and must have assented to all its terms. It could be made, however, by the intervention of agents, as well as by the parties themselves.

Second—They had the right, in case of a failure to prove the express contract, to prove that they rendered services—the services involved in this case—for the benefit of the defendants, with the knowledge and approbation of the latter, for which the law would imply a promise, an agreement, to pay for them. This is termed a contract created by law.

You will now be instructed touching the alleged express contract. The contention of the plaintiffs is that they were expressly and actually employed by James H., Frank X. and John E. Ohlen, who, in employing them, acted, not only for themselves, but also for Kate E. Holland, Sarah J. Hanson and Mary J. Holloway, as their agents. They insist that the three Ohlen brothers were authorized to employ them when all six of the defendants, and the husbands of Kate E. Holland and Sarah J. Hanson, were present; that all of them participated in conferring such authority upon the brothers; and that this was done on the day the will and the codicil were opened and read in the probate court room.

highest duty of that branch whose power is invaded, to assert its right.

We think this section clearly encroaches upon the judicial power of the state; assuming to exercise it for the court—making this court simply a recording clerk pro tanto.

We feel solid in our conviction that it is an attempt on the part of the general assembly to deprive the owner of his property without remedy by due course of law, an exercise of powers on its part, in contravention of the sixteenth (16) section of the bill of rights, as well as of section one (1), article four (4) of the constitution.

“Due course of law” means, as well within the powers and limitations of the constitution, as the laws enacted by the legislature; with absolute supremacy for the constitutional provisions, and unquestioned subordination of the powers of the general assembly to the constitutional law that vests the legislative power in it, and the judicial powers in the courts. Encroachments of either, upon the powers of the other, are void.

Entertaining these views, we must hold section three (3) of this act to be invalid, contrary not only to the plain spirit, but contrary to the express provisions of the constitution.

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## ATTORNEY AND CLIENT—PLEADING.

[Franklin Common Pleas, 1893.]

J. T. HOLMES AND HENRY J. BOOTH V. KATE E. HOLLAND ET AL.

1. Under a petition resembling a “*narr.*” of common counts in the old system of pleadings, attorneys may recover the value of services, either upon an express contract, or, if that was not proved, upon a contract created by law.
2. If persons, who assumed that they had authority, which they did not possess, employed the plaintiffs for the defendants, and the latter afterwards, with full knowledge, ratified it, by words or acts, or by the same means, waived the right to object to the services which were being rendered under their immediate observation, they are liable for their reasonable value.
3. Declarations of the alleged agents affirming their authority to employ the plaintiffs, although not in themselves proof of the agency, may be considered with other evidence tending to prove the agency.
4. The testimony of attorneys who testified to their opinions touching the value of the services is not conclusive upon the jury. But it should be considered, and its use is to aid the jury in ascertaining reasonable worth of the services.
5. In estimating the reasonable value of the services, the amount of property involved in the will case, in which the services were rendered, the pecuniary advantage or disadvantage of the services to the defendants, the successful termination of the will case, the time and labor employed and done, and the skill, learning and ability of the plaintiffs, as attorneys, should be considered by the jury.

Pugh, J., (charging the jury.)

In this case the plaintiffs sue to recover the reasonable value of alleged professional services, services rendered as lawyers to the defendants.

These services consisted in learning and preparing the facts, and ascertaining and preparing the law for, and prosecuting and trying, a case in this court to set aside the last will and codicil of James Ohlen, deceased; and preparing for and arguing a motion for new trial in this court, and preparing for and arguing the case in the circuit court of this

county, and other work done by them in the line of their duty, as attorneys.

I have not attempted to state all of the services which, as they assert, they rendered. You have heard them testified to by the witnesses.

In their petition, the plaintiffs estimate the value of their services at \$12,500.00; they give the defendants credit for \$500, and pray for judgment for the balance.

There are six defendants. Three of them, James H. and Frank X. Ohlen and Mary J. Holloway, make no defense, so that no matter what your conclusion may be as to the others, your verdict must be against these non-resisting defendants.

The other three defendants, Kate E. Holland, Sarah J. Hanson and John E. Ohlen, resist the suit of the plaintiffs, denying, by their answers, all of the allegations of the petition of plaintiffs. This denial cast upon the plaintiffs the duty of proving, by a preponderance of the evidence, all of the facts necessary to entitle them to a recovery. A preponderance of the evidence does not mean the larger number of the witnesses, but the greater weight of the testimony, judged by the impression which it made upon your minds.

At one time, and in some states, a lawyer could not maintain a suit for his fees. It was supposed to be wiser to leave the question whether he should have any fees, and their amount, to his own sense of justice and the honor and liberality of his clients. But that never was, is not now the law of Ohio. Lawyers, in common with every other class of citizens, have the legal right to bring suits to recover the price of their labor. Both lawyers and clients stand upon an equality of legal right and obligation.

Under the allegations of their petition it was competent for the plaintiffs to establish their case in either of two ways.

First—They had the right to prove a special agreement by which they were expressly employed to render the services in question. This is designated an express contract. To constitute such a contract between these parties it was necessary that the minds of both should have met; one party could not make the contract alone; both must have understood the contract alike and must have assented to all its terms. It could be made, however, by the intervention of agents, as well as by the parties themselves.

Second—They had the right, in case of a failure to prove the express contract, to prove that they rendered services—the services involved in this case—for the benefit of the defendants, with the knowledge and approbation of the latter, for which the law would imply a promise, an agreement, to pay for them. This is termed a contract created by law.

You will now be instructed touching the alleged express contract. The contention of the plaintiffs is that they were expressly and actually employed by James H., Frank X. and John E. Ohlen, who, in employing them, acted, not only for themselves, but also for Kate E. Holland, Sarah J. Hanson and Mary J. Holloway, as their agents. They insist that the three Ohlen brothers were authorized to employ them when all six of the defendants, and the husbands of Kate E. Holland and Sarah J. Hanson, were present; that all of them participated in conferring such authority upon the brothers; and that this was done on the day the will and the codicil were opened and read in the probate court room.

There is a dispute, however, as to the day on which the will and codicil were opened and read, the plaintiffs alleging that it was Saturday, January 14, 1888, and the defendants that it was Monday, January 16, 1888. The latter also aver that Sarah J. Hanson was not outside of the town of Lancaster on Monday, January 16, 1888. This dispute has a bearing upon the question of agency.

If Sarah J. Hanson was not in this city on Monday, January 16, 1888, and the will and codicil were then opened and read, she could not have had any art or part in making the agreement that James H., Frank X. and John E. Ohlen should act as agents of the others in employing the plaintiffs, unless her husband took part in it as her agent. But if the will and codicil were opened and read on Saturday, January 14, 1888, and Sarah J. Hanson was present on that occasion, and was in company with the others until they reached the factory, the only question would be whether this contract of agency was made at all.

Remember, the plaintiffs affirm that such a contract was made, while the defendants deny it; and they rely upon this denial, whether the will and codicil were opened and read on Saturday, or Monday.

The agency of James H., Frank X. and John E. Ohlen cannot be inferred from the declarations of all or any of them that they were such agents, unaided by other evidence. This does not mean that you are not at liberty to infer the agency from the testimony of James H. and Frank X. Ohlen, or either of them, and the other evidence, on that subject. In connection with that evidence you may consider the declarations of the agents, or either of them.

The burden of proving the agency, it may be reiterated, rested upon the plaintiffs.

If you find that the power to employ the plaintiffs was bestowed upon James H., Frank X. and John E. Ohlen—if the fact of their agency was proved—the next fact which the plaintiffs were required to prove was, that they, as such agents, employed them to perform the services in question.

If James H., Frank X. and John E. Ohlen, assuming to act, but not having the authority from Kate E. Holland and Sarah J. Hanson to do so, employed the plaintiffs to render the services for all of them, including Mary J. Holloway; and Kate E. Holland and Sarah J. Hanson afterwards, with full knowledge of the employment, recognized and ratified that employment, the contract would, legally, be just as obligatory upon them as if they had originally authorized James H., Frank X. and John E. Ohlen to employ them.

In law this would be called a contract made by the ratification of the unauthorized act of the agents.

The fact of ratification may be inferred from the acts of Kate E. Holland and Sarah J. Hanson; it was competent to prove it by circumstantial evidence; the plaintiffs were not obliged to prove it by positive testimony; that is, by proof that they said they ratified the employment.

If after receiving full knowledge of their employment, they remained "silent whilst they ought to have spoken; or, if by any other act, or by words, they waived their objection which they might interpose," that was an affirmance, a ratification, of what was done by their assumed agents, and the contract which the latter made, became their own contract.

If it was proved that Kate E. Holland and Sarah J. Hanson were informed of the employment of the plaintiffs by James H., Frank X. and

John E. Ohlen, and that after that they aided in prosecuting the action to set aside the will and codicil, although it was being done in Mary J. Holloway's name; took part in the preparation of the facts of said case, held consultations with the plaintiffs, but not in the character of witnesses alone, and made suggestions to them as to the trial of the case—from these facts, unless they were explained or rebutted, you may infer that Kate E. Holland and Sarah J. Hanson ratified the employment of the plaintiffs; and the contract of employment, in that case, would be as binding on them as if they had authorized it to be made before it was done.

Should you find that James H. and Frank X. Ohlen, without the concurrence of John E. Ohlen, employed the plaintiffs, assuming to have power from all of the others and him to do so, but, in truth, having none, these hypothetical instructions in regard to ratification which have just been given will be applicable, if you find that as against Kate E. Holland, Sarah J. Hanson and John E. Ohlen acts of ratification have been proved.

Mary J. Holloway has not been mentioned in these instructions, because, as has already been said, she, as well as James H. and Frank X. Ohlen, make no defense. Against them the plaintiffs were only required to prove the nature, extent and value of their services; every other essential fact is confessed by them.

You will now be instructed on the other branch of the proposition in regard to how the plaintiffs may make out their case.

It is true, as counsel for defendants has argued, that one person cannot make another his debtor without his consent. But it is equally true that whenever one person renders service for another with his consent, or the latter stands by and sees the former doing the service for him, beneficial in its nature, and overlooks it as it progresses, and does not interfere to prevent or forbid it, but appropriates the benefit of it to himself, and there is no express employment, the law, in the interest of justice and right, will imply, or supply, a promise, a contract, contemporaneous with the rendering of the service, on the part of the latter, to pay such a compensation for it as fair and honest men ought to have paid.

The law assumes that the laborer is worthy of his hire, even though he be a lawyer.

Therefore, in this case, should you reach the conclusion, upon the preponderance of the evidence, that the plaintiffs rendered professional services, such as have been detailed by the witnesses, for the resisting defendants, as well as for the non-resisting defendants, with the knowledge and approbation of the former, Kate E. Holland and Sarah J. Hanson and John E. Ohlen,—or that they stood by and saw the service performed, overlooked it, and neither forbade nor prevented it, but appropriated the fruits of it, and there was no express contract as to the mode or manner of compensation, the law assumes that they agreed to pay a fair and reasonable compensation for such services; and this is true although you may find that they never authorized James H. and Frank X. Ohlen to act as their agents in employing the plaintiffs.

Upon the mere beneficial nature of the services, the law does not raise the presumption of a promise or agreement that the resisting defendants were to pay for them, the services having also been rendered for the benefit of the others; there must have been besides that a full knowledge and recognition of the services by them.

Again, if there were facts and circumstances proved which repel the conclusion and prevent the implication of law of a promise to pay for the services, then, the plaintiffs cannot recover on the contract created by law, about which you have just been instructed.

Again, this conclusion cannot operate against any defendant who may have informed the plaintiffs, or either of them, in person, or by agent, before the services were rendered, that they would not pay for them, for the law will not imply a promise by a party against his express declaration to the contrary. The court does not mean to intimate that this was proved by either of the defendants; that is for you to decide.

In determining whether the plaintiffs should recover upon either the alleged express contract, or the contract created by law, you are at liberty to consider the following facts, if they have been proved: That the prosecution and successful result of the action to set aside the said will and codicil were a benefit and advantage to the resisting defendants; that they were present during the trial which the plaintiffs were managing, and to whose management they made no objection; that they, or either of them, entrusted to the plaintiffs papers necessary to the successful prosecution of the suit, and recognized the plaintiffs as their attorneys in the presence of third parties; and that they consulted with them at their offices and furnished them information touching witnesses for the case, and also statements of their testimony.

You must not infer from this enumeration that these facts are the only ones which you may consider. It is your duty to consider all of the facts which have been proved that bear on any of the questions in issue. It is your duty to consider that the defendants claim that the nullification of the will and codicil was of no benefit or advantage to them, and that their theory and interpretation of their presence at the trial, their conduct while there, their attendance at the plaintiffs' offices, and at the residence of one of them, and their consultations with them, are radically different from the hypothesis of the plaintiffs.

They insist that they went to the offices of the plaintiffs to consult them about other business; that they also went there, and that some of them went to the residence of the plaintiffs, to inform the plaintiffs what their testimony would be just as other witnesses did; and that they were in attendance at the trials as witnesses, and as sympathizers with Mary A. Holloway.

It is for you, upon the evidence, to decide what the true construction of their conduct was, and what their purposes and objects were. The plaintiffs were required to prove their hypothesis by a preponderance of the evidence.

Should you reach the conclusion that Kate E. Holland, Sarah J. Hanson and John E. Ohlen did not authorize James H., and Frank X. Ohlen, to employ the plaintiffs, then you cannot consider as evidence against them any of the statements made by James H. and Frank X. Ohlen, or either of them, to the plaintiffs, or any conversation and transaction which occurred between them and the plaintiffs in their absence. So, if you find that either one of these defendants did not, while the others did, authorize James H. and Frank X. Ohlen to employ the plaintiffs, then these statements made to, and the conversations and transactions had by the latter, or either of them, with the plaintiffs, in the absence of the one who did not authorize the employment, cannot affect that defendant, and you should, in that case, disregard them.

Again, if Kate E. Holland and Sarah J. Hanson did not authorize their respective husbands to act for them, as their agents, the declarations and statements made by the latter, and their conversation with the plaintiffs, which may have been proved, cannot bind them, and you must disregard them.

But, on the other hand, if it has been proved, either by positive or circumstantial evidence, that they authorized their respective husbands to act for them, in reference to the will case, or, if, without such authority, they assumed to act for them with their knowledge and approval, then all such statements made by their husbands, and conversations and transactions had with plaintiffs, during the pendency of the will case, would be just as binding on Kate E. Holland and Sarah J. Hanson respectively as if they had themselves been the authors of them.

Evidence tending to prove the acts, declarations and conversations of Kate E. Holland and Sarah J. Hanson was introduced. They can only be considered against the one who did the acts, or made the declarations, or had the conversations.

If you should reach the conclusion that the plaintiffs, upon the evidence, and subject to the foregoing instructions, are entitled to recover against the defendants, or some of them, the next question will be what shall be the amount of the recovery?

The plaintiffs were bound to prove the nature, extent and value of their services. In estimating their value, you should consider the nature and extent of the services, the labor that was done, the time consumed in doing the necessary labor, the knowledge, diligence, skill and ability required to prepare and try the case, the value of the property, of the interests at stake, the result of the suit, whether it was beneficial or otherwise, to the defendants, and the standing and reputation of the plaintiffs for learning, skill and ability.

A class of witnesses was introduced by the plaintiffs who testified to the value of the services. They are called experts. They testified, not to facts, but to opinions. You are not bound to reach the same conclusion they did as to the value of the services; their opinions do not bind you. Yet the law allowed the plaintiffs to offer such evidence. Its office is to aid you in reaching a conclusion, and the value of it depends upon whether the opinions of the experts were biased, or were based upon sensible reasoning. Your obligation is to consider all of the evidence in the case, including the expert evidence, and from that to determine what is the fair and reasonable worth of the services in question. Exercise your common sense and reason, and do not be controlled by any prejudice. It may be more difficult to determine what the reasonable worth should be for services, the value of which depends, in a large degree, upon professional learning, skill and ability, than it would be to rate the reasonable value of mere mechanical or physical labor. But the same principles of law apply and govern in each case, although the elements of the calculation may not be the same.

You have to determine the credibility of the witnesses and the value to be attached to their testimony. In performing that duty, and it will be necessary where there is a conflict of testimony, you may consider the means of information and opportunity of knowing the facts which the witnesses had, their bias, and their interest in the case, or its result, if any have been proved; their connection or relationship with the parties; their manner and bearing on the witness stand, and the manner in which they gave their testimony, the self-consistency, or self-inconsistency of

their testimony, and its consistency or inconsistency with other testimony which you deem credible, or with facts about which you have no doubt.

One of the legal methods of impeaching witnesses is to show that they have made contradictory statements, touching something that is material, or by contradicting them with the weight of the testimony, or by the internal improbability of the truth of their statements; and it is for you to determine whether any or all of the witnesses in this case have been thus impeached.

If any witness has, in your judgment, testified falsely about any material matter, it may be assumed that he or she testified falsely about all matters concerning which he or she testified.

The law does not require you to so conclude, but it leaves you free to do so. Although a witness has testified falsely about some material matter, yet if you should believe that he or she has been corroborated as to the other matters to which he or she testified, you may, if you choose, believe that part of his or her testimony.

It was argued that in estimating what the defendants would get if the will was set aside, they had a right to consider that the widow of James Ohlen, deceased, would get one-third of the real estate for life. Life tables were admitted to show what the expectation of life was for her; I believe, some 22 years. On this the value of her dower was calculated. But it was not right to assume that she would live all that time; the tables are merely based upon the average expectancy of life. Her health and strength, also, had to be taken into the consideration.

Although her expectancy was, according to the table, 22 years, she might not have lived but a year, as it turned out she did not. They could only give weight to the probabilities in determining the value of the dower.

If you find for the plaintiffs, you will add interest to the sum, which you allow them, from September 26, 1890, to this day. If you find for some of the defendants you will simply so declare in your verdict.

Verdict for \$12,503 33-100.

**NOTE**—The foregoing charge which so clearly elucidates the law upon the subject of employment of attorneys, is worthy of especial attention, and should be thus preserved for the benefit of the bar, because of the infrequency, and lack of reported cases. This is entirely unlike any reported case, in that the parties all agreed among themselves to put one of their number forward as the plaintiff, and therefore nominally the only client, but all agreeing among themselves to share in the payment of the fees.

What constitutes employment: It is not always essential to show employment by an original contract, but a claim for professional services may be shown by the performance of the same within the knowledge of the client, and also by the recognition of the attorney by the client during trial. *Jackson v. Clopton*, 66 Ala., 29, (1890). The employment of additional counsel may be made by the regular counsel of a client, even without authority so to do, and the client will be bound for the fees of such counsel if present at the trial assisting therein, his conduct amounting to an implied ratification. *Hogate v. Edwards*, 65 Ind., 372, (1879). Employment made by a general adviser or agent without authority, will be binding upon a client, who remains silent and tacitly acquiesces thereto, after knowledge, upon the theory that such conduct amounts to a conclusive ratification. *Yerger v. Aiken*, 7 Tenn., 539, (1874). See also *Sedgwick v. Bliss*, 23 Neb., 617, (1888). If the client does not intend that he shall be looked to for the payment of counsel fees, he must make his intention known, otherwise a promise will be implied by his silence. *McCrary v. Ruddick*, 33 Iowa, 521, (1871). Employment may be shown by circumstances, as well as by direct retainer, such as the performance of services



within the knowledge of client, and recognition of the relationship during progress of trial. *Jackson v. Clopton*, 66 Ala., 29, (1880); *Hood v. Ware*, 34 Ga., 323; *Graves v. Lockwood*, 30 Conn., 276; *Davis v. Downer*, 10 Vt., 529; *Cameron v. Baker*, 1 C. & P., 268; *Hudspeth v. Yetzer*, 42 N. W. Rep., 529, (Ia., 1889); *Smith v. Lyford*, 24 Me., 147; *Dorsey v. Lyford*, *Wright* 120; *Bogardus v. Livingston*, 7 Abb. Pr., 428; *Goodall v. Bedell*, 20 N. H., 205.

## ELECTION BETWEEN OFFENSES.

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[Hamilton Common Pleas, 1893.]

### STATE OF OHIO V. JACOB FRANZREB.

1. Where the prosecution is upon a single count, and evidence is introduced tending to prove several separate and distinct offenses, the court should require the state to elect upon which offense it will proceed.
2. Where separate and distinct offenses, not part of the same transaction, are charged in the same indictment, the state should be required to elect.
3. Where several distinct offenses are charged in different counts of the same indictment, where they arise out of or are connected with the same transaction, or where they are connected by the same subject-matter, it is a matter of discretion with the trial court whether the prosecutor shall be required to elect upon which count he will proceed.
4. Where a single offense is charged in two or more counts of the same indictment, with changes in the allegations in each count to meet the proof as it may appear upon the trial, the court can not require the prosecutor to elect upon which count he will proceed.

Decision on motion to compel prosecutor to elect on which count he will proceed, at the close of the evidence for the state.

Sayler, J.

The first motion filed is a motion to compel the prosecutor to elect on which count he would proceed. For the purpose of arriving at some conclusion or determination as to what the law with regard to the question of election is, I have taken all the time I could to investigate, not only the authorities which were cited, but some other authorities. I wished, if possible, to satisfy myself what the law is on the subject of election.

I find in the case of *West v. The People*, Supreme Court of Illinois, 13th Criminal Law Magazine, 575, the court held that the prosecutor should elect as to which felony he would proceed on under an indictment, in which the first, second and third counts charged the issuing of forged certificates of one hundred shares each, of the capital stock of a certain company; the fourth and fifth counts charged another and distinct issue of a certificate for three hundred and forty-nine shares, and the sixth and seventh counts charged the issuing of a certificate aggregating twelve hundred and fifty shares of other stock. The court held there were three separate and distinct felonies charged, and that the defendant could be put on trial for a single felony only. The court say on page 581: "The general rule is, as we have seen, where two offenses charged, form part of one transaction, and are of the same nature, the prosecutor will not be called upon to elect upon which charge he will proceed." Quoting *Wharton on Criminal Practice*, secs. 293 and 294: "Such election will not be required when the several charges in the indictment relate to the same transaction, and are simply variations or modifications of the same charge, in view of meeting the proof." Citing

4 Ohio St., 442. And on page 582 the court says: "That where, for the purpose of proving the charge made in any single count, evidence is introduced tending to prove several separate and distinct offenses, the court should require the prosecutor to elect; but should never interpose where the joinder is simply designed and calculated to adapt the pleadings to the different aspects in which the evidence on trial may present the transaction." In 94 Illinois, 37, the court held that in cases of felony, it is the right of the accused, if he demand it, that he be not put upon trial at the same time for more than one offense, except in cases where the several offenses are so respectively parts of the same transaction. In *Furst v. The State*, Supreme Court of Nebraska, 47 N. W. R., 1116, the court held an election is only required where separate and distinct offenses, not part of the same transaction, are charged in the same information or indictment. Quoting 4 Ohio St., 442. In the case of *People v. Kemp*, Supreme Court of 43 Michigan, N. W. R., 439, the court held, where several counts of an indictment charged the forging and uttering the same indorsement which is set out in each count, it is proper to refuse to require the prosecutor to elect on which count he will proceed. In 113 Ind., 26, the court held, "where the prosecution is upon a single count, and two entirely distinct and disconnected offenses, distinct in themselves and separated by a clear and perceptible interval of time, are proven, the state must elect which offense it will prosecute. That two separate offenses can not be prosecuted, where only one is charged \* \* \*. An election can not well be made until it is shown that two or more distinct offenses have probably been committed \* \* \*. So long as the presiding judge is in much doubt whether the commission of more than one offense by the defendant of the class charged is indicated by the evidence, or where the offenses are so mingled and blended together that a separation is impracticable, an election should not be required." I now come to the 27th Ohio St., 563, being the case of *Stockwell v. The State*, where there was one count charging the illegal selling of liquor, several distinct sales were proven, and the court on page 566 say: "A single issue was thus formed which it was the province of the jury to determine, according to the evidence under the instructions of the court. No evidence should have been admitted which was not relevant to that issue, and as that issue was limited to a single transaction, the evidence should have been restricted accordingly. The rule on this subject is thus clearly stated in 1 Bishop on Crim. Pro., sec. 460, 'Where there is a single count in an indictment for a misdemeanor, as well as in an indictment for felony, whatever the number of counts, the court will restrict the prosecutor, by so compelling him to elect as shall prevent his giving evidence of more than the one transaction.' And in this doctrine, so far as we are aware, the adjudged cases agree." The next case that I am cited to is the 30th Ohio St., 264, *Brainbridge v. The State*. That was for an offense of selling milk contrary to the statute. An offense of selling milk contrary to statute had been charged and tried under a former indictment, and a charge of the same kind was made in this case, and the defendant interposed the plea of former acquittal. It was shown that on the former trial the state was required to elect as between various offenses. The court say, on page 271: "The offense charged in the former indictment was of the same kind as that charged in this case, and alleged to have occurred September 1, 1872; and to show their identity the accused proved that on a former trial the state gave evidence tending to prove the commission of the offense on various days from the last

of June to the tenth day of September, 1872. Thereupon the state proved, that on the motion of the accused, it was required by the court to elect upon which particular offense it would rely for a conviction, and that such election was made \* \* \*. That it was the right of the accused to compel such election, where, upon an indictment containing a single charge, he may be convicted of any one of several offenses, was settled in *Stockwell, v. The State*, 27 Ohio St., 563. This right does not stand alone upon the single ground that the accused should be informed of what particular transaction will be relied on for conviction, but also upon the ground that a conviction or acquittal upon a single charge will not be a bar to more than one offense. It was conceded that the former indictment, though it contained two counts, charged but one offense. The accused, then, could be convicted of but one offense on that indictment, and there is no good reason why a conviction thereon should be a bar to more than one. While it is the right of every person not to be put in jeopardy more than once for the same offense, the principal should be so applied so as not to create an immunity for crimes, which do not constitute the offenses for which the criminal has once been exposed to punishment. *Wilson v. The State*, 24 Conn., 57. But the objection to the proof offered by the State of its election on the former trial, to ask a conviction only on a single transaction, which was different from that named in the present indictment, is founded upon the idea that the time of the offense alleged in an indictment, is not material, and that therefore the proof of the facts alleged in the present indictment would sustain a conviction under the former, and so the proof offered was immaterial. This is claimed upon the authority of *Price v. The State*, 19 Ohio, 423, where it is held that the true test whether the plea of a former acquittal is a sufficient bar in any particular case, is whether the evidence necessary to support the second indictment would have been sufficient to warrant a conviction on the first. That this had always been the general rule as to a prima facie case is not denied. Where but one crime has been committed, it may be regarded as a conclusive test."

I take it this case in the 30th Ohio St., deals entirely with the question whether the offense for which the defendant had been tried under the first indictment was the same offense as that for which they were trying him under the second indictment, and if it was the same offense under the second indictment, the first indictment could be pleaded as a former acquittal; and as to whether it was the same offense was to be determined by the test, whether the evidence which would prove one would prove the other. That part of the case is very material, I think, in determining the present case.

On the part of the State, I am cited to *Bailey v. The State*, 4 Ohio St., 440. The first two of the syllabi in this case are as follows: "Where an indictment charges two or more offenses, arising out of distinct and different transactions, the court trying the cause may require the prosecutor to elect upon which charge he will proceed. But the action of the court in this respect being a matter of discretion, can furnish no ground for writ of error."

"Several distinct offenses may be joined in different counts of the same indictment, as a general rule, either where they arise out of, and are connected with, the same transaction, or where they are connected by the same subject-matter."

The court say on page 442: "When an indictment charges two or more distinct offenses, differing in their nature, or arising out of distinct

and different transactions, the court may compel the prosecutor to elect upon which charge he will proceed. But such election will not be required to be made, where the several changes in the indictment relate to the same transaction, or are simple variations or modifications of the same charge with a view of meeting the proof. The exercise of this authority, however, to compel the prosecutor to make the election, rests in the sound discretion of the court." The court in this case further proceeding, say on page 443: "The limit to the rule, however, allowing distinct offenses to be joined in the same indictment, has not been defined by the adjudications on the subject, with that degree of precision and certainty which is desirable. In this state it would seem to have been limited chiefly, either to offenses arising out of and connected with the same transaction, such as burglary and larceny, or horse stealing committed at the time of a larceny of a buggy or other property, or the uttering and publishing of counterfeit bank notes, together with a forged promissory note, etc.; or to offenses connected by the same subject-matter, such as the making of counterfeit or spurious paper, and the uttering and publishing the same, etc." In connection with the case in the 4th Ohio St., my attention was called to the case of *Meyer v. The State*, 4th Cir. Ct. Rep., page 570. Judge Smith says on page 571: "The indictment presented against the defendant below, and on which he was convicted, contained four counts. The first charge that the defendant upon March 3, 1888, being the guardian of the estate of Cora E. Seibern, a minor, did unlawfully and fraudulently embezzle and convert to his own use \$3,000 of the personal property of the said Cora, which had come into his possession by virtue of his said guardianship. The second, third and fourth counts in like form respectively charged him with the embezzlement on the same day of \$3,000; the property of his other wards, viz: The second laying it as the property of Norma, the third of Walter, and the fourth of Stephen G. Seibern. Each count of the indictment standing alone was in due form. The defendant filed a motion to quash this indictment, on the ground that more than one crime or felony was charged therein. Namely: Four several felonies in four several counts thereof. Each count alleging the felony of embezzling the money and property of a distinct person, who was the alleged sole owner thereof. This motion was overruled by the court and an exception duly taken, and it is urged that this action was erroneous.

"If the indictment is to be understood as charging but the one offense, viz.: The embezzlement by the defendant at the time named of one sum of \$3,000, then the state might properly charge him with it in as many different counts as was thought advisable, averring in each that the property belonged to a different person, so as to meet the proof which might be offered. And in such case we are not aware of any law or rule of criminal pleading which requires that it should appear on the face of the counts themselves, that the intent is to charge but one offense by the indictment. If this be so, the motion was properly overruled, as we see no defect on the face of the record or in the form of the indictment, or in the manner in which the offense is charged, which are the grounds upon which a motion to quash may be filed under sec. 7249." It will be noticed in this case, the first count is the embezzlement of \$3,000 upon the third of March from Cora E. Seibern, and the second count the embezzlement of the same sum of \$3,000 upon the same date of Norma Seibern, and the third and fourth counts respectively for the same sum the property of Walter and Stephen G. Seibern. One of the ques-

tions before the court, was, whether that was charging the same offense, or whether it was charging four several offenses. Judge Smith says on page 573, speaking of the verdict (the verdict found the value of the property five thousand dollars, whereas if this was a charge of a single offense of an embezzlement of three thousand dollars, the finding was excessive): "We incline to the opinion that the legal presumption in such case is that but a single offense is charged, and that several are charged is only a legal fiction, and that from the structure of the indictment itself the fact that the dates of the alleged embezzlements are the same, and that in all respects the counts are identical, except as to the allegation of the ownership of the property, that the same conclusion should be reached, and that the change in the allegation as to the ownership was only to meet the proof as it might appear on the trial." And the circuit court in that case found that it was a charge of simply one offense in the four counts of the indictment, laying ownership in four different parties respectively, only for the purpose of meeting the proof as it might appear on the trial of the case. The court further, in that case, coming back to the question of election, say on page 572: "If it was intended by the indictment to charge the defendant with four several and distinct offenses, one by each count thereof, the motion to quash it was not the remedy of the defendant. We understand it to be the rule in this state, that several distinct offenses may be charged in different counts of the same indictment, where they arise out of, or are connected with the same transaction, or where they are connected by the same subject-matter; but whether in such cases the prosecutor shall be required to elect upon which count or counts he will proceed, being a matter of discretion with the trial court, error will not lie to reverse its action in this behalf unless the discretion is abused. 4 Ohio St., 440. It seems to be the law that if in the opinion of the trial court the defendant will be prejudiced, by having to defend himself in the one case, against two or more charges of felony brought against him in the same indictment, arising, it may be, out of wholly different transactions, and occurring at different times, the prosecutor should be required to elect upon which count he will proceed."

Now, from these authorities, I have come to the following conclusions; I may be right and I may be wrong, but I have satisfied myself I am right.

First—That where the prosecution is upon a single count, and evidence is introduced tending to prove several separate and distinct offenses, the court should require the state to elect upon which offense it will proceed.

Second—Where separate and distinct offenses, not part of the same transaction, are charged in the same indictment, the state should be required to elect.

Third—Where several distinct offenses are charged, in different counts of the same indictment, where they arise out of, or are connected with the same transaction, or where they are connected by the same subject-matter, it is a matter of discretion with the trial court whether the prosecutor shall be required to elect upon which count he will proceed.

Fourth—Where a single offense is charged in two or more counts of the same indictment, with changes in the allegations in each count to meet the proof as it may appear upon the trial, the court can not require the prosecution to elect upon which count he will proceed.

Applying these propositions to the indictment in this case,—the first count of the indictment charges in substance that on the twenty-first day of July, 1888, Franzreb unlawfully did falsely pretend, with intent to defraud, to the Allemania Loan and Building Association No. 2 of Cincinnati, Ohio, that he, Franzreb, was the authorized agent of Catherine Spatz, a depositor in the said association, and that he was duly authorized as such agent to sign her name to an order on the said association for the payment of money, and that he was authorized to receive from the said association for her, the sum of five hundred dollars, and by which false pretenses, he then and there did unlawfully obtain from the said association, said amount of money of the property of the said association, whereas such pretenses were false, and that he well knew them to be false.

By the second count the charge is made the same as in the first count, except that instead of alleging that the false pretenses were made to the association, it is alleged that they were made to John H. Gellhaus, then and there the treasurer of the Allemania Loan and Building Association No. 2 of Cincinnati, Ohio, and by which false pretenses he unlawfully obtained from said Gellhaus, treasurer of the association, said amount of money, the property of said association.

The question, therefore, that I have to determine, is whether or not, these two counts charge the same offense, or whether they charge different offenses growing out of the same transaction, or whether they charge two distinct and different transactions. Now, the Meyer case is very much in point. In the Meyer case, as I have stated, the charges were of embezzlement of four different amounts, three thousand each, being the property of four different individuals. In embezzlement, the court held on page 577, that it is necessary to show the intent to deprive the owner of the property. The court say "the offense is committed only when the person having in possession the property, which came to him by virtue of his employment or position, fraudulently converts to his own use, intending to deprive the real owner of it." In each one of those counts the real owner was set out as a different person, and it was necessary to show that he intended to deprive the real owner of it. Yet, notwithstanding that, the court held that it was the same offense, which was the offense of obtaining by embezzlement, and with intent to defraud, the sum of three thousand dollars. In that case the court did not overlook the cases of the 27th Ohio St., and 30th Ohio St., because they expressly, on page 574, refer to them, and on page 575 the court say: "In the subsequent case of Gravatt v. The State, 25 Ohio St., 162, and Campbell v. The State, 35 Ohio St., 70, the court held that where the proof showed that the defendant had received the money afterwards embezzled at different times, and from different persons, that this alone did not constitute ground for requiring the prosecution to elect upon which of the sums so collected the state would rely for conviction. \* \* \* We think that there is a strong implication in these cases that if the proof had shown that the conversions were at wholly different times, that the election should have been made, as is expressly held in 27th Ohio St., and 30th Ohio St., before cited, if the rule is the same in cases of embezzlement as in others, which, we think it must be." In the cases cited by the 4th Circuit Court, where the money came to the agent from different ones, the court held that it was the fact of embezzling which was the crime, and the question of ownership was simply one of the elements, and might be differently stated. So in the case at bar, I think the offense is the obtaining the

money by false pretense, and the evidence tends to show the money charged in the first count to be the identical money charged in the second count. In 4th Circuit Court the four counts were held to charge one offense; although different owners were set out; so I think in the case at bar the two counts charge the same offense, although the allegations as to whom the pretenses were made, and from whom the money was obtained, are different, it appearing that it is the identical money and the property of the association.

The evidence which proves or tends to prove the first count, would tend to prove the second count. And if there had been a former indictment, setting out the offense as charged in the first count, and this indictment were for an offense as charged in the second count, the test stated in 30 Ohio St., 272, could be applied, and it would be held to be the same offense.

I think the offenses charged in the first and second counts come within my fourth conclusion above stated, and I overrule the motion to require the prosecution to elect.

Schwartz, Wright & Rulison, attorneys for the state.

Blackburn, Crawford and Col. Hounshell, attorneys for defendants.

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## DIVORCE.

156

[Hamilton Common Pleas, 1892.]

HENRY v. HENRY.

Where a ground of divorce has been condoned, the testimony of the wife as to subsequent acts relied on to revive the ground of divorce, must be corroborated.

WILSON, J.

This is an action for divorce by the wife on the ground of extreme cruelty. The case presents but one question. The wife has testified to an act of extreme cruelty. Her testimony is supported by that of her husband and of other witnesses. The husband has testified that the act of cruelty was condoned by his wife. His testimony is corroborated by that of his wife and of other witnesses. The wife has testified to acts of ill treatment by the husband subsequent to the condonation. Her testimony is contradicted by the husband, and is not supported by that of other witnesses. Is she entitled to a decree of divorce?

Section 5697, Revised Statutes, provides, that a divorce shall not be granted upon the testimony of a party, unsupported by other testimony. Condonation of an act of cruelty bars an action for divorce founded on such act. But condonation being conditioned on the future good conduct of the husband, the wife may prove acts of ill-treatment by the husband after the condonation, for the purpose of removing the bar caused by the condonation, and of reviving the cause of action based on the act of cruelty condoned. Her right to a divorce depends on the proof of such acts. To consider her uncorroborated testimony as to such acts sufficient to entitle her to a decree of divorce would be doing what section 5697 prohibits, i. e., granting a decree for divorce upon the testimony of a party unsupported by other testimony.

Counsel for plaintiff have cited *Robbins v. Robbins*, 100 Mass., 150. In that case it was decided that the usage of not granting a divorce upon the uncorroborated testimony of the wife was, in the state of Massachusetts, a rule of practice, and not an inflexible rule of law; that there was no law in that state to prevent the finding of a fact in a divorce case on the unsupported testimony of the wife. In Ohio the rule is not one of practice which a judge may follow at his discretion; it is an inflexible rule of law, made so by statute.

The petition must be dismissed.

C. W. Baker, and Harmon, Colston, Goldsmith & Hoadly, for plaintiff.

Mallon, Coffey & Mallon, for defendant.

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[Defiance Common Pleas.]

LAFAYETTE CONKLIN V. EDWARD SQUIRE.

For this opinion, see 4 Dec. Re., 493.

171

[Superior Court of Cincinnati.]

GEO. W. NEARE V. MT. AUBURN CABLE RY. CO.

HENRY HANNA V. MT. AUBURN CABLE CO.

For this opinion, see 4 S. & C. P. Dec., 475.

175

[Police Court of Cincinnati.]

STATE OF OHIO V. JAMES M. CRICHTON.

For this opinion, see 4 S. & C. P. Dec., 481.

185

ROBBERY.

[Knox Circuit Court, 1893.]

LOUIS MCNEAL V. STATE OF OHIO.

One who goes into a hardware store, asking to see a revolver, and when shown one, loading it, pointing it at the clerk and backing out of the store, is guilty of robbery.

JENNER, J.

The act of the plaintiff in error in going into a hardware store, asking to see a revolver, and, when shown one, loading it, pointing it at the clerk, and backing out of the store with the weapon, constituted the crime of robbery notwithstanding the revolver was peaceably given to McNeal and that there were no violent acts until after he had obtained it.



[Hamilton Common Pleas.]

190

## STATE OF OHIO EX REL. ROSS V. ARTHUR BULL.

For this opinion, see 3 S. &amp; C. P. Dec., 190; S. C., 6 S. &amp; C. P. Dec., 14.

[Hamilton Common Pleas.]

191

## MELLEN V. HARVEY.

For this opinion, see 6 S. &amp; C. P. Dec., 15.

## TAXATION.

205

[Scioto Circuit Court.]

## WELLS V. ADAIR.

1. A notice to a taxpayer, to add to his return, requiring him to appear on the following day, to show that his return was correct, is unreasonable and void for want of time.
2. The notice must inform the taxpayer, wherein the returned is false, and the proposed amount to be certified to the treasurer.
3. The auditor is a ministerial officer, and the regularity of all the steps taken by him can be inquired into collaterally.
4. The auditor is not entitled to the four per cent. fee for additions for false returns, and hence has no pecuniary interest to disqualify him.

Two suits were brought in the court of common pleas of Scioto county by Mark B. Wells, the then county treasurer, against Mary O. Adair and Lucy C. Winkler, respectively.

He claimed in his petition that Mrs. Adair had made false returns of personal property for six years previous, and that she owed for taxes and fifty per cent. penalty, amounting to \$800; also that Mrs. Winkler falsely returned her personal property, and that she was indebted to the county, including the "half hundred" penalty, the sum of \$1,000. Before the filing of treasurer Wells' petitions the auditor, Hon. Fillmore Musser, had instituted proceedings against the parties under secs. 2781 and 2782, Rev. Stat., and the auditor certified to the treasurer the above amounts for collection.

The defense set up by the party defendants was that the notice given them by the auditor was unreasonable and insufficient, because he did not specify wherein their returns were false, and that he had, under sec. 1071, Rev. Stat., an interest of four per cent. in the result of his investigation; that he acted in a judicial capacity in determining the amount of taxes and penalty that should be charged against them, and that, therefore, his action was null and void. Upon these issues trials were had in the common pleas court, Judge Noah J. Dever presiding, and judgments were rendered against the parties for the amounts claimed by the treasurer.

The case was thereafter taken to the circuit court, and decisions therein were handed down on the morning of March 25th, Judge Russell, of Pomeroy, delivering the same. In substance they held:

First—That a notice served by the auditor on the taxpayer under sec. 2782, on one day, requiring him to appear on the following day, to show that his statement or return was correct, is unreasonable and void for want of time.

Second—That the auditor must inform the taxpayer in his notice wherein the returns are false, and what amount of taxes he proposes to certify to the treasurer for collection.

Third—That the auditor is a ministerial officer, and does not act in either a judicial or quasi judicial capacity, and in an action to recover taxes so certified by him to the treasurer, the regularity of all steps taken by him can be inquired into.

Fourth—That under sec. 1071 of the Rev. Stat., the auditor is entitled to four per cent. only for taxes collected on property inadvertently "omitted" from the tax duplicate, as specified in sec. 2782, and placed thereon by him, and is not entitled to four per cent. on taxes placed on the duplicate in cases where the taxpayer has made a "false return," or "has evaded making a return" to avoid the payment of taxes; that he therefore has no pecuniary interests in the result of his investigations or findings in cases of false returns under secs. 2781 and 2782, Rev. Stat. The court reversed the judgment of the common pleas in both cases, and remanded them for a new trial. Judge A. C. Thompson was the attorney for the treasurer, and Captain N. W. Evans and Hon. Duncan Livingston for the taxpayers.—[Editorial.]

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[Superior Court of Cincinnati.]

**EXECUTORS OF ROBERT HAMILTON V. FIREMAN'S INS. CO.**For this opinion, see 4 S. & S. P. Dec., 407; See also *Ib.*, 437.

225

[Hamilton Common Pleas.]

**M. LEAF V. HARRY AND FRED MARRIOTT.**

For this opinion, see 4 S. &amp; C. P. Dec., 402.

226

[Hamilton Common Pleas.]

**IN RE WINTERFELDT'S APPEAL.**

For this opinion, see 4 S. &amp; C. P. Dec., 473.

250

**APPEALS.**

[Richland Common Pleas, December 12, 1893.]

**JOHN HALE, (ASSIGNEE) ET AL. V. FIRST NATIONAL BANK (SHELBY)  
ET AL.**

In a proceeding by an assignee in probate court for the sale of real estate, the probate court in fixing the amount of the bond for a lienholder defendant desiring to appeal from the order finding amount and priority, etc., and directing payment will be governed by its discretion without regard to double the mounts involved.

WOLFE, J.

This is a motion to dismiss an appeal from the probate court, because the bond in no view of the case is double the amount of money ordered to be paid appellant, and therefore does not conform to the provisions of sec. 6408, Rev. Stat.

The entire proceeds of the sale amounted to over \$12,000.00. The order of distribution and payment reached eight of the lienholder defendants. The amount so found and ordered paid said Newlon was \$1,619.16, and the amount so ordered paid said Boise was \$517.15. These defendants gave notice of appeal, and executed a bond therefor in the sum of \$1,000, being the amount fixed by probate court. It will be seen that the bond is not double the amount of the entire proceeds of sale, nor is it double either or both the amounts so found and ordered paid these appellants.

The section expressly excepts the assignee from giving bond when appealing in the interest of the trust on the principle that creditors have ample protection under cover of the bond originally given by such assignee for the proper administration of the trust.

In effect this appeal is not from an order directing the payment of money, but rather the order of its payment; besides, it is not an appeal by the person to whom the order is directed, but by him in whose favor it is made. No legislature contemplated that a citizen of Ohio would interpose objections as long as the money came his way. The only indemnity needed in this case is that of the assignee or creditors against the costs of a frivolous appeal, and it is only where the order is against the party appealing or personal in its nature directing the payment of money that the bond should be double such amount; any other construction would be unreasonable, and not contemplated by the statute. While this conclusion is not in harmony with the case quoted ante 678, and I am not advised that this question has ever been passed upon by our Supreme Court, yet it is supported by the case of *Ohio ex rel., Mannix v. Goeble*, 1 Circ. Dec., 307.

It follows that the motion to dismiss the appeal must be overruled.

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[Clark Probate Court.]

260

OHIO SOUTHERN R. R. V. MARY A. RAWLENS.

For this opinion, see 4 S. & C. P. Dec., 483.

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[Cuyahoga Common Pleas.]

281

JOHN REEVES V. HENRY A. GRIFFIN ET AL.

For this opinion, see 4 S. & C. P. Dec., 461.

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[Hamilton Common Pleas.]

284

CINCINNATI (CITY) V. BABB.

For this opinion, see 4 S. & C. P. Dec., 464.

## 305

## LABOR LAWS—INFORMATION.

[Police Court of Cincinnati, 1893.]

\*STATE OF OHIO V. L. W. DAVIS.

1. The Act of April 14, 1892, (89 O. L., 269,) "to protect employees, and guarantee their right to belong to labor organizations," is constitutional.
2. An allegation that defendant unlawfully attempted to coerce complainant from belonging to a labor union by threatening to discharge him, and discharging him, is sufficient.

GREGG, J.

It is charged in the first count of the information filed in this case that defendant, L. W. Davis, being the Superintendent of the Edison Electric Company, did on or about the thirteenth day of April unlawfully attempt to coerce one A. J. Roberts, who was then in the employ of said company, from belonging to the Brotherhood of Electrical Workers No. 13, of Cincinnati, a lawful labor organization, by threatening to discharge the said Roberts from the employ of said company by reason of his connection with said organization, and in pursuance of said attempt to coerce, did discharge the said Roberts, contrary to the laws of the state.

In the second count of the information it is charged that defendant, as superintendent aforesaid, did coerce the said Roberts from belonging to the Brotherhood of Electrical Workers No. 13, of Cincinnati, a lawful labor organization, by threatening to discharge, and discharging the said Roberts from the employ of said company for reason of his connection with said organization, contrary to the law of the state. The law upon which this charge is founded provides:

"That it shall be unlawful for any individual or member of any firm, or agent, officer, employee of any company or corporation to prevent employees from forming, joining and belonging to any lawful labor organization, and any such individual, member, agent, officer or employee that coerces or attempts to coerce employees, by discharging or threatening to discharge from their employ, or the employ of any firm, company or corporation, because of their connection with such lawful labor organization, shall be guilty of a misdemeanor," etc. To the information a motion to quash is filed, setting forth that there are no such crimes or offenses known to the laws of Ohio as are those which are set forth in the information.

A demurrer is filed alleging that the facts stated in the information do not constitute an offense under the laws of this State; and it is urged in support thereof that the prosecutor, in alleging that defendant coerced, or attempted to coerce, Roberts from belonging to a labor union, has stated an offense not warranted by law, for the reason that the law is silent as to the subject of coercion; in other words, that the law does not make it an offense to coerce an employee from belonging to a labor union, or from doing or not doing any particular thing, and that, therefore, the charge by the prosecution that defendant attempted to coerce Roberts from belonging to a labor union is a creation of the prosecutor, and not of the law.

If the law was uncertain in this respect, it would call for a construction by the court. "No act will be declared void for uncertainty if it is possible to ascertain its meaning." *State v. Board of Com'rs*, 35 Ohio St., 458. In determining its meaning, we have only "to examine the legislative purpose discoverable in its enactment." *People v. R. R. Co.*, 43 California, 398. It is to prevent the discharge of an employee by a firm, corporation or individual by reason of his connection with a lawful labor organization, and an allegation that any person, firm or individual did coerce or attempt to coerce an employee from belonging to a lawful labor organization, by threatening to discharge, or discharging him because of his connection therewith, would properly state an offense within the meaning of the law.

As to whether or not the law is constitutional is the remaining question to be determined. It is urged that the law is in violation of article I, sec. 1, of the constitution, providing that all men are by nature free and independent, and have certain rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness, etc.

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\*This judgment was sustained by the common pleas; opinion, post 894.

It is claimed the law denies the right to man of protecting property. Property rights, in my judgment, are not involved, but it is a question rather of personal or individual rights. The right to acquire, possess and protect property is not denied, but the personal right to hire and discharge employees at will is restricted. Individual rights and privileges are frequently and lawfully made subservient to the demands of public policy, good government, or the convenience and comfort of the community. The legislative power to enact such laws has not been questioned. The presumption is always in favor of the validity of the law, and it is only where manifest assumption of authority, and a clear incompatibility between the constitution and the law appear, that the judicial power will refuse to execute it. *Railway v. Commissioners*, 1 Ohio St., 78; *Gilpin v. Williams*, 25 Ohio St., 283; *Telegraph Co. v. Mayer*, 28 Ohio St., 521. The only limitations to the creation of offenses by the general assembly are the guarantees contained in the bill of rights (*Morgan v. Nolte*, 37 Ohio St., 23).

"In the consideration of it is case I have connded myself, as was my duty, solely to the question of legislative power, without any thought or inquiry as to the wisdom of the act, or the motive which induced it, and being unable to find a conflict between the statute, and either the letter or the reasons of the limitations upon legislative power contained in the bill of rights, it is my duty to affirm the validity of this statute." *Ex rel. Att'y Gen'l v. Covington et al.*, 29 Ohio St., 118.

F. Hertenstein and W. H. Pugh, for the state.

J. B. Foraker, for defendant.

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[Franklin Common Pleas, April, 1893.]

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BANCROFT ET AL V. WILLIAM WALL.

For this opinion, see 6 S. & C. P. Dec., 22.

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[Hamilton Common Pleas.]

313

ALICE C. AND VIRGINIA PATTERSON V. MARIA S. EARHART.

For this opinion, see 6 S. & C. P. Dec., 16.

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[Hamilton Common Pleas.]

315

EX PARTE WOODWORTH.

For this opinion, see 6 S. & C. P. Dec., 19.

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[Superior Court of Cincinnati.]

338

FERDINAND RONNEBAUM V. MT. AUBURN CABLE RY. CO. ET AL.

For this opinion, see 6 S. & C. P. Dec., 338.

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[Hamilton Common Pleas.]

339

WM. GERINGER V. JOHN HEINLEIN ET AL.

For this opinion, see 6 S. & C. P. Dec., 26.

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[Auglaize Common Pleas.]

341

H. HEINRICH KOLKHOFF V. BUSSE.

For this opinion, see 6 S. & C. P. Dec., 28.

assuming "dense smoke" to be a nuisance without proof that it is attended with injury to property and annoyance to the people. It has, however, been declared a nuisance per se by the Supreme Court of Illinois, "Harmon v. City of Chicago, 110 Ill., 400," and I will rest my judgment with that decision. In that case the court passing on the question, say: "A dense smoke emitted from chimneys and smoke stacks, in the midst of a large and densely populated city, is a public nuisance, whether it is so declared by ordinance or not. Unless it is so in fact, the act of declaring it to be a public nuisance would not make it so. Omitting so to declare it, it is none the less a public nuisance. Certainly anything that is detrimental to certain classes of property and business in a populous city and is a personal annoyance to the public at large within the city, needs not be defined by ordinance to be known to the common mind as a public nuisance—it is so per se.

The third allegation of the demurrer, that the intent is not alleged in the information, is not well taken, for proof of intent is not necessary to make out the offense charged. The demurrer is therefore overruled.

## 366

## TAXATION.

[Montgomery Common Pleas.]

BARNEY & SMITH MFG. CO. v. COMMISSIONERS (MONTGOMERY CO.),  
ET AL.

1. Under the provisions of sec. 1038, Rev. Stat., relating to the discovery and corrections of errors in tax lists, the auditor cannot go into a judicial inquiry outside of the official returns of the decennial board of equalization, and take oral testimony to ascertain what action the board had in fact taken with regard to a particular parcel of land.
2. The *errors* which it is contemplated by said section, the auditor may *discover* and *correct*, are such as may be detected by an inspection of books and papers in his possession or under his control, and are merely clerical errors.
3. When a land owner has gone on for ten years paying taxes upon an assessment nearly ten times greater than the land appraiser's return and therefore greatly in excess of any taxes which he had ever paid before, and had taken the usual tax receipts for such payments, and has never protested, or made any inquiry or effort to discover error, and without calling the attention of any board or authority to the duplicate, it is then too late to ask from the county commissioners a refunder of the alleged excessive payments. Such payments of taxes will be regarded as having been *voluntarily* paid.

ELLIOT, J.

This action is brought to recover taxes paid by the plaintiff from 1880 to 1890, under an alleged erroneous assessment, or a mistake on the part of the auditor.

The real estate appraiser of the 14th Ward for 1880, returned plaintiff's property, being the Car Works, and lands as follows :

13 acres of land, at \$450.00.....	\$ 5,850
Buildings.....	127,250
Machinery .....	15,450
	\$148,550

It is alleged that the city decennial board of equalization changed these appraisements of the assessor as follows, to-wit:

The 13 acres of land was reduced from \$5,850	
to .....	\$ 5,400
The buildings are left the same.....	127,250
The machinery was advanced from \$15,450 to	20,000
	<hr/>
	\$152,650

It is alleged that the auditor in transferring the appraisal of the land from the blotters, or register, of the board of equalization, to the tax duplicate, erroneously put the land at fifty-four thousand dollars instead of fifty-four hundred, as the board of equalization had intended it to be. That during the whole decennial period, from 1881 to 1891, the plaintiff, by its ignorance of the facts, paid taxes on this increased valuation, aggregating nine thousand nine hundred and twelve dollars and fifty-four cents.

Under section 1038, applicable to such cases, the plaintiff can only recover for the preceding five years, to-wit: The sum of four thousand nine hundred and eighty-two dollars and thirty cents.

From these facts plaintiff on appeal asks a judgment and order against the commissioners, that they cause to be issued a warrant on the county treasury for said sum of four thousand nine hundred and eighty-two dollars and thirty cents.

The defendants deny that any mistake has been made by the auditor, as alleged, or that the plaintiff is entitled to an order or warrant as prayed for. Also set up the statute of limitations, and denies that the plaintiff had no knowledge of the facts, and alleges that it paid the taxes voluntarily.

The plaintiff discovered the alleged mistake, and presented its bill to the county commissioners for the over-payment of four thousand nine hundred and eighty-two dollars and thirty cents, and asked the commissioners to direct the auditor to issue a warrant upon the treasurer of the county for that sum. The commissioners refused to make the order, and thereupon the plaintiff appealed to this court.

The case has been heard upon the testimony offered by both sides, and we find the facts to be substantially as follows:

The land appraiser for 1880, for the 14th Ward, returned a valuation of plaintiff's property for taxation as follows:

13 acres of land on which is built plaintiff's	
immense plant, at \$450 per acre.....	\$ 5,850
The buildings thereon .....	127,250
The machinery .....	15,450
	<hr/>
Total .....	\$148,450

Matters remained in this situation until the city decennial board of equalization met. This board, under the provisions of the statute, consisted of six persons exclusive of the county auditor, who is ex officio, constituted a member of the board. The other members were Solomon Bookwalter, James Campbell, F. M. Leas, J. F. Gerber, Fred Feicht, and John Keasaber. According to its minutes the board met and organized by electing Solomon Bookwalter president, the auditor being ex officio

clerk. This board kept four books, to-wit: The minutes of their proceedings, two blotters, and a return book or final report. It was usual for the board, after meeting, to go out into portions of the city for the purpose of viewing property, especially where complaints had been made. On returning to their meeting place, the property which had been reviewed was taken up and gone over. If question was made, by complaint or otherwise, as to the correctness of the appraiser's return, the matter would be settled by affirming the return, or increasing or diminishing the same as justice might demand.

Confining ourselves to the 14th Ward, it appears from the minutes that many changes were made and entered in the minutes. Nothing, however, appears under the name of the Barney Smith Manufacturing Company. So far as the minutes show, its property was left as the land appraiser made it. We must, however, look beyond this, as it is rendered certain that all the changes made were not entered in the minutes. We must look to the recorded returns. Now, it seems, that James Campbell was appointed clerk of the board by either the auditor or the board. At any rate, he was recognized as such, and did the clerical work of the board—kept their memorandums and minutes, and made the final returns to the auditor, from which the latter officer made up his duplicate. We may as well state here that the final report of the board of equalization was not in form signed by the members thereof, but left to Mr. Campbell to make up and enter the same into the final records. Unfortunately, Mr. Schutte, the then auditor, and all the other members of the board are dead, excepting Mr. Gerber and Mr. Feicht.

Blotter "B," used by the board, is made from a number of sheets of paper fastened together with eyelets and ruled into parallel columns. So far as plaintiff is concerned, the columns may be as follows:

	Assessor val. lots.	Bd. eq. val. lots.	Assessor build- ings.	Bd. eq. build- ings.	Final lots.	Value build- ings.
B-S. Mfg. Co.....	5,850 (in ink)	5,400 (in pen- cil)	15,450 127,250 (in ink)	20,000 127,250 (in pen- cil)	5,400 (in ink)	20,000 127,250 (in ink)

It seems that the work of the board was next carried to Blotter "C," which is ruled the same as "B" as above referred to.

	Value of lots.	Value of build- ings.	Total brought forward.	Net footing after deducting al- lowance of state board. 10 7-10
B-S. Mfg .....	54,000	20,000 127,250	201,250	179,715



The result of the action of the state board of equalization, it seems, was made known before the city board made its final report. The final report is marked Exhibit "D," and is more formal, contains more columns and facts, and is evidently the final report. Mr. J. D. Turner, who was a deputy in the office at the time, says the first four columns of the ruling of this book contained the land appraisers' return, and the other columns are the action of the board of equalization. We then have this result :

	A.	Value per acre.	Total val. land.	Total of build-ings and lands.	Board of Equalization			
					Val. lots.	Val. build-ings and mach.	Total.	State board.
B-S. M. Co.....	13	450	5,850	15,450 133,100	54,000	20,000 127,250	201,250	179,715

From this record, which was not finally closed by Mr. Campbell until some time after the board adjourned, the auditor and his deputies made up the tax duplicate. These figures were carried into the duplicate, and right or wrong, the plaintiff paid taxes on its land valuation at \$54,000.00 instead of \$5,400.00, as it claims it should have been, or instead of \$5,850, as the land appraiser returned it.

No further evidence of consequence appears from the records.

The claim as made is found mainly upon the oral testimony of Mr. Gerber, who gives his recollection of what occurred after a period of twelve years. Shall this parol testimony be received for the purpose of explaining, and in some important particulars contradicting, the record made up by Mr. Campbell, by authority of the board of equalization?

Before going into this matter, however, it will be necessary to refer to the law governing boards of equalization and other authorities in such cases.

Section 1038, Revised Statutes, provides that when the auditor discovers that taxes have been erroneously collected, he shall call the attention of the county commissioners to the fact. If the commissioners find that taxes have been so erroneously charged and collected, they shall order the auditor to draw an order on the county treasurer for the amount so erroneously collected, limited, however, to such taxes as have been erroneously charged and collected in the preceding five years. This is confined to cases where merely clerical errors have been made on the duplicate. It is provided that, "the auditor shall from time to time correct all errors which he discovers in the tax lists and duplicate, either in the name of the person charged \* \* \* the description of lands or other property \* \* \* or in the amount of such taxes," etc. These corrections of such errors as the auditor discovers must have relation to the year in which the tax list or duplicate is in use.

The discovery of the alleged error in the plaintiff's case was not made by the auditor at all, nor did he, nor has he at any time, reported any such erroneous payments, but on the contrary contends that there is no such error. There is no clerical error in the case, unless it is in copy-

ing from the work of the board of equalization. Was the auditor responsible for the work and return made by James Campbell for the board?

In the following cases the courts have held that the errors which the auditor may correct, and the taxes erroneously corrected which the commissioners may order refunded, refers to "clerical errors," merely. 31 Ohio St., 271; 38 Ohio St., 574; 39 Ohio St., 168.

What is a "clerical error" in such cases? It must, in the nature of things, be such an error as appears by inspection of the books and papers in the auditor's office, under his control and supervision.

In *Insurance Co. v. Capellar*, 38 Ohio St., 574, the Supreme Court says as to a clerical error:

"No fact is to be inquired into. Every necessary fact appears on the face of the return."

Hence, if it becomes necessary for the auditor, in order to discover the error and correct the same, to resort to testimony aliunde the record, while the error might be fundamental, it would not be a clerical one, and could not be corrected under section 1038. See *State v. Brewster*, 6 Dec. Re., 1210.

It is manifest here that if any error was made in transferring from blotter "B" to blotter "C" and final record "D," that mistake was made by Mr. Campbell while acting for the board, and such error could only be ascertained and corrected by a resort to testimony outside of the books, and to some extent independent of them, which fact would seem to be in the face of the decisions of the Supreme Court.

Hence, if the auditor, in order to discover and correct a mistake, must resort to testimony outside of the record, and outside of documents in his possession, to make the discovery contemplated by the statute, then his proceeding would not be under section 1038.

Looking to the duty of auditors and boards of equalization, we find the statute providing in sections 1034 and 1035, that it shall be the duty of the auditor to furnish to assessors a list of the real estate in their districts, with maps and plates, etc. The district assessor, under section 2790, is to value the land and buildings separately, and to make his return to the auditor by the first Monday of July, 1880. Under section 2800 the auditor is authorized to correct any errors he may discover in the name, valuation, description or quality, but no deduction from valuation shall be made except upon the order of the auditor of state, or the state or county board of equalization.

It will thus be seen that the county auditor is not authorized to change any return made by the assessor, either by increasing or diminishing the assessment made by the assessor.

The statute provides for an annual county board of equalization, exclusive of cities of the first and second class, composed of the county commissioners and county auditor. In cities of the first and second class there is to be an annual city board, composed of the auditor and six citizens. The auditor is to have no compensation as a member of the board, but the board may appoint all necessary clerks and messengers at three dollars per day. The county auditor may act by his deputy. Section 2804.

By section 2806 the auditor is required to furnish the annual board a list of real estate, and then it provides that the board shall keep a regular journal of its proceedings, and deposit the same with the county auditor, upon its adjournment.

By section 2813, the decennial county board is to be composed of the auditor, surveyor and commissioners, for the equalization of real estate in the county outside of cities of the first and second class. This board shall convene at the county auditor's office on the second Monday of August, 1880, etc. Each member shall be sworn, and three of the board may form a quorum. The auditor shall keep full and accurate records of the proceedings and orders of the board.

By section 2414, the auditor is required to furnish the board full lists of real estate for taxation. The board shall raise or lower the value, but deductions shall not be made which shall reduce the aggregate of the assessor's return.

By section 2815, a decennial board is provided for cities of the first and second class, composed of the auditor and six citizens, who shall meet at the auditor's office on the third Monday of September, 1880, and thereafter every ten years. Each member is required to take an oath, and they are required to keep a record of their proceedings and orders, the auditor being clerk of the board.

These boards proceed to investigate complaints which have been made, and where it is necessary, to make personal re-appraisal of property returned, and deduct from the assessor's return, or add to it, as justice may demand. But deductions shall not be made which shall reduce the aggregate below that of the assessor.

If the board of equalization add to the valuation returned by the assessor, the law will presume it to have been done on sufficient evidence, unless the contrary be made to appear. 28 Ohio, 168; 44 Ohio St. 112.

In 29 Ohio St. 608, it is held that under-valuations by assessors must be corrected by the board of equalization, and not by the county auditor.

The state board of equalization, in its work, may reduce or increase the general aggregate of the county.

In the case in hand, the state board of equalization, which seems to have completed its work, so far as this county and city are concerned, before the report of our city board was made up, made a reduction of 10 7-10 per cent. from the general valuation. Hence, when Mr. Campbell made up the final return of the city board, he deducted from the findings and return of the city board the deductions made by the state board. That is, his report showed the finding of the city board in the case of plaintiffs to be \$201,250. Deducting the 10 7-10 per cent. would leave the net amount upon which the plaintiff was to be assessed for taxation \$179,715.

It must be presumed, that the return of the board of equalization was correct; nor is it necessary that any reason should appear for the action of the board in increasing, or diminishing, the valuation. Their act would be presumed to have been done upon sufficient evidence.

In the case of *Wagner v. Loomis*, 37 Ohio St. 571, 582, Judge McIlvaine, says:

"The legislative intent was to place the correction of any error in the judgment of assessors as to valuation under the sole supervision of boards of equalization, whether such erroneous judgment was induced by ignorance or mistake, either of law or of fact."

And again, he says: "As a general rule the decisions of officers of tribunals specially created and charged in the tax laws with the duty of valuing property for taxation and equalization, such valuations are final and conclusive."

Supposing a mistake to have been made by the clerk of the board in copying from one book to another, and in making the final return of the board of equalization, can parol testimony, even of a member of the board at that time, be admitted to explain, vary or contradict the return so made? It would seem doubtful if the auditor would be authorized under sec. 1038 to go into such investigation in order to ascertain what the intent of the board was.

It is unimportant whether, in a proper case, parol testimony would be admissible, or not. For it is certain that the auditor could not call witnesses, nor could the commissioners, nor could the court, to establish a clerical error.

We have said the return makes out a prima facie case of its accuracy. If a mistake is apparent upon the auditor's books he may correct it of his own motion. If it is too late for correction, and taxes have been collected, he may call the attention of the commissioners and have them refund such taxes. But would the auditor be authorized, as before said, to go into an investigation, to call witnesses and ascertain as a matter of fact and law that a mistake had been made in an action of the board of equalization? The error which he may correct is merely clerical, and must be determined by inspection of his books, or from papers in his possession. If the auditor could not discover and make the correction under section 1038 of the Revised Statutes, the commissioners could not correct it, nor order the over-payment of taxes refunded. And if the auditor in proper time did not discover, and could not from the papers in his possession discover the clerical error and correct it, nor the commissioners when he called their attention to it, then this court, having no higher authority in this proceeding than the auditor and commissioners would have, could not correct the correction.

It is true that taxes illegally levied and collected, may be recovered back by action in the proper court.

Section 5840, provides that courts of common pleas, etc., shall have jurisdiction of actions to recover taxes and assessments illegally made, and which have been collected, without regard to the amount thereof. But in such case no recovery shall be had unless the action be brought within one year after the taxes, or assessments, are collected.

That would not meet the requirements of the plaintiff's case. It could not, if the tax was illegally assessed and collected, recover for more than one year. Under section 1038, if there was a mere clerical error, plaintiff would be entitled to recover for five years.

The plaintiff alleges that it had no knowledge of the matters set up as a ground of refunder. That is, that it had no knowledge of the facts of the assessment having been erroneously put upon the duplicate at \$54,000, instead of \$5,400, or \$5,800, and that it paid the taxes in ignorance of the facts.

Let us look at this for a moment.

There is not a particle of evidence before the court that the plaintiff was ignorant of the facts, or might not, with reasonable diligence, have discovered them. If the payment of taxes was a voluntary one, made through carelessness on the part of the plaintiff, with no attempt to have the error investigated or corrected, if the plaintiff was not required under compulsion or involuntarily to pay the taxes, then the payment was voluntary, and can not be recovered back. These propositions are well sustained by the authorities, both in Ohio and elsewhere.

In a case reported in the 9 Dec. Re., 813, the same position is taken, and it was held that the plaintiff in that case had been afforded ample time and ample remedies, but failed to avail himself for them, and the court say his failure to do so gives no jurisdiction to the commissioners not conferred by the statute. In that case they had no authority to order a refunder of the taxes, therefore properly disallowed it.

In the case of *Mays v. Cincinnati*, 1 Ohio St. 268, a leading case upon this subject, it was held to make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party of detention, or to prevent a seizure of either by the other party having apparent authority to do so, without resorting to an action at law. Judge Ranney, in passing upon this question, cites several authorities which are very much in point. One was the case of *Brisbane v. Dacres*, 5 Taunton R., 143, which was an action brought to recover back the amount of certain freights paid for the transportation of specie, received by the defendant illegally as commander of a government vessel. The court refused to allow a recovery, and laid down the principle broadly that if a person, with a knowledge of the facts, but under the mistake as to the law, pays over to another claiming it as a right, money which he was not compelled to pay, cannot upon discovering what his legal right was, recover it back, there being nothing against conscience in the other party's retaining it.

The case of *Elliot v. Swartwant*, 10 Peters Rep. 150, which was an action brought to recover back of the defendant money illegally received by him as collector of duties of the Port of New York, the Supreme Court of the United States held unanimously that the action would not lie. Mr. Justice Thompson, delivering the opinion, said that it presented the case of a purely voluntary payment, without objection or notice not to pay over the money, or any declaration to the collector of his intention to prosecute him to recover back the money. It was therefore to be considered as a voluntary payment by mutual mistake of law, and in such case no action will lie to recover back the money.

The case of *Clark v. Dutcher*, 9 Cowen 674, wherein it was held, after an elaborate review of the English authorities, that where money is paid with full knowledge of the facts and circumstances upon which it is demanded, or with the means of such knowledge, cannot be recovered back upon the ground that the party supposed he was bound to pay it, when in fact he was not, and he will not be permitted to allege ignorance of the law, but it will be considered as a voluntary payment.

The case of *Smith v. Redfield*, 27 Maine, 146, was a tax illegally assessed upon the plaintiff, which he paid without coercion and sought to recover it back. The court held that it was paid voluntarily; that the fact that the taxes were paid to collectors who had warrants for their collection, afforded no satisfactory proof of payment by duress, etc.

Concluding the decision, Judge Ranney says, "This unbroken chain of authority seems to warrant the conclusion that the payment of money upon illegal, or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the either party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where he can only be reached by proceeding at law, he is bound to make his defense in the first instance, and he cannot postpone the litigation by paying the demand in silence, and afterwards suing to recover it back."

And we may add, that the mere payment in ignorance of the fact that a mistake has been made, is no defense, when the party might have discovered the mistake, or in other words, when the means of such knowledge was within his reach.

How stands the fact in the case so far as the Barney & Smith Manufacturing Company is concerned? The valuation, as before stated, of the assessor was \$5,850. That must have been known to the plaintiff. It was an important matter, one that its officers and agents could not well overlook. The property was valuable. The taxes in any event thereon would be considerable, and when the agents of the corporation found the duplicate charging them \$54,000 instead of \$5,850, as returned by the land appraiser, it seems to me that every consideration demanded that they should make inquiry into the matter. They had full opportunity to go to the county commissioners, to the city board of equalization, to the state board, to every board from year to year having the matter under consideration, and to the courts also. With all these duties and facts before the plaintiff, it and its agents never took any action in the matter whatever. It will not do to say that the plaintiff did not know that it was paying taxes upon \$54,000.00 assessment upon the land. During the ten years that it was paying at this rate, not less than twenty payments of taxes were made, and receipts delivered, in the ordinary form. These receipts show the valuation placed upon the real estate and the personalty separate. So that there was before the eyes of the agents of the plaintiff, at least twenty times in the ten years, written and printed notice of the existing fact of this largely increased assessment. That being so, it seems to me, upon principle, and following the decisions in Ohio and elsewhere, plaintiff is estopped to now claim the return of taxes paid for ten years under an alleged clerical error of the auditor.

## 382

## NATIONAL BANKS.

[Superior Court of Cincinnati, Special Term.]

BARNES ET AL. V. POGUE ET AL.

In an action of deceit against the directors of a National Bank to recover damages sustained by persons who had loaned money and taken as collateral security therefor, the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense to such directors that the bank has been placed by the comptroller of the currency in the hands of a receiver, or that the receiver has settled with the directors and released them from all liability arising from such violations of duty, unless it is further shown that in some way the injured persons had elected to proceed against the bank.

SMITH, J.

This action is one of a large number similar in character.

It first came before me upon a demurrer to the petition, and the only point discussed by counsel, and the only one decided, was whether the plaintiff, who loaned money upon the faith of the stock of the Fidelity National Bank, which he had taken as collateral security, could maintain an action against the directors for negligence in the management of the affairs of the bank, whereby the assets of the bank were lost and the shares rendered valueless. *Barnes v. Swift*, ante 321. It was held that such an action could not be maintained.

Subsequently an amended petition was filed, making more specific the allegations as to the deceit of the directors, and alleging that the loan was continued in reliance upon a false statement of the resources and liabilities of the bank, which was attested by three of the defendants, and published as required by the banking law.

That those directors, who thus falsely attested said statement, were liable in an action of deceit to those who had taken the stock as collateral security in reliance upon the truth of such statement was subsequently decided by me upon a demurrer to a petition containing such allegations in the case of the Merchant's National Bank v. Thoms et al., ante 632.

The opinion in the Barnes case, *supra*, stated that the petition contained no allegations that the pledges were made or continued in reliance upon the false statements set out in the petition, or that the pledgees ever saw such statements.

A more careful reading of the petition, however, disclosed the fact that although the allegations of the petition upon the subject of deceit were more general than was desirable, yet they were sufficiently specific as against a demurrer to sustain an action of deceit; and a motion to strike from the files the amended petition which made the allegations more specific, was overruled by the general term, upon the ground that the amended petition did not substantially change the cause of action set forth in the original petition.

As the actions now stand, they are simply actions against the directors individually for deceit. The plaintiffs allege that they loaned money to one Matthews, upon his promissory note, receiving as collateral security therefor the stock of the Fidelity National Bank; that they relied either in making said loan or in continuing it solely upon said collateral security, and that such reliance was induced by the published reports of the financial condition of the bank, which was attested by the defendants, and that said reports were false, as the defendants well knew.

The defendants have answered, setting up amongst her defenses, (2), that a receiver of the bank was appointed by the comptroller of the currency, and that said receiver has ever since been in possession of the property and assets of the bank, for the purpose of administering the same in pursuance of the acts of congress; (3), that this receiver instituted proceedings in the U. S. circuit court against the officers of the bank to recover from them on account of their various violations of duty as such officers, and that said proceedings were finally settled by the payment of the defendant officers to the receiver of a large sum of money, and that such settlement covered the matters set out in the petition filed in this case.

To these two defenses the plaintiff has filed a demurrer.

In the decision of the Merchant's National Bank case, *supra*, I directed attention to the fact that this action was in form an ordinary action of deceit against an agent for fraudulent representations made by him in the conduct of the business of his principal to the injury of the plaintiff who relied upon such representations, and that it was unnecessary to determine whether the plaintiff had or had not a right of action against the principal, because, whether he had or had not, he at least had a right of action against the agent (Henshaw v. Noble et al., 7 Ohio St., 231). A thorough exposition of this principle appears in secs. 571 to 576, Mechem on Agency, and the cases cited, among which I call attention to Weber v. Weber, 47 Michigan Reports, 570, where it is said:

"Neither is it true that an agent is exempt from liability for fraud, knowingly committed on behalf of his principal. A person can not avoid responsibility merely because he gets no personal advantage from his fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another." And in a later part of the decision it is said:

"If liable at all, the agent might as well be sued separately as any other joint wrongdoer. It is not usually necessary to sue jointly in tort."

If now we bear in mind the nature of this action, as I have described it, the difficulties which are supposed to surround the determination of the question raised by this demurrer rapidly disappear.

In the first place, if there is no liability upon the part of the bank itself, or the receiver, who stands in its place, and the right of action is only one which can be maintained against the individuals who practiced the deceit, it necessarily follows that any settlement between the receiver and the agent who made the false representations would in no way affect the rights of the injured parties; because such release to the agent from the receiver would be by the one who was not legally concerned in the transaction, and who, therefore, had no right to grant such a release.

But if we assume that the principal—the bank or the receiver—is also liable equally with the agent, then, such principal is liable jointly with the agent, or severally at the option of the injured party, upon the elementary principle declared in *Weber v. Weber*, *supra*, that joint tortfeasors are either jointly or severally liable for the entire damage arising from the commission of a tort.

But it does not appear from the answer that the plaintiff ever filed his claim with the bank or the receiver, nor does it appear in any other way that he ever elected to proceed against the bank or the receiver.

There is therefore no opportunity presented by this demurrer to press the argument that the plaintiff by his conduct led the principal and his agent to suppose that he intended to look to the principal, and not the agent, for the recovery of his loss, and that the settlement by the agent with the principal was due to that fact, and that the plaintiff is now estopped to recover from the agent.

The settlement, therefore, between the receiver and the officials, if one was ever had which embraced this claim, was merely by way of anticipation of a recovery against the principal on account of the fraud of the agent. But as the injured party had not by his conduct induced such a settlement, and was not a party to it, I am unable to see in what respect his rights have been affected by it.

Whether in case the plaintiff had filed his claim with the bank or the receiver, any different result would follow, is a question that is not before me at this time, and as to which, therefore, I express no opinion.

The argument of the defendants, when followed to its logical conclusion, amounts to this: That where an agent, when engaged in the business of his principal, fraudulently deceives a third person with whom he is dealing, the principal may settle with the agent without the consent of the third person, and by such settlement compel the third person to abandon all the right of action against the agent, and look to the principal solely for a recovery for his injury, and that this may be done, although such third person never elected of his own accord to proceed against the principal, but preferred to proceed solely against the agent.



I am unable to find anything in the provisions of the national banking law which leads me to believe that it has incorporated in it a principle so foreign to one of the most elementary principles of the law.

The contention of the defendants, that such a principle has been declared by that act, is based upon the language of sec. 5239, U. S. Rev. Stat., which reads as follows:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association, to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation, however, shall be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in, or assented to, the same, shall be held liable in his individual and personal capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

The appointment of a receiver is provided for in sec. 5234, Rev. Stat., U. S. The power of such receiver is there defined as follows:

"Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

It appears from this section that the duty of the receiver is to collect all the assets of the corporation, convert them into money, and distribute the same among its creditors, and that he has given him the additional power to enforce the individual liability of the stockholders.

Now, conceding that the receiver represents the creditors in the collection of debts due to the bank, and that if the plaintiffs were creditors of the bank, demanding a share in its assets, there might be a right of action in the bank against its agents who had fraudulently created such claims; yet, if the injured person claims nothing from the bank, he is in no substantial sense a creditor of it, and I am unable to see anything in the provisions of the national banking act which enables the receiver to make him a creditor, and by settling with the fraudulent agent deprive the injured person of his right of action against the agent.

But in view of the broad allegations in the third defense which in effect are that the release from the receiver to the defendants was made by the direction and with the authority of the U. S. circuit court, it seems to me proper to assume as against a demurrer that the defendants in some manner, by their conduct towards the receiver, so brought themselves within the jurisdiction of that court that its order, with reference to the release, was valid, and that the question of the validity of the release should be determined by the trial court, when the evidence upon that subject is submitted to it.

It is also urged by defendants that in several of the petitions it is not alleged that the loan was it reliance upon the false statement, but merely that it was continued in reliance upon them; and that inasmuch

as the bank was totally insolvent when the May statement was published, upon which plaintiff claims to have relied in continuing his loan, and that the bank continued so from that time until its failure, the plaintiff was not prejudiced by such statement; because his collateral had already become absolutely worthless, and it would have availed him nothing to have known the exact truth as to its condition.

But I do not understand the petition to allege that the May statement was totally false, but was only partially so. And the probability of this appears in the fact that the bank did not suddenly become insolvent, but reached its point of almost absolute insolvency by reason of a continued course of conduct upon the part of the officials in abstracting its assets.

The petition, too, in the Barnes case distinctly avers that if the plaintiff had known of the falsity of the report, or had a truthful report been made, he could at that time have obtained his money, and made himself secure of his loan, to secure which he held the shares of the stock of the company as aforesaid.

In view of these allegations, I do not think I can say as against a demurrer that plaintiff suffered no damage by reason of the false statement.

Demurrers sustained as to second defense, and overruled as to third defense.

J. B. Foraker, David Davis, C. W. Baker, for plaintiffs.

Thos. McDougall, Herbert Jenney, H. P. Lloyd, for defendants.

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## WILLS—TRUSTS.

[Hamilton Common Pleas, May, 1893.]

CAROLINE W. SOTELDO v. JOHN B. CLEMENT, (TRUSTEE).

1. A devise to "my daughter and her children" vests in her and her children then *in esse* in equal moieties, to the exclusion of afterborn, and the same rule applies if the interest is equitable, as a trust for her and her children.
2. Where the owners of the entire beneficial interest in a trust are *sui juris*, and unite in requesting its termination and no object to be accomplished by continuing the trust appears, the court should terminate the trust, though in advance of its natural expiration, and give the beneficiaries their estate absolutely.

An action to construe a will and terminate a trust.

Wm. H. Clement, of Warren county, father of the parties, died in February, 1888, leaving a will dated November, 1886, in which, among other things, he gives,

Item 1. To his wife, a life estate in the home farm, with remainder in fee to his two daughters, one of whom is the plaintiff.

In item 5 he gives the plaintiff \$5,000, in addition to sums theretofore advanced.

Then follows the clause to be construed, viz.:

"Item 10. I will and bequeath to my son, John B. Clement, in trust and as trustee for the sole use and benefit of my daughter, Mrs. Caroline W. Soteldo, and her children, and for no other purpose, one undivided one-fourth part of said remainder of my said estate. I also order and direct the said John B. Clement as trustee aforesaid, to collect and pay over to my said daughter Caroline W. Soteldo, the income and profits of her said undivided one-fourth part of the said remainder of my said estate hereby devised, and also the income of the special bequest bequeathed to her in item 5 of this, my last will and testament."

The executors, of whom the trustee is one, are authorized to sell any part of the real or personal property at discretion.

The share of the other daughter is left to her absolutely, without any trustee.

The plaintiff is a widow, and has two daughters, both now of age, and both of whom, by answer, join in her prayer to have the will construed and the trust terminated, and their share given to them absolutely.

The trustee has duly paid over to the plaintiff the income of the trust fund and has the principal ready to abide by the result of this case, and chiefly desires not to be liable to any possible unborn claimants on the fund.

The case comes up on demurrer to the petition.

BATES, J.

1. In Wild's case, 6 Coke, 17, a devise to B and his children, B being then childless, was held to create an estate tail, secus if he then had children.

In the former alternative the intent is to benefit subsequent children, and could only be so effectuated. But, in the latter case, it was said that he and they took jointly, afterborn children being excluded; for they can not take immediately, because not in rerum natura; nor in remainder, because the gift is immediate—at least such was the interpretation at once put in the decision, and it has ever since been the law.

We are only concerned with the latter branch of the case, or, as the rule is generally stated, an immediate gift to a class vests at once to those in esse answering the description, and will not open to let in after-born.

(a.) Hence an immediate gift to children, or to a person and his children, or his issue, if he has children at the testator's death, vests in those in esse to the exclusion of those born afterwards. This rule applies equally to deeds and to wills, and its universality will appear from the following cases, nearly all of which cite Wild's case. The list, though not exhaustive, except as to recent cases, is made full, because the protection of the trustee requires that each point be perfectly proved. Saunder's note to *Heathe v. Heathe*, 2 Atk. 121, 122; *Davidson v. Dallas*, 14 Ves. 575; *Scott v. Scott*, 15 Simon, 47; *Smith v. Ashhurst*, 34 Ala. 208; *Jones' appeal*, 48 Conn. 60; *Tharp v. Yarbrough*, 79 Ga. 382; *Lewis v. Lewis*, 62 Ga. 265; *Gillespie v. Schuman*, 62 Ga. 252; *Wood v. McGuire*, 15 Ga. 203; *Faloon v. Simshauser*, 130 Ill. 649; *Handberry v. Doolittle*, 38 Ill. 202; *Biggs v. McCarty*, 86 Ind. 352; *Powell v. Powell*, 5 Bush. 619; *Shotts v. Poe*, 47 Md. 513; *Worcester v. Worcester*, 101 Mass. 128; *Langmaid v. Hurd*, 64 N. H. 526; *In re Green*, 131 N. Y. 586; *Jenkins v. Freyer*, 4 Paige, 47; *Moore v. Leach*, 5 Jones, (N. Ca.) L., 88; *Jourdan v. Green*, 1 Dev. (N. Ca.) Eq. 270; *Simms v. Garrot*, 1 Dev. & Bat. 393; *Landwehr's Est.* 147 Pa. St. 121; *Swinton v. Legare*, 2 McCord's (S. Ca.) Ch. 440; *Cannon v. Apperson*, 14 Lea. (Tenn.) 553.

4 Allen, 566; Bowditch v. Andrew, 8 Allen, 339; Inches v. Hill, 106 Mass. 575.

In *Biggs v. Peacock*, 22 Ch. D. 204, the testator directed his trustees to sell and hold the proceeds in trust for his widow for life, and after death, for his children. The prayer to divide the property was refused because some of the children resisted it, but *Jessel, M. R.*, and *Cotton, L. J.*, both said that no doubt, if all were of age and sui juris, they could call on the trustee to convey the estate to them.

In *Huber v. Donohue*, 49 N. J., Eq. 125, the devise was in trust to apply rents and profits to support widow and children for ten years, and then sell and divide. The court said that the beneficiaries had the entire interest, subject to the executor's power to sell, which they could defeat by electing to take the land instead of the proceeds, and could sell and pass title, and therefore the court could terminate the trust now.

If the children of the plaintiff should die leaving her their heir, or convey to her, her situation would be something like that in *Taylor v. Huber*, 13 Ohio St. 288, and *Culbertson's Appeal*, 76 Pa. St. 145. The cestui's interests here are accessible to creditors, and can be sold by themselves. The will neither discloses an object in interposing a trustee between the cestuis and their property, nor a duration of the trust whether forever or for whose life. If the motive was infancy of the children, that has now passed. If it was any incapacity, none was mentioned, and none is disclosed. To end the trust seems like making a new will for the testator. Yet there are many restrictions on property rights, and remote limitations which the law forbids; and though a testator might like to keep his heir in tutelage and his property intact, the policy of the law is to put every one on his own responsibility at twenty-one, to sink or swim, as he may choose to be prudent or improvident. Hence, except in alimentary trusts where maintenance or protection is the defined purpose, it would seem, from the above authorities, that, where the owners of the entire beneficial interest are sui juris, and unite in asking a termination of the trust and an immediate distribution, and no object to be accomplished by continuing it appears, the trustee could end it by a conveyance to the beneficiaries, and the court can, and apparently should, decree its termination.

Accordingly, the prayer of the petition must be granted.

Matthews & Cleveland, for plaintiff.

J. E. Smith, of Warren county, for the trustee.

## STREET RAILWAYS.

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[Franklin Common Pleas, June, 1893.]

## JOSEPH H. HARNER V. COLUMBUS STREET RAILWAY CO.

A street railway company having located and constructed its railway under the proper municipal authority, with all the switches or turn-outs which were then deemed necessary by the company, cannot afterwards construct additional switches or extend those already constructed, without first obtaining the written consent of a majority of the property holders, represented by the feet front, of the property abutting on that part of the street where such additional switches or extensions are proposed to be constructed, and obtaining the right to do so, from the proper municipal authority.

## ABERNATHY, J.

This was an action brought by plaintiff for himself and a number of other persons, owners of lots abutting on Oak street in the city of Columbus, to enjoin the defendant, the Columbus Street Railway Company, from constructing a double track on said street between Eighteenth street and Wilson avenue.

A temporary restraining order was granted. Upon the hearing of the case on the merits, the evidence in substance showed that a single track railway was constructed on Oak street under an ordinance passed by the city council in 1875, which authorizes the construction of a street railway on this street, without any express authority as to switches or turn-outs; that such switches were then constructed by the company at various points on the line of its railway as it deemed necessary or convenient for its operation.

The right as then granted contemplated the use of horses or mules in running its cars, and was so used.

In 1889 the city council, by ordinance, granted the right to the defendant company to use electricity in running its cars, and the company constructed the necessary appliances for running its cars by this method. It was claimed by the defendant that this change in the method of propelling its cars, together with the large increase of public travel on this street, and in order to afford better facilities to the public by making greater speed, more frequent trips, and less delays, it became and was necessary to extend some of the switches on this line.

At the time the restraining order was granted, the company had commenced the extension of one switch, which it intended to extend about one hundred feet, and also to connect two other switches which were about eight hundred feet apart. It claims the right to do so without obtaining the consent of abutting lot owners, or the consent of the city authorities.

The plaintiff and the other persons in whose behalf this suit was brought, are owners of property whose lots abut on Oak street, and in front of which the above extensions were threatened to be made.

The case was submitted on the single question as to the right of the company to make said extensions, without reference to the further question as to the safety or practicability of these extensions so far as the abutting lot owners were concerned.

The question presented is whether or not a street railway company, under the authority granted to construct a street railway, and having exercised that right by laying its track, and constructing such switches or turn-outs as were then deemed sufficient for its operation, can afterward

extend and enlarge these switches without further municipal authority, and without obtaining the consent of abutting lot owners who may be affected by the alteration.

We are clearly of the opinion that it can not, and that neither the consent of the city authorities to change its motive power from horses to electricity, nor the assumed demand of the public for increased facilities for travel, furnishes any ground for the exercise of such right.

It is a familiar principle in the law of corporations—such as railway companies—that they acquire only such powers as are expressly granted, or are clearly implied from the nature of the grant. *Straus v. Ins. Co.*, 5 Ohio St. 59; 1 Ohio St. 37; 10 Ohio, 108.

And these grants of power, being in derogation of common right, are to be strictly construed; especially where the right claimed is a delegation of the power of eminent domain. *Currier v. Marietta Ry. Co.*, 11 Ohio St. 228; *Toledo, etc. R. R. v. Daniel*, 16 Ohio St. 390; *R. R. Co. v. Naylor*, 2 Ohio St., 235; *Moorehead v. R. R. Co.*, 17 Ohio, 340, 353; *Harbeck v. Toledo, etc.*, 11 Ohio St. 219; 20 Ohio St. 496; 1 *Redfield on Railways*, p. 250.

And doubtful grants are to be construed most favorably towards those who seek to defend their property from invasion. 1 *Redfield*, 251.

The statute prescribes the requirements whereby street railway companies may acquire the right of eminent domain, and these requirements must be strictly pursued. *Roberts v. Easton*, 19 Ohio St. 78; 10 Ohio St., 560; *Harbeck v. Toledo*, 11 Ohio St., 219; *Dyckman v. Mayor, etc.*, 1 *Sel.* 439.

While the precise question presented in this case has not been expressly passed upon by the Supreme Court of this state, we think the principle involved has been settled by numerous decisions in their application of the rules of construction to other railroad corporations. *Railway Co. v. Lawrence*, 38 Ohio St. 41, 45; *Street Ry. v. Cumminsville*, 14 Ohio St. 523; *R. R. Co. v. Naylor*, 2 Ohio St. 236; *Roberts v. Eaton*, 19 Ohio St. 78; *Moorehead v. R. R. Co.*, 17 Ohio, 340; *Atkinson v. R. R. Co.*, 15 Ohio St. 21; *Warren v. R. R. Co.*, 39 Ohio St. 70. See also *Com. R. R. Co. 27 Peen. St.* 339; *Booth on Street Railways* par. 56, 95; 1 *Redfield on Railways*, page 250, 253 and note 17.

It was contended by counsel for defendant that the right to make these extensions was incident to the grant conferred to construct its track in the first instance, and the implied authority to construct such switches or side-tracks as were necessary or convenient for the proper exercise of its franchise, and especially so, under its right to operate its cars by electricity, as subsequently conferred by the city council, inasmuch as the company had the right to have constructed such switches as it now proposes to construct, in the first instance if they had been deemed necessary and convenient.

Whether this is so or not, we hold that it was within the contemplation of both the city and the company under the franchise then conferred, that the company should construct its railway and switches in the manner in which they were then constructed, and having done so, it cannot make a substantial change in their location and construction, by extending its switches several hundred feet without first acquiring a new grant, and obtaining the consent of a majority of the property owners who may be affected by the proposed extension, any more than a railroad company can re-locate its road, after it has once been located and constructed, and for manifest reasons—principal among which is the fact that many per-

sons may have purchased lots and built houses, for business or residence, and made improvements with reference to this road as already located and constructed. In such a case we think a remedy by injunction lies, and the prayer of the petition for a perpetual injunction should be granted.

Cyrus Huling, for plaintiff.

H. J. Booth and James Caren, for defendant.

## FORFEITURE OF ESTATES.

398

[Hamilton Common Pleas, May, 1893.]

### WALKER BRANCH V. WESLEYAN CEMETERY DIRECTORS.

1. The ceremony of re-entry is not necessary in Ohio to forfeit an estate for breach of condition subsequent.
2. The power to forfeit for a future breach of the condition is not alienable and is gone if the grantor attempt to convey.

In 1841, Timothy Kirby, by deed, granted to the trustees of a Methodist church three-quarters of an acre out of a larger tract in Cummins-ville, on which to build their church, with the following clause of defeasance:

"Should the said land cease to be occupied for church purposes, and as a place of divine worship, the grant will cease and determine." The habendum clause contains no such condition. No right of re-entry is in terms reserved to his heirs, or even to himself.

Afterwards, in 1846, Timothy Kirby sold and conveyed the entire tract to the defendants, subject to the prior conveyance to the church.

In 1888, the church burned down, and a new lot was purchased elsewhere for the new edifice, and the church obtained an ex parte decree of the court authorizing it to sell the old lot, which was accordingly sold to the plaintiff. To this decree the defendants were not parties.

The plaintiff wants his title quieted, and the defendants want a prior alleged oral contract of purchase enforced, or claim the lot by virtue of the clause of forfeiture.

The question arises on demurrer to the answer and cross-petition.

BATES, J.

I. (a.) Mere non-performance or breach of a condition subsequent never ipso facto defeated the estate granted or produced a reverter of the title, for as performance could be waived by the grantor, the condition was deemed dispensed with, and the estate ran on in full force, unless the proper steps were taken to consummate the forfeiture and re-vest the title.

Now, as by the common law livery of seizin was essential to pass a free-hold, a forfeiture and re-vesting of the title could only be accomplished by a re-entry to defeat the prior livery made on its original creation, this being a resumption of the seizin parted with by the feudal investiture; and then, only, would an ejectment or writ of entry or action of disseizin lie for a re-possession in fact. Or, as Coke puts it, when any man will take advantage of a condition, if he may, [can] enter, he must

enter; and when he can not enter, he must make a claim, and this is the universal rule of the common law. Coke Litt. 218; Greenl. Cruise. Tit. XIII, Ch. 2, sec. 39; Shep. Touch, 153; 2 Bl. Com., 155; 4 Kent. Comm. 122; 2 Washb. R. P. 13, 16; Tiedeman Real. Pr. sec. 277; Chalker v. Chalker, 1 Conn. 79; Bowen v. Bowen, 18 Conn. 534; Warner v. Bennett, 31 Conn. 468; Norris v. Milner, 20 Ga. 563; Boone v. Clark. 129 Ill. 466; Cross v. Carson, 8 Blackf. 138; Kenner v. American Contract Co., 9 Bush. 202; Tallman v. Snow, 35 Me. 341; Hooper v. Cummings, 45 Me. 359; Osgood v. Abbott, 58 Me. 73; Canal Co. v. Railroad Co., 4 Gill. & J. I. 121; Guild v. Richards, 16 Gray, 309; Adams v. Lindell, 5 Mo. App. 197; Mo. Hist. Soc., v. Academy of Science, 94 Mo. 459; Willard v. Olcott, 2 N. H. 120; Sperry v. Sperry, 8 N. H. 477; Rollins v. Riley, 44 N. H. 9; Nicoll v. N. Y. & E. Railroad, 12 Barb. 460 (a leading case, and aff'd in 12 N. Y. 421); Fonda v. Sage, 46 Barb. 109; Phelps v. Chesson, 12 Ired. (N. C.) L. 194; Hammond v. Railroad Company, 15 S. C. 10, 34; Kibler v. Luther, 18 S. C. 606; Allen v. Dent, 4 Lea. (Tenn.) 676; Martin v. Ohio Railroad, (37 W. Va.) 16 S. E. Rep. 589, and the cases cited in paragraph II of this opinion.

In some states it is held that other indications of an intent by the grantor or his heirs, to insist on the condition, are sufficient without actual entry, or even that an action of ejectment is sufficient, as in Ruch v. Rock Island, 97 U. S. 693; Cowell v. Springs Company, 100 U. S. 55 (affirming s. c., 3 Colorado, 82); Georgia Railroad v. Macon, 86 Georgia 585; Hubbard v. Hubbard, 97 Mass., 188; Sioux City & St. Paul Railroad v. Singer, (49 Minn.) 51 S. W. Rep. 905; O'Brien v. Wagner, 94 Mo., 93; Cornelius v. Ivins, 26 N. J. L., 376; Gulf, etc., Railroad v. Dunman, 74 Tex. 265; Martin v. Ohio Railroad, (37 W. Va.) 16 S. E. Rep. 589, (by statute), and a demand was deemed equivalent to an entry in Ellis v. Elkhart Car Works, 97 Ind. 247; and Hamilton v. Kneeland, 1 Nev. 40. See generally the American notes to Dumpor's case, 1 Sm. Lead Cas. [47].

(b.) I am satisfied, however, that in the laws of Ohio re-entry is an obsolete ceremony, even for the mere purpose of signifying an election to insist on the condition; for as no feodal investiture by livery or seizin was ever necessary here, no resumption of the seizin by re-entry is necessary. That livery is not necessary, appears in Borland v. Marshall, 2 Ohio St. 308, 313. For example, an owner here can convey land which is in the adverse possession of another, Borland v. Marshall, Id. 314; and can maintain partition without actual seizin. Tabler v. Wiseman, 2 Ohio St. 207. It was not deemed necessary in Sperry v. Pond, 5 Ohio, 387.

II. (a.) But there is another rule of law which is fatal to the defendant's claim to hold by forfeiture, viz.: Mere rights of entry are not alienable; for no one but the grantor or his heirs, that is, he or his privies in blood, can insist on the performance of an express condition subsequent or take a benefit by its breach. The power to forfeit for the breach, cannot be assigned, conveyed, or even devised, and on an attempt to do so the condition is gone. The authorities on this are all one way from the Year Books down until the statute of 32, Henry VIII, Ch. 34 (the presence of the word "assigns" in 2 Bl., Com., 155, is doubtless to be accounted for by his having written after this statute was in force, for the law is certainly the other way). Thus in Rice v. Boston, etc., R. R. 12 Allen 141, a grantor on condition subsequent devised the right of entry for forfeiture to his son, and it was held that the son could not enter as



heir by reason of the devise, nor as devisee, because the right of entry was not devisable, and hence the condition could not be enforced.

The reason that the right to forfeit can not be alienated, is variously stated. Coke (Co. Litt. 218), and Cruise (Tit. XIII, Ch. 1, sec. 15), assign the discouragement of maintenance as the reason, or one reason; meaning, no doubt, that permitting sales of doubtful or disputed titles would enable the wealthy and powerful to oppress the weak, whose land he might want. Tiedeman, section 277, adopts the view of cases holding it is not alienable because not an estate, nor a possibility of reverter, but a mere chose in action. This of course does not refer to the old rule that a chose in action is not assignable, because the long abolishment of this rule has not affected the inalienability of the right of re-entry in modern law where choses in action are freely assigned. The majority of the cases which assign any reason, put it on the ground that the right to re-enter for forfeiture is not an estate or reversion on the ground that the right to re-enter for forfeiture is not an estate or reversion, or any interest in land, but a mere expectancy or possibility of reverter, to be classed, for example, with those cases familiar to the Ohio lawyer, holding that dower before marriage is not releasable, because it is a demand not in existence, *Grogan v. Garrison*, 27 Ohio St. 50, 65, and that a child's expectancy in his parent's estate cannot be conveyed or devised. *Needles v. Needles*, 7 Ohio St., 432; *Hart v. Gregg*, 32 Ohio St., 502; *Gilpin v. Williams*, 25 Ohio St. 283, 300.

In fact, however, this last reason and that given by Tiedeman and his cases are substantially the same, for when we remember that the grantor after forfeiture is not in of any new estate, nor by any right to acquire a new estate, but is in of his original estate, it is obvious that his alienation conveys no estate, for there was none; nor a right to acquire an estate, for there was not even, that, but only a power to terminate the grantee's estate, upon which his original estate is revived, and then for the first time he has anything recognizable in law as a right.

The following authorities show the right to be confined to the grantor and his heirs, and not to be transferrable by alienation or devise: Co. Litt. 214 a; 5 Viner's Abr. 312; Greenl. Cruise, Tit. XIII, Ch. 1, sec. 15; Shep. Touch. 140; 4 Kent Com. 127; *Schulenberg v. Harriman*, 21 Wall. 44, 63; *Ruch v. Rock Island*, 97 U. S. 693; *Davis v. Memphis & Charleston R. R.*, 87 Ala. 633; *Warner v. Bennett*, 31 Conn. 468; *Norris v. Milner*, 20 Ga. 563; *Boone v. Clark*, 129 Ill. 466; *Higbee v. Rodeman*, 129 Ind. 244; *Cooper v. Cummings*, 45 Me. 359; *Osgood v. Abbott*, 58 Me. 73; *Guild v. Richards*, 16 Gray, 309; *Rice v. Boston, etc., R. R.*, 12 Allen, 141; *Winn v. Cole*, 1 Walk. (Miss.) 119; *M. & C. R. R. v. Neighbors*, 51 Miss. 412; *O'Brien v. Wagner*, 94 Mo. 93; *Southard v. Central R. R.*, 26 N. J. L. 13; *Nicoll v. N. Y. & E. R. R.*, 12 Barb. 460; 12 N. Y. 121; *Underhill v. Saratoga, etc., R. R.*, 20 Barb., 455; *DePeyster v. Michael*, 6 N. Y. 467, 506; *Phelps v. Chesson*, 12 Ired. (N. C.) L. 194; *Wellons v. Jordan*, 83 N. C. 371.

The only contrary cases are either sporadic, or explainable on peculiar grounds. Thus it was held that the right, though not assignable, was devisable, in *Boone v. Clark*, 129 Ill. 466, and *Kenner v. Amer. Contract Co.*, 9 Bush., 202, as if a devisee were a species of heir. It was held devisable, though not assignable, under a statute of wills permitting devises of expectancies, in *Cornelius v. Ivins*, 26 N. J. L. 376, and see *Hayden v. Stoughton*, 5 Pick., 528; and it was held to be alienable in any way

on the ground that the statute, 32 Henry VIII, Ch. 34, was part of their common law, in *Cowell v. Springs Co.*, 3 Colorado, 82, (affirmed in 100 U. S. 55), and in *Hamilton v. Kneeland*, 1 Nev. 40; see also *McKissick v. Pickle*, 16 Pa. St. 140.

The statute, 32 Henry VIII, Ch. 34, is not in force in Ohio. — *Crawford v. Chapman*, 17 Ohio, 449, 452; *Masury v. Southworth*, 9 Ohio St. 340, 346; *Smith v. Harrison*, 42 Ohio St. 280, 184.

(b.) After a grantor has re-entered, and thereby resumed the seizin and become re-vested of his former estate, he could alienate at will, whence it might be urged that no re-entry being necessary in Ohio, he can assign at any time. But this theory is more specious than real, for as the grantor had no estate, but only a possibility or expectancy, the abolishment of one of the formal preliminary steps for converting his possibility into a right does not make it an estate ab initio. The grantee's estate being a fee-simple and nothing less until defeated under the condition (see citations in *Cincinnati v. Babb*, 4 S. & C. P. Dec., 464,) if the grantor does nothing to defeat it, the grantee's estate runs on, for the breach does not ipso facto re-vest the title as if it were a limitation. Hence the forfeiture must be affirmatively insisted on, and the grantee's estate terminated in some way before the grantor can again get an assignable estate, even though a re-entry is not necessary.

In fact, even if the grantor is already in actual possession, he has no estate under the forfeiture which he can assign, unless he claims to hold for the breach of the condition; nor does his entry give him an estate if his entry is on another claim than to hold for the breach. *Bowen v. Bowen*, 18 Conn. 534; *Osgood v. Abbott*, 58 Me. 73; *Andrews v. Senter*, 32 Me. 394; *Hubbard v. Hubbard*, 97 Mass. 188; *Willard v. Olcott*, 2 N. H. 120; *Rollins v. Riley*, 44 N. H. 9; *Ellis v. Elkhart Car Works*, 97 Ind. 247; *Hamilton v. Elliott*, 5 S. & R. 375. The necessity of an affirmative act to terminate the grantee's estate, as by demand, is recognized in *Sperry v. Pond*, 5 O. 387, 390, and in our cases on forfeiture of a lease, *Boyd v. Talbert*, 12 O. 212; *Smith v. Whitbeck*, 13 Ohio St. 471; 15 Wall. 471.

No injustice is done thereby, for if there be a remainder, the estate may be construed as a conditional limitation; if the payment of money be required, it may be a trust or a covenant, and not a condition; and though in modern law it seems strange to us that the semblance of a right should not be transmissible, the policy of the law, which never looked on conditions subsequent with eyes of lenient construction, would seem best subserved by restricting the power to forfeit to him who created it, so that the motives which induced the original grant might still operate to waive the forfeiture rather than give such a power to a stranger in blood.

The demurrer to the petition will therefore be sustained.

Berry & Cash, for plaintiff.

W. G. Roberts and Robt. C. Taylor, for defendant.

## SETTLEMENT OF ESTATES.

5

[Richland Common Pleas.]

## MARGARET CATE, EXRX., v. A. A. PECK, GUARDIAN, ET AL.

1. A mortgage of realty, executed by the administratrix and heirs to secure a fund to satisfy a former lien thereon created by the decedent, is void as against creditors.
2. Upon a sale of the real estate to pay debts, and there being no intervening rights, such mortgagee may, in equity, be subrogated to the rights of and priorities of the holder of the lien so paid, without regard to the solvency of the estate.

## APPEAL from the Probate Court.

## WOLFE, J.

In November, 1873, Anthony Cate, by mortgage deed, conveyed certain real estate to one Elizabeth Statler, thereby securing certain indebtedness, and such proceedings were afterwards had in the life-time of said Cate as resulted in a decree of foreclosure; the amount of said indebtedness being then found and announced by the court as \$2,764.00.

Pending these proceedings, and prior to said decree, Anthony Cate departed this life, and this plaintiff, his widow, qualified as administratrix of his estate.

After said decree a compromise was effected between said Statler and the administratrix, by which said amount was to be settled in full, on a cash basis of \$1,500.00.

To pay this and costs of suit, the administratrix, on January 19, 1891, borrowed \$1,900.00 from defendant, A. A. Peck, as guardian of minor wards, to secure which said administratrix, joining with all the children and heirs at law of said decedent, executed and delivered to said guardian their mortgage deed, purporting to convey the same real estate above mentioned. All the makers of said mortgage were insolvent.

Afterwards, upon the petition of the administratrix, said real estate was sold for the payment of debts—said Peck, guardian, was made a party defendant, who answered, alleging fully the facts as to his said alleged mortgage and the purposes for which said money was used, and asked that he be subrogated to the rights of said Statler, and for full relief.

The proceeds of the said sales are in the hands of the administrator de bonis non, and are insufficient to pay creditors, including the claim of said guardian, who appeals here from an order made against him, and in favor of said creditors, by said probate court.

The evidence shows the money so borrowed was used by the administratrix in full satisfaction of said mortgage and judgment and costs of suit, and the release of said mortgage of record, but that the decree and findings of the court, so announced in the foreclosure proceedings, was never journalized; the said entry being negligently omitted from the record.

That A. A. Peck, guardian, acquired no lien by his mortgage as against the creditors of said Anthony Cate, deceased, is settled. *Lucht adm'r v. Behrens*, 28 Ohio St., 231; *Curtis v. National Bank*, 39 Ohio St., 583.

It follows, then, that all relief to Peck on his cross-petition must be denied him unless he can be subrogated to the rights of Statler, or claim by an equitable assignment of such rights.

It is ably urged on behalf of creditors that the relation of the guardian here is that of a volunteer merely, and accordingly not entitled to the relief prayed for. The truth of this proposition depends upon the facts of the case. And it will be observed here that no intervening rights have accrued on the strength of the release of the original mortgage, or the satisfaction of the claim.

To deny him the relief demanded would be to appropriate his property, or that of his wards, to a fund for distribution among other creditors without a single equity in their favor.

A distinguished jurist says:

"The doctrine of equitable assignments is justly extended by analogy to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party, and for his benefit; such a person is in no sense a mere stranger and volunteer." Pomeroy's Eq., sec. 1212. (2nd ed.)

And the same author, under head of "Liability for money advanced to pay debts of a person incapable of making a contract," section 1300 says: "He can sue in a court of equity, and stand in the place of those creditors whose debts had been so paid, and recover back the amount of the advance."

The same doctrine has been extended to corporations where the contract of loan was ultra vires. See said section 1300. (Note 2).

"In *Peter v. Beverly*, 10th Peters, 566, it was held that, if an executor pays a debt of an estate, out of his own funds, he becomes a creditor of the estate, and may resort to the trust fund to satisfy his debt. A third party, who, through the executor, pays a debt of the estate, is surely equally the creditor of the estate. Accordingly, it was said by the court, in *Steel v. McDowell*, supra, that 'it is but just that the person making the payment should have the right to look to the fund which the executor holds, and recover it under a count for money paid to the use of defendant, as executor.'" Conger, Adm'r, v. Atwood, 28th Ohio St., 142.

Also the doctrine of *Peter v. Beverly*, further approved in *Lucht, adm'r v. Behrens*, 28 Ohio St., 240.

The case of *Unger v. Leiter*, 32 Ohio St., 210, has no application, the court declaring "a mere understanding, etc., cannot affect the rights of bona fide mortgagees."

Because, "The doctrine of subrogation cannot be invoked when it would work inequitably." Anderson's Law Dic., (Subrogation).

Why, then, should it be refused when justice requires it? The case at bar is not unlike, in principle, a deed at private sale from an heir, before administration, under covenants of warranty to a bona fide purchaser,—the purchase money being used to pay debts of the ancestor. The grantor is entitled to be subrogated upon distribution to the rights of creditors so paid. *Sidener v. Hawes*, 37 Ohio St., 532.

The equitable rights of the appellant to the relief prayed for is further supported by the following authorities, viz.: 37 A. R., 794; 31 N. J., E., 135; 23 Wis., 30; 64 N. Y., 400; 57 A. R., 187; 30 A. Dec., 174; *Jones Mort's* sec. 874; (4th ed.).

The conclusion reached is that A. A. Peck, as guardian, holds the superior equity, and is entitled to priority over all creditors, and the administrator is ordered, first, after costs and taxes, to pay said Peck, guardian, said sum of \$1,900, with interest unpaid, computed at 6 per cent. per annum, without regard to the rate evidenced by the note.

Decree accordingly.

## APPEAL—REPLEVIN.

19

[Hamilton Common Pleas, May, 1897.]

\* HENRY B. WELLMAN V. JOSEPH P. WELLMAN.

On appeal in replevin, judgment on default for a petition may be rendered for the defendant for a restoration of the property without an answer being filed.

On motion to set aside a default judgment in a replevin case coming up from a justice and rendered against plaintiff for failure to file a petition, the defendant having filed no pleading.

BATES, J.

It was held in *Louden v. Clark*, 2 Dec. Re. 161, (1 W. L. M. 598, Portage common pleas), and the ruling was approved in a dictum in *Striker v. Beattie*, 7 Dec. Re. 688, (Hamilton district court), that a pleading by the defendant was necessary in order to render an affirmative judgment in his favor, because it was necessary that he should become an actor in the case, and not a mere resister.

It is difficult to see how this can be correct, for if defendant must become an actor, his right to become such cannot be restricted in time by plaintiff's delay, nor be dependent upon a previous pleading by the plaintiff, and it being now decided (*Bailey v. Swain*, 45 Ohio St., 657), that a general denial is sufficient to enable the defendant to recover, an affirmative judgment, it would follow that defendant could file his general denial at once without waiting for the petition and when there is nothing to deny; which is a *reductio ad absurdum*. Moreover the Code (Rev. Stat., sec. 5824), provides for an assessment of damages on demurrer to the petition which contemplates a case without a valid petition.

The logic, if any, of the ruling no doubt is that plaintiff's default is merely a confession that he has no right or title, and not that defendant has a right, and that a judgment for defendant in damages must rest on a substantial interest in himself, to be averred and proved as a chose in action, whereas a mere confession by plaintiff of a want of title would only entitle defendant to nominal damages, which is a mere mathematical point, for non constat, but that a third person has the title, and hence defendant ought not to recover more without proof and corresponding averment.

But the present statute, (Rev. Stat., sec. 5819 as amended in 1891, 88 L., 273), conditions the replevin bond, not only to prosecute the action, but on judgment against plaintiff to return the property or pay damages at defendant's election, and the circuit court, in *Knight v. Kinney*, 7 C. C., 59, has held that this statute has altered the rule that the bond takes the place of the property. So now the defendant has alternative rights, viz.: a restoration or an affirmative recovery of the value.

Remembering now that a finding on a default by the plaintiff to file a petition, is a confession that he has no right, or is an abandonment of it, or, as is said in *Striker v. Beattie*, supra, is not a judgment, "since damages remain to be assessed to enable the court to pronounce judgment" and is "not a finding upon any claim or demand of the defendants since

\* See decision in *Wellman v. Wellman*, 6 Circ. Dec., 61, reversing this opinion in part.

no pleading whatever was filed by them," and "could not reach beyond what was the only consequence of the default, namely, that plaintiff was not entitled to the possession," it is no doubt still true, if true before, that defendant must file a pleading if he elects to pursue his affirmative right to recover the value.

But if defendant elects not to rest on the strength of his own title by pursuing his chose in action, viz.: the right to value; but prefers to rest merely on the confessed negation of any right in plaintiff and take back his former possession, there is no need of a pleading by him averring what is not only not denied, but is found on the record by default; for to this extent he is now allowed to recover on the weakness of the plaintiff's title instead of on the value of his own. No damages remain to be assessed, no right of action to be prosecuted. In other words, the statute enabling him to elect to have a return of the property because the plaintiff has no claim to it, dispenses with any necessity of his making himself an actor, unless he desires to press his further right of recovery on the strength of his own title, viz.: of damages on the money value of his interest.

II. It is also urged that jury only, and not the court could assess damages. *Wolf v. Meyer*, 12 Ohio St., 432, (criticized in 6 Neb., 464), and *Striker v. Beattie*, supra. But Revised Statutes, sec. 5829, unlike sec. 183 of the old code, enables the court to assess damages on demurrer, or if plaintiff fails to prosecute. However this may be, the question does not arise in his case, for here that part of the default judgment which gave damages was a claim for loss of earnings by being deprived of the use of the property, a team, and being special and not naturally contemplated as arising out of the taking, could not be part of the case until brought in by averment; and an answer filed on the day of the default judgment, setting up such claim, cannot be considered because as to that plaintiff was not in default until rule day, and so far the judgment was erroneous.

III. The claim that the affidavit for the replevin so far takes the place of a petition that plaintiff is not subject to default, is untenable: Thus in *Louden v. Clark*, and *Striker v. Beattie*, supra, leave was refused to let plaintiff file a petition after default. Revised Statutes, section 5824, recognizes a judgment on demurrer to the petition which is on default, and *Taylor v. Grever*, 6 C. C., 269, reverses for defective petition. The affidavit and bond is not a suit, but require a suit to be entered at once.

Hence that part of the judgment by default, which orders restoration of the property, will not be set aside, but the award of damages will be set aside.

Huntington & Holmes, for plaintiff.

Robert C. Taylor, for defendant.

[Superior Court of Cincinnati.]

31

JAMES M. GLENN ET AL. V. FRED RAINE.

For this opinion, see 4 S. &amp; C. P. Dec., 517.

[Hamilton Common Pleas.]

32

RIGHTER V. THORNTON.

For this opinion, see 6 S. &amp; C. P. Dec., 7.

[Anglaize Common Pleas.]

33

JOHN H. VOONHOLT ET AL. V. R. B. GORDON ET AL.

For this opinion, see 4 S. &amp; C. P. Dec., 493.

**ENTAILS—OCCUPYING CLAIMANTS.**

39

[Knox Common Pleas Court, 1893.]

MUNSON HOLLISTER ET AL. V. JAS. S. RAMSEY ET AL.

1. Where property is entailed the estate in the first donee in tail is not a life estate merely, but has all the incidents of a fee simple, until its determination by the death of the donee in tail or his grantees. Until the death of the donee in tail, the heirs have no vested interest in the estate, nor power to assert a title, and cannot be charged with neglect by not asserting a title.
2. An occupying claimant under a mean conveyance from the first donee in tail, cannot claim for improvements made before the death of the donee.

GILL, J.

The question before the court is raised on the motion of plaintiffs asking the court to instruct the jury in their inquest of the value of permanent improvements, rents, etc., on the claim of the defendants in this case, under the occupying claimant law, to limit their inquiry to such improvements as were made after the death of Hannah Hollister, the donee in tail, to-wit, in January, 1883, to the commencement of plaintiffs' action for ejectment against the defendants in December 1884.

It is admitted that the premises passed from Hannah Hollister by mesne conveyances to the defendant in 1869, who has been in possession ever since; that the principal part of the improvements in question were made by the defendant on said premises prior to the death of the donee in tail; that the estate is an estate tail, and that Hannah Hollister is the first donee in tail; that the descent is limited by the conveyance of the ancestor, William Kattoll and wife, to Hannah Hollister his daughter, as follows: "To the said Hannah Hollister and her heirs or children, to-wit, the children begotten by her present husband, Isaac Hollister, to the exclusion of any others and her assigns forever."

What kind of an estate did she take? It is contended by the defendants that she took a life-estate only, and by the plaintiffs that she took a greater than a life-estate. In a life-estate the fee instantly vests in the remainderman, and he can control the estate in the hands of the

holder of the life-estate to prevent waste. The incidents of a life-estate are, that it may forfeit by non-payment of taxes, and the holder is liable for waste, and neither dower or courtesy pass to the relict of the person holding the estate for life.

The plaintiffs contend that the first donee in tail was vested with an estate having all the incidents of a fee simple absolute; that the donee in tail is not liable for waste, and that dower and courtesy passed to the relict of the donee in tail in other words, that it is a fee simple, determinable upon the death of the donee in tail, and descending by inheritance to a limited line of heirs, who, prior to the death of the donee in tail, have only a naked possibility of inheriting the estate; that until the death of the donee in tail the heirs have no vested interest or fee in the estate, or power to control or prevent waste; that the whole fee vests in the donee in tail, and at her death descends by inheritance to the heirs in tail surviving.

The questions of estate tail are fully discussed in the case of Pollock v. Speidel, 17 Ohio St., 439, and in the case of Harkness v. Corning, 24 Ohio St., 416. In the latter case it is held that the estate in the first donee in tail is not a life-estate merely, but has all the incidents of a fee simple, until its determination by the death of the donee in tail, either in the hands of the donee in tail or his grantees. This holding of the court has never been overruled, and the court so holds in this case.

Who is entitled to the benefits of the occupying claimant law? The statute provides in sec. 5786, that "a person in the quiet possession of lands or tenements, and claiming to own the same, who has obtained title for and is in possession of the same without fraud or collusion on his part, shall not be evicted or turned out of possession by any person who sets up and proves an adverse or better title, until the occupying claimant, or his heirs, are fully paid the value of all lasting and valuable improvements made on the land by him, or by the person under whom he holds, previous to receiving actual notice by the commencement of suit on such adverse claim, whereby such eviction may be effected, unless such occupying claimant refuse to pay to the person so setting up and proving an adverse and better title the value of the land."

In the case of McCoy v. Grandy, 3 Ohio St., 467, the subject is ably discussed by Judge Bartley.

To entitle the occupying claimant to claim for improvements, two things must occur. First, that the occupying claimant has a proper title for the lands, and honestly believes himself to be the owner thereof, and has made valuable improvements thereon, and has been ejected therefrom by some one having a superior title. Second, that the party ejecting him from the premises has himself been guilty of some negligence in not asserting his title before the improvements were made.

To assert a title there must be vested interest or fee in the party asserting such title. One holding a naked possibility that he will some day inherit, has no vested interest or fee in the land, and no power to assert his title, and cannot be charged with neglect by not asserting his title. In the case at bar, the court holds: That the plaintiffs had no vested title or interest in the lands until the estate determined by the death of the donee in tail, and cannot be charged with neglect in not asserting title to the lands until the death of the donee in tail; that the defendant is not entitled to payment for improvements by him made on the lands prior to the death of Hannah Hollister, the donee in tail.

The motion is sustained, and exceptions noted.



## LIMITATIONS.

75

[Superior Court of Cincinnati, Special Term, June, 1893.]

\* WM. S. GROSBECK V. E. O. ESHELBY ET AL.

An action for recovery of overpayment on a street assessment, where the mistake was one of calculation by the city's agent, is not barred by the one year limitation of section 5848.

HUNT, J.

This case comes before the court on demurrer to the amended petition.

The plaintiff is the owner of lots and lands in the subdivision of the estate of the late Col. John Riddle, deceased, fronting 1,572.89 feet upon the west side of Clifton avenue, in the city of Cincinnati. On the twelfth day of February, 1887, the city of Cincinnati adopted a resolution, declaring it necessary to improve the said avenue from the north corporation line south to McMillan street, and ordered the same to be improved by grading, setting curbs, paving gutters, macadamizing the roadway, and draining the same, and declared that the cost and expense of the same should be assessed against the abutting property in proportion to the feet front. A contract was entered into with one Charles N. Dannenhauer, on the twelfth day of February, 1887, to do the work. The work was completed, and on the fifth day of January, 1889, the cost was, by special service, assessed against the abutting property.

The plaintiff, relying on the fidelity and accuracy of the agents of the city of Cincinnati to correctly estimate the quantities of work to be done and to compute the same, and relying upon the certification of the completion of the work, did, on the twenty-ninth day of January, 1889, pay to the city of Cincinnati the amount so computed by the agents of the city to be due the defendant, the sum of \$15,351.45. It appears that the agents of the city of Cincinnati erroneously computed the cost and expense of the improvement under the contract upon quantities of work and material, larger than in fact was done and furnished, to the extent of \$1,179.04.

At the time the payment was made, the plaintiff had no knowledge that the computation was erroneous, and had no opportunity to ascertain the fact, and there is an allegation in the petition that if the plaintiff had known that he was so overcharged he would not have paid the bill.

No objection is made to the improvement, and the only claim asserted is that the quantity of work charged for was not done, and that the payment was made under a mistake of fact, without fault on his part. The plaintiff asks to have returned to him the sum of \$1,179.04, with interest from January 29, 1889, being the amount so overpaid.

The defendant demurs to the petition, for the reason that it does not state facts sufficient to constitute a cause of action.

The question to be decided is whether the plaintiff's action is brought to recover back an illegal assessment which has been collected, or to recover back money paid under a mistake of facts.

The statute of limitations alone is relied upon as a defense. Section 5848 of the Revised Statutes provides that the courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and the action to recover such taxes and assessments as have been collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.

This action, as will appear from the petition itself, was not brought within one year.

It is claimed that the statute of limitations is inequitable and not favored. Perhaps the better practice is to plead the statute of limitations as a specific ground of demurrer. Where the petition, however, on its face shows a cause of action which is barred by the statute of limitations, no legal cause of action is stated, and a demurrer, on the ground that the petition does not state facts sufficient to constitute a cause of action, raises the question of the statute of limitations as well as other defects in the petition. *Seymour v. Railway Company*, 44 Ohio St., 12.

There are two general divisions which it evidently was intended the term, "the illegal levy of \* \* \* assessments," should cover; one relates to a statute

\* This judgment was affirmed by the Supreme Court; opinion 51 O. S., 365.

which itself is unconstitutional or illegal; the other, where the statute is constitutional, but the terms have not been complied with so as to create a legal assessment. In both instances the property owner may have received full consideration for his money.

Before the enactment of this statute no such right of action existed, and the legislature certainly intended to limit the right thus created to one year from the payment. There are no words in the statute indicating an intention to bar any other right than the one here created. The term "assessment" means the cost and expense of the improvement—that is, the work and materials which go into the improvement. Indeed, the resolution declaring it necessary to improve the avenue in question also declares that the cost and expense of the same shall be assessed against the abutting property. The power of assessment is thus limited. It certainly was never intended to include an erroneous calculation. The defendant can not well claim the benefit of an error made by its own agents or officers. The word "illegal" no doubt can be employed to convey many meanings, but it can not be used in this statute to mean errors in calculations by agents or employees without apt words to show that intention. The legislature, while enacting a statute which gave this new right, did not intend to cut off a greater right altogether—that of the right in equity to recover money paid without consideration through mistake of fact.

The recovery of money paid through a mistake of fact is one of the original heads of equity. It is founded on the principle that there is no consideration to sustain such payment, and this right is as fully recognized and established as any principle in equity—indeed as much so as any right arising by reason of the fraud of the opposite party, because in equity fraud and mistake are classed together.

In New York it has been held that when an assessment for a local improvement in the city of New York, valid upon its face, and an apparent lien upon the lands assessed, but which is in fact, by reason of facts *de hors* the record illegal and void in part, is paid by the owner of the lands in ignorance of the illegality, he may, on the discovery thereof, maintain an action in equity against the municipality to set aside the assessment as to the illegal excess, and to recover the same; *Strusburg v. The Mayor*, 87 N. Y., 452. Earl, J., in deciding the case, uses this language: "But this is an action in equity, and the relief prayed is for judgment declaring the assessment invalid to the extent of the overpayment claimed by plaintiff, and then to recover the amount of such overpayment. Why may not such an action be maintained? There is no case in the books holding that it can not be. \* \* \* Here is a case where it is conceded that the plaintiff is equitably and justly entitled to the sum which he seeks to recover. The only obstacle in the way is the unvacated assessment. That obstacle, without any fault of his, he cannot overcome in an action or proceeding at law. No degree of vigilance which could have been expected or required of him would have enabled him, before payment, to discover the illegality of the assessment. Unless, then, he can have equitable relief, there will be a wrong without a remedy—an absolute failure of justice.

"It will not be against public policy to allow an action, under the circumstances of the case, to be maintained. The assessments have been collected, and the revenue for public purposes has been realized. It will be no more embarrassing for a municipality to be compelled to pay this debt than to pay a debt of any other kind. Under such circumstances there can be no public policy which will be served or promoted by depriving a citizen of the money justly due him, and leaving it where it has been placed by the illegal action of a municipality or its officers."

In *Woolley v. Staiey*, 39 Ohio St., 354, it is distinctly held that money paid under a mistake of facts, and without consideration, may, as a general rule, be recovered back. It is assumed that the calculation made by the officer acting for the city was made in good faith. His action justified the belief on the part of the plaintiff, that the money he seeks to recover was properly charged to him, and it is clear that it was paid by him under that belief. It is admitted that the calculation was erroneous as to quantities of work and material furnished under the contract, and the city collected for this amount in excess of the actual work performed and material furnished.

The plaintiff has brought an action for an injury to his rights not arising on contract, and not otherwise enumerated in the general provision relating to the statute of limitations. The action, in the judgment of the court, is not barred by section 4982, of the Revised Statutes, and the demurrer will, therefore, be overruled.

W. H. Whittaker, for the demurrer.

Isaac J. Miller, *contra*.

## CORPORATIONS.

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[Superior Court of Cincinnati, General Term, June 16, 1893.]

## SPORTSMAN SHOT CO. V. AMERICAN SHOT &amp; LEAD COMPANY.

A large number of shot companies desiring to unite their interests organized a corporation which should be the owner of all their properties. The property, real and personal, of each company was thereupon transferred to the new corporation, who in payment therefor transferred to each of said companies, such a number of its shares of stock in the new corporation as the value of the property transferred entitled it to have.

Subsequently one of the companies becoming dissatisfied with the arrangement, brought an action against the new corporation for a rescission of the sale, upon the ground that the formation of the new corporation and the exchange of its shares for property, as aforesaid, was an arrangement in restraint of trade, and tended to create a monopoly, and was therefore void. *Held:*

1. That as the plaintiff could not tender back all the shares of stock received by it for its property, it could not ask for a rescission.
2. The fiction that a corporation is a legal entity distinct from the persons who compose it can never be resorted to, when it enables the persons composing the corporation to work an injury to anyone.

SMITH, J.

This is a suit brought by the Sportsman's Shot Company, a corporation under the laws of Ohio, against the American Shot and Lead Company, a corporation under the laws of Illinois, to rescind and set aside a sale of the real estate and personal property of the Sportsman's Shot Company to the American Shot and Lead Company, made on the twenty-second day of October, 1890.

The American Shot and Lead Company was incorporated under the general laws of the State of Illinois, receiving its certification of incorporation August 27, 1890. The object for which it was formed was to manufacture, deal in and sell in Illinois and other states, shot, lead and all articles manufactured therefrom and therewith.

Section 5 of the law under which this company was incorporated provides among other things, that it may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of its business, etc.

The authorized capital stock of the American Shot and Lead Company is \$3,000,000, divided into 330,000 shares of \$100 each, and the subscribers thereto were L. B. Chapman, one share, paid in cash. A. N. Eastman, one share; unpaid. A. W. Bulkley, 29,988 shares, which were paid by the transfer of properties to the amount of \$2,105,668.66, which were received by the company in satisfaction of said subscription to that amount. The balance of said subscription was paid by the surrender to the company by said Bulkley of his right to the stock, the board of directors by vote releasing him from further liability on his subscription, and the company becoming the owner of the unpaid and unissued shares.

After the incorporation of the American Shot and Lead Company on September 27, 1890, the Sportsman's Shot and Lead Company of Ohio, through its board of directors, passed a resolution authorizing the president and secretary of said Sportsman's Shot Company to sell and convey all the real estate, buildings, appurtenances, machinery, tools, apparatus, furniture, fixtures and good will, and also \$16,666.66

in value of its stock and account, to Almon W. Bulkley, or the American Shot and Lead Company, for the purchase price of \$133,333.33, to be paid in the stock of the American Shot and Lead Company.

On the same day the stockholders of the Sportsman's Shot Company, representing all of its stock, held a meeting and passed resolutions ratifying and confirming the action of the board of directors, directing the directors and officers of the Sportsman's Shot Company to distribute the stock received for the sale of said property among the stockholders of the Sportsman's Shot Company in proportion to the amount of stock held by them respectively; and directing that the stockholders therein surrender their stock to the secretary of the company for cancellation, releasing all rights as stockholders; and that the company go into liquidation, settle up its business, distribute its remaining assets, and thereupon stand dissolved.

On the same day, pursuant to these resolutions, the Sportsman's Company executed a deed conveying its real estate to the American Shot and Lead Company, and at the same time executed a bill of sale conveying all the personal property so sold to The American Shot and Lead Company. This action was taken by all the stockholders and all the directors of the Sportsman's Shot Company. Afterwards, on October 2, 1890, Mr. Murdock, as the representative of the Sportsman's Company, delivered certified copies of the resolutions aforesaid, together with the deed and bill of sale, to the American Shot and Lead Company in Chicago, and received therefor four certificates of the capital stock of the American Shot and Lead Company; one for 261 shares to Wesley M. Cameron; one for 186 shares to Wm. J. Lawler; one for 445 shares to Patrick J. Roach; and one for 545 shares to Edwin H. Murdock; that being the amount of stock of the American Shot and Lead Company each of those parties were entitled to under the resolutions of the stockholders directing the officers to distribute the stock received.

Afterwards Mr. Farrell, the president of the American Shot and Lead Company, came to Cincinnati and took formal possession of the property by symbolical delivery, and placed the same in possession of Mr. Murdock, on behalf of the American Shot and Lead Company, in whose possession it has remained ever since that date, and has been managed, controlled and operated by The American Shot and Lead Company as owner thereof.

These resolutions, passed by the Sportsman's Shot Company, were certified with the intention that Murdock should take them to Chicago. He took them to Chicago and delivered them to the officers of the American Shot and Lead Company, together with the deed and bill of sale. He also took a memorandum showing the interest of each stockholder in the Sportsman's Shot Company. Upon presentation of these resolutions and conveyances, the American Shot and Lead Company issued the certificates of stock aforesaid to the stockholders as appeared on the memorandum which stated the amount each party was entitled to, and which was then and there presented by Mr. Murdock.

Mr. Murdock came back from Chicago, and delivered the certificates of stock issued to Lawler, Roach and Cameron to them, or to Lawler for them—at least, each received his certificate.

From the foregoing statement of fact, it appears that this is an action in which a large number of shot companies undertook to form a corporation by uniting their interests and conveying their property to the new corporation in the payment of their stock.

The contention is that this arrangement was illegal. That it violated the law of trusts, and that the entire proceeding was void, and the Sportsman's Shot Company now seeks to recover back its property.

It is not disputed that the Sportsman's Shot Company, all of its directors and all of its stockholders, were well aware of all the facts upon which it is now relied in the contention that the arrangement was illegal.

The main question which confronts us at the threshold is whether this, being a proceeding in equity to set aside and rescind a contract of sale, the plaintiff comes into court with clean hands. The plaintiff is seeking a rescission of a sale which it voluntarily, for valuable consideration, without misrepresentation or fraud, made of this property to the defendant company, we do not think the plaintiff is in any position to demand rescission. It cannot possibly restore the defendant company to its original situation, although a majority of the shares given and received in payment for plaintiff's property are tendered back, because Mr. Murdock who owns 445 shares of the par value of \$44,500, refuses to join with plaintiffs in this proceeding.

It is an essential condition precedent to the obtaining of a rescission of a contract, that the party demanding the rescission should offer to restore the other party to his original position.

The contention of the plaintiff, however, is that the Sportsman's Shot Company never received these certificates of stock which was the consideration for the transfer of all its property to the new corporation, but the stock went to the individual stockholders of the company. But we do not think this contention is sound. It is true that for certain purposes the law will recognize the corporation as an entity distinct from the individual stockholders; but that fiction is only resorted to for the purpose of working out the lawful objects of the corporation. It is never resorted to when it would work an injury to any one, or allow the corporation to perpetrate a fraud upon anybody.

In this case it is true that the stock in the new company was given the individual stockholders of the corporation in Cincinnati; but it is also true that it was given to them in pursuance of a resolution of the corporation directing the shares of stock to be delivered to the individual stockholders.

We are unable to see how a corporation which has directed a delivery to its individual stockholders is in any position to say that, after the party with whom it has dealt has followed that direction, the corporation itself has not received the stock.

In this case, as I have just stated, all of the stockholders in the Sportsman's Shot Company do not unite in this application to rescind the sale. There is \$44,500 worth of stock still held by Mr. Murdock, which the plaintiff is unable to tender back. We think the application of simple principles in equity determines this case, and we are therefore not called upon to express an opinion upon many other serious questions which have been very ably and learnedly argued here by counsel on both sides as to the validity of a transaction of this kind. Those questions would be presented to us for solution if the plaintiff were in a position to tender back all the stock; but that not being the case, we think it is the duty of a court of equity to leave these parties where it finds them.

The petition will therefore be dismissed.

MOORE and HUNT, JJ., concur.

Alfred Yaple, for plaintiff.

Paxton & Warrington, A. W. Buckley, for defendant.

## EVIDENCE OF GIFT.

[Hamilton Common Pleas, June, 1893.]

## WM. McCAMMON, JR., v. DILLABY &amp; ROBSON, EXECUTORS.

That U. S. bonds on which the testator had always received the interest, found in his safe deposit box after his death, had been registered in his son's name and were without the latter's indorsement, is not presumptive evidence of a gift to or ownership in the son.

In the safe deposit box of Wm. McCammon, Sr., were found, after his death, \$3,500 in registered U. S. four per cent. bonds, payable to his son, the plaintiff, who is now demanding them. The executors refuse to deliver except in accordance with the will which bequeathed them to the plaintiff's sons.

The bonds are dated January 2, 1879. The testator's books show continuous quarterly receipts by him of the interest on these bonds from October, 1881, to his death in 1890, the evidence being that he sent the interest checks to his son with the demand for his indorsement, which was given without objection, and thus obtained it. These books of testator were admitted over plaintiff's objection, and the executors also offered in evidence McCammon, Sr.'s, will, leaving the bonds to those grandsons; and several schedules made by McCammon, Sr., during the past ten years of his investments, showing that he held many bonds in the names of various of his children, the schedules stating that these were his property, and were to go as his will should provide. The will and schedules were objected to by plaintiff, and admitted provisionally, i. e., reserving the ruling on them until final decision.

Plaintiff being ineligible to testify, this comprehended all the evidence of any value.

BATES, J.

I. To dispose of the preliminary questions of the evidence first.

(a.) The account book of McCammon, Sr., will be considered evidence, not only as his account book, but also as declarations against interest.

(b.) The will and schedules are self-serving declarations, and though similar declarations were considered in *Lewis v. Mason*, 84 Va., 731, 739, admitting the will to nullify evidence of gift; *Snowdon v. Reid*, 67 Md., 130, 134, and *Matter of Crawford*, 113 N. Y., 560, 565, admitting the subsequent schedules of investments, the former as showing the vacillating nature of his intentions as to the alleged gift. *Scott v. Berkshire County Savings Bank*, 140 Mass., 157, also admits a class of later declarations; yet without examining now what declarations by one in possession as to the nature of his possession are competent, I will assume the law to be that declarations would be admissible before a gift is perfected, but cannot after that derogate from the donee's title and will discard them on the question of whether the gift was or was not perfected. If it should be decided hereafter that these declarations are competent, it will relieve the case of all doubt. I will examine it on a more difficult ground.

II. Plaintiff urges the very powerful argument that where the payee's name is part of the bond itself, he has the original and absolute legal title, and the decedent having parted with all dominion and power

to control the bond or collect the interest has nothing left to deliver, because the legal title presumptively carries all beneficial interests with it; and if the decedent is allowed to prove the payee's title to be less than absolute he must show it affirmatively; the only question being one of burden of proof, or rather of weight of evidence.

(a.) I will first examine the authorities which I have been able to gather bearing nearly on this interesting question.

In *Francis v. N. Y. & Brooklyn Elev. R. R.*, 17 Abb., N. Cas. 1, and *Roberts' appeal*, 85 Pa. St., 84, a man transferred stock on the books of a corporation into the names of children (they had no knowledge of it, and he retained possession of the certificates), it was held that he had parted with the absolute title and with the control and dominion, and that it was a completed gift. In the former case, however, he was seeking a rescission as against the corporation, and the court said that, having disabled himself to tender back the stock, he could not recover, hence the rest of the case is obiter. Moreover, *Creed v. Lancaster Bank*, 1 Ohio St., 1, holds that a stock subscription in a child's name is only prima facie a gift and rebuttable. In *Matter of Townsend*, 5 Dem., 147, (N. Y. Surrogate), registration of corporate bonds in a child's name was held an accomplished gift, but by comparing names and dates I am satisfied that this case is the same as *Matter of Crawford* below, and reversed by it.

In *Standing v. Bowring*, 27 Ch. D., 341, affirmed in 31 Ch. D., 282, a woman caused £6,000 consols to be transferred into the joint names of herself and her god-son, he knowing nothing of it. She now asks that he be compelled to retransfer to her, and the court refuse to compel him, holding that assent of the donee is not necessary at common law, unlike the civil law the title vesting in a donee until he repudiates, and that the gift was complete and not revocable. In this case the intent to give was shown, which does not appear in our case, and the non-necessity of assent cannot be said to be true of American law, as will appear hereafter.

*Dummer v. Pitcher*, 2 M. & K., 262, and *George v. Bank of England*, 7 Price, 646, decide that a transfer of bank stock into the joint names of the donor and donee, is prima facie a gift on survivorship of the donee.

On the other hand, in *Matter of Crawford*, 113 N. Y., 560, T. bought coupon bonds of a corporation payable to bearer, saying he wanted them for C., his daughter. T. afterwards told his banker to have them registered in C.'s name. The banker took them to the company's office and C.'s name was there endorsed on each with the name of the transfer agent. C. knew nothing of the transaction, T. keeping possession of the bonds during his life-time and collecting the coupons. The court held that there was no delivery to C., and therefore no completed gift, and said they were not prepared to say that the indorsement passed title. The intent to give and getting the indorsement is not a delivery, and T. could change his mind, even though the intended donee would have to aid in effectuating the change. Merely rendering the bonds non-negotiable by registration in another's name is not a transfer of title, unless there is a delivery. On p. 567, the court put a different case, saying if the owner of stock, intending to give it to A. surrenders the scrip and gets new scrip in A's name, he does not by the mere change of title on the books while retaining possession and control accomplish a valid executed gift, however difficult it might be to get them back in his own name, and the intended donee could not sue him to get possession.

In *Telford v. Patton*, Sup. Ct. of Ill., 1892, 33 N. E. Rep., 1119, Samuel Telford deposited \$2,600 in a national bank and took a certificate of deposit reading "L. J. Patton has deposited \$2,600, payable to the order of himself, on return of this certificate one year after date with 6 per cent. interest." Telford died within the year, never having delivered the certificate to L. J. Patton, who was a lady to whom he was paying attentions, and she brought replevin for it against his administrator. The money could not be drawn except upon the payee's indorsement, and the bank had no knowledge of the lady. It was held that no title passed to her because there was neither delivery of the subject of the gift nor evidence of an intent to give. Telford might have deposited in an assumed name.

The cases as to depositing money in a savings bank in the name of another without his knowledge, will be found collected in 30 *Central Law Jour.*, 201, and 34 *Solic. Jour.*, 452; but as in all of them the depositor could draw on the fund, they do not help this investigation.

In *Scott v. Berkshire Co. Savings Bank*, 140 Mass., 157, Betsy Ford deposited money in plaintiff's name in a savings bank; two years afterwards she had the plaintiff sign an order so that she might draw it, but she died without withdrawing from the account, or ever having parted with the pass book. There were some declarations that plaintiff was not to have the money, and others that she was to have it. It was said: "If the donor made the deposit and kept the book for plaintiff, intending it as a gift to her, the gift would not be perfected until acceptance by the donee; and acceptance implies a mutual act of parties, or an act of one assented to by the other equivalent to an acceptance of a chattel upon delivery." See also *Pierce v. Burroughs*, 58 N. H., 302, requiring assent of both parties, and 64 N. H., 228.

In this state of discordance among the authorities the doctrine must be examined on principle, and by proceeding from the known to the unknown.

(b.) Kent (quoted in *Flanders v. Blandy*, 45 Ohio St., 108, 113), says of gifts: "The necessity of delivery has been maintained in every period of English law," and this is supported by every decision in this opinion (even an assignment for creditors requires delivery: *Johnson v. Sharp*, 31 Ohio St., 611). Three great English judges, *Standing v. Bowring*, supra, held, though with doubts that assent in England, unlike the civil law was not necessary, and that the gift vested in the donee with a right to repudiate it when he heard of it; but this is far from being supported by the American cases, some of which are distinctly the other way, and all of them in case of gifts to infants or imbeciles injecting the fiction of an implied assent as a rule of law arising from the benefit, thus assuming its necessity.

A purchase of land in the name of an infant child is presumed to be an advancement: *Vanzant v. Davies*, 6 Ohio St., 52; *Creed v. Lancaster Bk.*, 1 Ohio St., 1. If an owner puts on record a deed to his infant child, the reasonable presumption is of intent to pass title, though the grantor kept possession of the deed and the child was not informed of the transaction, assent being by a rule of law presumed from the benefit. *Devlin on Deeds*, sec. 286; *Mitchell v. Ryan*, 3 Ohio St., 377; *Eastham v. Powell*, 51 Ark., 530; *Huse v. Den*, 85 Cal., 390; *Reed v. Douthit*, 62 Ill., 348; *Colee v. Colee*, 122 Ind., 109; *Compton v. White*, 86 Mich., 33; *Tobin v.*



Bass, 85 Mo., 654; Spencer v. Carr, 45 N. Y., 406; Davis v. Garrett, 91 Tenn., (18 S. W. Rep., 113).

But every one of the above cases also hold that this presumed intent can be rebutted by proof that the record was not made for that purpose. And the cases holding that record by the grantor of a deed to an adult is presumably a delivery, also hold that this is rebuttable, as in Glaze v. Ins. Co., 87 Mich., 349; Burke v. Adams, 80 Mo., 504; and Swiney v. Swiney, 14 Lea., 316; while Devlin, sec. 290, and Washburn Real Prop., p. [577.] say that such act is not even sufficient to constitute a delivery at all to which add Weber v. Christen, 121 Ill., 91. The intent successfully rebutted in Hendricks v. Rason, 53 Mich., 575, of a deed to a wife recorded by the grantor of which he kept possession, and never informed her the holding that the jury's finding of no delivery was sustained by the evidence. Stevens v. Castel, 63 Mich., 111, of a deed to a third person and by him to the grantor's wife to evade creditors, but the grantor told the recorder to give them to no one but himself, and he kept the papers all his life, the wife being aware of the transaction; there was held to be no delivery, and her vendee after separation of the spouses could not recover. In McGraw v. McGraw, 79 Me., 257, the grantor's record of deeds to his wife through a third person and without her knowledge, or a delivery to her, were held not to pass title.

(c.) Although recording a deed to a child or subscribing for stock in his name are equivalent to delivery and presumptively gifts, yet substantial differences between those acts and the registering of a bond easily appear.

1. The deed is not the property but mere evidence of title, and people are proverbially careless of it after record, and do not need its presence or possession to effect a valid transfer over. Stock certificates are not the property, but only secondary evidence of what is on the corporate books, and cannot be sold on execution; the interest in the corporation being the property. But the bond is the government's promise itself, like a bank note, and the books are a record of the bond, and not the bond a certificate of the contents of the books, and possession of it is necessary to a transfer. Hence, non-delivery of the bond is a retention of the property itself, and negatives a consummated gift, unlike keeping possession of the recorded deed, for the possessor of the bond is in possession of the property.

2. Recording the deed is not part of the deed, but a later, extraneous and independent act, which the grantor need not have done until he has made up his mind to complete the gift, and hence this gratuitous act involves naturally a presumption of intended delivery. Whereas, an unexecuted intent to give a registered bond involves a registry in the intended donee's name, to create the desired subject of the gift without thereby effecting or implying a final execution of the intent to assign, sell, or give it to the payee.

3. Recording the deed is a proclamation to the world that the grantee is the owner, yet being rebuttable it is not such a proclamation to the donee himself if there was a reservation of a more restricted meaning in the act. But registration of the bond is not a proclamation to anybody, but a secret act requiring no restrictive language to qualify an apparent significance, for it does not invest the donee with any power of disposition, and hence is but one step in the execution of the intent.

From the above it follows that registration does not consummate a transfer of property, and that until delivery of the bonds no gift is completed. But the case is not even so strong as this because even an intent to give which is always necessary (88 N. Y., 520, cases supra), nowhere appears. Hence several other hypotheses are possible. Thus the decedent may have taken them from his son as collateral for a debt and omitted indorsement because not expecting to sell out his son. Decedent may have agreed to sell them to his son, and was awaiting his convenience for payment. Decedent may have bought them in his son's name, intending to give them to his son at death, which would be a testamentary intention and void.

To say that there was a completed gift, means that the son could have forced the decedent to have delivered the bonds to him. If the father's retention of possession is not sufficient to establish his right until the plaintiff disproves it, his collection and use of some forty continuous installments of interest are presumptively indicia of ownership.

Judgment for the defendants.

W. M. Ramsey and J. E. Bruce, for plaintiff.

T. B. Paxton and Goebel & Bettjinger, for defendants.

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### DIVORCE JUDGMENTS.

[Franklin Common Pleas, June, 1898.]

#### MARY B. VAN DERVEER V. GARRETT VAN DERVEER.

A judgment of divorce rendered on service by publication may be opened up by the defendant within five years from its rendition, under sec. 5355 of the Rev. Stat.

A judgment of divorce was rendered in this case on February 17, 1893, on service by publication duly made against the defendant, a non-resident of the state. Afterward in June, at a subsequent term, the defendant filed his motion to have said judgment opened up, and that he be given leave to defend and file his answer.

Arnold & Morton, for the motion, claimed that section 5355 was so general as to include a judgment of divorce, and that the right given a divorce defendant there could not be taken away on the ground that the giving of the same was against public policy, citing *Probasco v. Raine, Auditor*, 50 O. S. 378. Also citing *Endlich on Interpretation of Statutes*, section 5, and *Story's Constitution*, section 426, 507 and 524.

Counsel for defendant also claimed the cases of *Smith v. Smith*, 20 Mo., 166, and *Lawrence v. Lawrence*, 63 Ill., 577, which are cases upon similar statutes, sustained defendants position. They also cite *Black on Judgments*, sec. 320, and *Bishop on Marriage and Divorce*, secs. 1533 and 1534.

Charles Case, against the motion, claimed sections 5355 et seq. applied only to property interests, and that divorces in the state of Ohio are absolute from the granting of a decree, citing *Cheever v. Wilson*, 9 Wall., 108, 14 Howard, 334.

Counsel also cited the *Parish case*, 9 Ohio St., 534, as sustaining his petition that a decree of divorce was absolute and could never be reopened, and claimed that section 5355, substantially as it now is, was in

force when that case was decided. Counsel also referred to the Greene case, cited in the Parish case, and claimed that Block on Judgments as referred to by counsel for defendant would not support their theory, and that the law as laid down by the Supreme Court of Ohio in the Parish case is the law of today.

ABERNATHY, J.

The question raised by the motion here is an important one, both because it involves the social status of parties seeking divorces, and complications are likely to arise should such motions be granted, and because it is the well settled understanding of the bar that judgments of divorce cannot be opened up.

After careful consideration of the question the court is compelled to decide this question contrary to his former convictions, but fails to see how any other construction can be given to section 5355, and especially considering the recent decision of the Supreme Court in the case of Probasco v. Raine, Auditor, supra.

Section 5355, is general in its terms, and applies to any judgment rendered in the common pleas court, and the court after diligent search is unable to find anything in the statute recognizing, either expressly or by implication, an exception in judgments of divorce, or indicating a legislative intent to withdraw or except judgments of divorce from the general provisions of this section.

While the court is convinced that it is against public policy that decrees of divorce should be opened up, particularly where the relations of the parties have changed as by subsequent marriage and the birth of children, yet section 5355, being general in its terms, gives a right to the defendant here which cannot be taken from him simply because the granting of it was contrary to public policy. According to the rule laid down by the Supreme Court of Ohio in the case of Probasco v. Raine, Auditor, supra, that the validity of an act passed by the legislature must be tested alone by the constitution, the courts have no right or power to nullify a statute, or to take away a right given by a statute, upon the ground that it is against natural justice or public policy.

In the court's view of the question, the legislature must provide the remedy by future legislation; particularly in cases where the parties have subsequently re-married.

Therefore the motion of the defendant is sustained, and the judgment of divorce is opened up, and the defendant given leave to file his answer and defend.

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[Franklin Common Pleas.]

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D. S. AMBACH v. B. & O. RY. CO.

For this opinion, see 4 S. & C. P. Dec., 467.

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[Stark Common Pleas.]

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LORENZ ZIGLER v. WILLIAM ROMMEL.

For this opinion, see 4 S. & C. P. Dec., 472.

## LIFE INSURANCE—DESCENTS.

[Stark Common Pleas, 1893.]

## CAVIE RICHARDSON, ADMR., v. JOHN B. MICHENER, ADMR., ET AL.

In 1860, S., who was then married to A., his second wife, and had by her an infant son, and had also a daughter by a former marriage, caused his life to be insured in the sum of \$5,000<sup>0</sup> for the sole use and benefit of his wife A., and his children by her, with a provision in the policy which states: "In case of the death of the said beneficiary before the death of the person whose life is assured, the amount of the assurance shall be payable at maturity to the heirs or assigns of the said person whose life is assured." The son died in 1880, without estate or debts. S. having paid all the premiums on the policy, died in 1892, leaving surviving him A., his widow, the sole surviving beneficiary named in the policy, and his said daughter by his former marriage. And his said widow died in less than a month thereafter, without issue, and intestate. The company having admitted its liability, and the parties having interpleaded as to the fund,  
*Held:*

1. The widow, as survivor of the beneficiaries, was entitled to the whole fund.
2. The proceeds of the policy did not come to her as a deed of gift under the provisions of sec. 4162 of the Rev. Stat. of Ohio, from her husband, and therefore did not descend and pass to his heirs.

## McCARTY, J.

This action was submitted to the court on an agreed statement of facts, and relates solely to the disposition of the proceeds of a policy of life insurance.

On April 15, 1869, Arthur B. Siess caused his life to be insured in the sum of \$5,000.00, in the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, for the benefit of his wife, Anna E. Siess, and his children by her. Anna E. Siess was the second wife of Arthur B. Siess, and at the time the insurance was effected, they had by that marriage one son, Arthur B. Siess, Jr., who was then about eleven months old. No other children were ever born of that marriage. Arthur B. Siess by a former marriage had one daughter, now Mrs. Lounsberry. The son, Arthur B., Jr., died Feb. 2, 1880, aged eleven years, eight months and nine days, without estate or debts, and ten years or more after said insurance was effected. Arthur B. Siess, the assured, died Jan. 26, 1892, leaving his wife (widow), and Mrs. Lounsberry, his only child, surviving him. His widow, Anna E. Siess, survived him less than a month; she died on Feb. 20, 1892, intestate, and without issue, leaving as next of kin two sisters and some nephews and nieces, named in the petition, children of a deceased brother and sister.

Arthur B. Siess paid the premiums on the policy of insurance during his life-time. The Insurance Company admits its liability, and has in fact paid the money over, and it is now in a bank in this city, awaiting the result of this action. The parties to this action have interpleaded and have set up their respective claims to the fund. The plaintiff, as administrator of Mrs. Siess, claims the fund. An answer and cross-petition by the heirs of John Eckert, deceased, a brother of Mrs. Siess, and also the heirs of Mrs. Ebersole a deceased sister of Mrs. Siess, the heirs of each

claiming the share of their deceased parent, as next of kin of Mrs. Siess. The administrator of Arthur B. Siess claims the fund as belonging to his estate. Emma Lounsberry claims that on the death of Arthur B. Siess, Jr., one-half of the proceeds of the policy at maturity vested in the heirs of Arthur B. Siess, his father, and that she is the only heir. She claims also that, as Mrs. Siess died intestate and without children, that so much of it as belonged to her was a deed of gift from her husband, and therefore would descend to her, Mrs. Lounsberry.

The questions are: Does it belong to the estate of Mrs. Siess? On the death of Arthur B. Siess, Jr., at maturity, where did his portion vest, in the survivor or in the heirs of the assured? Did Mrs. Siess receive this as a deed of gift from her husband so that on her death, without issue and intestate, it would, under the statutes, sec.4162, go to her husband's estate? How should it be distributed?

Those are the questions to be determined. The policy contains what the parties intended should be the contract. Its provisions, that particularly relate to and form a part of our matter for consideration, are as follows:

"This policy of insurance, in consideration of the representations made in the application therefor, and of the annual premiums in advance consisting of an annual premium note of one hundred and fifty-two dollars, — cents (the interest upon which must be paid annually at the date of the maturity of the annual premium), and of the annual cash premium of one hundred and sixty-nine dollars and twenty cents, to be paid at or before noon on or before the fifteenth day of April in every year during the continuance of this policy, doth assure the life of Arthur B. Siess, a blacksmith of Canton, in the county of Stark, state of Ohio, for the sole use and benefit of Ann E. Siess, his wife, and his children by her, in the amount of five thousand dollars, for the term of his natural life.

"And the said company doth hereby promise and agree to pay the said sum assured at its office to the said beneficiaries, or their executors, administrators or assigns, in sixty days after due notice and proof of the said person whose life is hereby assured (the balance of the year's premium and all notes given for premiums, if any, being first deducted therefrom). In case of death of the said beneficiary, before the death of the person whose life is assured, the amount of the assurance shall be payable at maturity to the heirs or assigns of the said person whose life is assured."

Now, this policy of insurance should be construed as other contracts, with a view of arriving at the intention of the parties. The intention at its inception is manifest; provision for the sole use and benefit of Anna E. Siess, his wife, and his children by her in the amount of \$5,000.00 after the term of his natural life. There was no intention then to provide for any person except his wife and his children by her. While it is true that by the terms of the policy, in case of the death of the beneficiaries, the amount was to be paid at maturity to the heirs or assigns of the assured, this was not his primary object. This provision was intended for the benefit of his estate, so that after those he intended primarily to benefit were dead and could not receive it, his estate which had produced it, would be entitled to it for his heirs next after his beneficiaries, rather than that the company should have it. Is there anything in his subsequent conduct that manifested any change in this respect? He could have, after the death of his son, changed the beneficiaries. He need not

have paid the premiums after that event; he could have had his own way about it, notwithstanding the vested interest of his wife in the policy. I have no doubt that after taking out a policy of insurance there then vests in the beneficiary or beneficiaries a vested interest that is subject only to be divested in this sort of contract, by their death. Whatever interest there is, whether it comes by way of a paid-up policy after failing to pay the premiums, or at the death of the assured, it is such an interest as comes to the beneficiary. He was providing then, at the inception of the policy, for the sole benefit, after his death, of that family. The terms of that contract excluded from any participation in it, his daughter by a former marriage, except in the case of the death of the beneficiaries, in which event it was to go to his heirs, but the primary object and controlling purpose in his mind at that time was to provide for his wife and his children by her; that was the family that was to be provided for by this arrangement. While many of the authorities hold that the husband causing his life to be insured for the benefit of his family, that the acts of the husband in that regard and in paying the premiums were as the agent of the beneficiary, and suppose that is true, the light shed on the transaction by his acts is but reflected from them, and his acts are in that regard their acts, and the meaning that the parties intended to have them express do so just as much as though they did the acts and said the words themselves. Our statute, sec. 3628, authorizes such insurance for the benefit of the family of the assured, and our exemption laws and the liberal construction put on them by our courts, show the current thought of the judicial mind in giving interpretation to statutes which provide for exemption to the defendant's family, to widows and to orphans. In 1850, the statute relating to homestead exemption contained this provision in substance:

Every widower or widow having an unmarried minor child or children residing with him or her, may hold exempt from execution a homestead in value not exceeding \$500.00. The statute then required that in order to hold exempt the homestead to a widow or to a widower, either, they must have residing with them an unmarried minor child or an unmarried daughter. The statute now provides, husband and wife living together, or a widow or widower living with an unmarried daughter or minor child, may hold exempt a family homestead not exceeding \$1,000; that the surviving widow alone may hold exempt from execution, and exempt from sale on petition to pay debts, a homestead not exceeding \$1,000 in value. So also may the minor child, if there is no widow, hold exempt from a sale on petition to pay debts a homestead to the value of \$1,000. It is the duty of appraisers to cause to be set off in the first instance such homestead.

Section 5427 of the statutes provides that a person who belongs to a benevolent society may take out a policy of insurance in that society, and no matter how much he is indebted, may make provision for his wife or his children, or any member of his family in a sum not to exceed \$5,000, notwithstanding his indebtedness in any amount; so that the current trend of sentiment by all parties is to make provision ample, broad and wide, for those who are dependent on husband or father for support. And all these statutes, whenever they have been subjected to judicial construction, have been liberally construed, holding thereby secure, above and beyond every other consideration, the provision made by the statute or

contract of insurance for the widow or dependent children of the debtor.

On this branch of the case, we are to reach a conclusion as though Mrs. Siess were still living—I have already stated that she died less than a month after the death of her husband, intestate and without children. We are aided by what the assured did, and by the current thought and evident tendency of the holdings of our courts in analogous cases, as to what would be a proper holding on this branch of the case before us; but unaided by the light deduced from cases parallel to this, do not reasons given show that if Mrs. Siess were living, the widow, sole survivor of the named beneficiaries, that she is entitled to the fund; I believe that the reasons given warrant the court in holding that the estate of Mrs. Seiss is entitled to the whole fund on this branch of the case, not only to what she received by virtue of the fact that she was one of the beneficiaries, but also that she, as the survivor of her deceased son, is entitled to the portion that would otherwise have gone to him, had he lived until after the death of his father.

While many of the authorities bear more or less directly pro and con on the subject, the court of appeals of Kentucky have passed on almost this identical question, and I desire to call attention to that case briefly. On page 466 of the twelfth volume of the Reporter is this case, and I will read the syllabus of the case and some portions of the decision:

“A life policy, as between the assured and the insurer, is strictly a contract, and is subject to the general rules which govern the interpretation of other contracts; with respect, however, to beneficiaries, it is a testamentary provision rather than a contract.

“The share of a beneficiary, upon his death, passes to the surviving beneficiaries under the policy, and does not revert to the assured.”

“Interpleader. On April 1, 1872, B. F. Crowfoot insured his life in the Connecticut Mutual Life Insurance Company for the sum of \$5,000, payable to his wife and children, or their representatives. At the date of the policy, the insured had three children, all minors and unmarried. In a few days thereafter his wife died. He continued to pay the annual premiums, as they fell due, until April 7, 1878, when he died, having survived all his children, two of whom died in infancy, and unmarried, and one, having married, left an only child, the appellee, W. T. Duvall, and her husband, surviving her. Before his death, and after the death of all his children, the insured assigned and delivered the policy to his niece, the appellant, Hattie E. Robinson, intending it as a gift to her. The executor of the insured, the guardian of the infant grandson, W. T. Duvall, and Hattie E. Robinson, all claiming the proceeds of the policy, the insurance company brought its petition of interpleader and paid the money into court, and the court having adjudged it to W. T. Duvall, Robinson alone appealed.”

Elliott & Atchison, for the appellant.

Lane & Harrison, for the appellee.

The opinion is given by Judge Cofer. In delivering the opinion, the court said: “A life policy, as between the assured and the insurer, is strictly and only a contract for the payment of money upon the happening of a contingency, uncertain only as to the time when it will occur, and is subject to the general rules which govern in the interpretation of other contracts. But when considered with respect to the rights of those who claim to be beneficiaries, especially when they are the natural objects of the affection and bounty of the person procuring and paying for the in-

surance, should be regarded in the light of a testamentary provision rather than a contract. The object of all interpretation of acts or words is to arrive at the intentions of the person whose acts or words are to be interpreted, and the nature of the transaction and the relation of the parties are frequently important, and sometimes controlling factors in the problem. In taking the policy, the insured was not providing for himself, but for his wife and children after his death, and it would be unreasonable to suppose that he intended, in case one of these objects of his affection should die during his life, that the interest of the one so dying should pass to himself, and at his death to his personal representatives. It would be more consistent with his evident design in insuring his life for the benefit of all his family, wife and children alike, to suppose that his intention was that, in case one or more should die before himself, without leaving children, the share to which those dying would have been entitled, had they survived him, should go to the survivors. He dedicated the whole to his family, share and share alike, and as the family was reduced by death and he came to renew the policy by paying the annual premiums, it can scarcely be doubted that he did so in order to provide for those who still survived, and this evident intention ought not to be defeated unless there are insurmountable legal objects in the way of effectuating it."

Then he goes on to discuss further the provisions there stated, showing what would have gone to the wife, had she lived, but she did not survive him, so that that would not bear on the question here. Now, in that case, the father, husband, insured his life for the benefit of his wife and three children, at his death, for the sum of \$5,000. The wife died; two of the children died in infancy, the third got married, died, leaving an only son, an only child, who was a grandson of the deceased assured. An action of interpleader was commenced; all parties in interest, or supposed to be in interest, or having any claim to the fund, were required to set up their respective claims. The administrator or executor of the deceased—assured—filed an answer and cross-petition; the niece to whom he had assigned and delivered the policy, filed an answer and cross-petition; the grandson, by his guardian, filed an answer and cross-petition; the case was tried below, and after it was passed upon there in favor of the grandson, the niece alone appealed, Mrs. Robinson, she alone appealed, so that the controversy in the appellate court was between her, as the assignee of the policy, and the grandson. The court held that the grandson was the sole survivor of the beneficiaries, and entitled to the entire fund.

Now, that is substantially this case, though not exactly parallel in all particulars, but in some of its parts, and in the controlling point that is in the case, viz.: The question as to the survivorship, it is. The proceeds of this policy then having vested in Mrs. Siess, and I have no hesitancy in coming to the conclusion that the entire proceeds of the policy did, on the death of Arthur B. Siess, vest in his widow, Anna E. Siess, as the sole survivor of the beneficiaries,—then the proceeds of the policy having vested in Mrs. Siess, and as survivor of her son, so that, were she living, she would be the sole owner of the whole of it. The next question then is: On her death, intestate and without issue, does it descend and pass to the daughter of her deceased husband, Mrs. Lounsberry, under the provisions of sec. 4162 of the Rev. Stat. of Ohio, which provision reads as follows: "When the relict of a deceased husband or wife shall die intestate and without issue, possessed of any real estate or personal prop-



erty which came to such intestate from any former deceased husband or wife by deed of gift, devise or bequest, or under the provisions of section forty-one hundred and fifty-nine, then such estate, real and personal, shall pass to and vest in the children of said deceased husband, or wife, or the legal representatives of such children. If there are no children or their legal representatives living, then such estate, real and personal, shall pass and descend, one-half to the brothers and sisters of such intestate, or their legal representatives, and one-half to the brothers and sisters, or such deceased husband or wife from which such personal or real estate came, or their personal representatives."

Now, it is contended on the part of Mrs. Lounsberry, that by virtue of the provision of this section of the statutes, Mrs. Siess, having died intestate and without issue, that the proceeds of this policy came from her husband's estate; that he paid the premiums, caused the insurance to be taken out, and really produced the results, namely, \$5,000 of insurance. The legislature in this section is disposing of, as applied to this case, the estate of Arthur B. Siess, what he owed, what he died possessed of, that belonged to him and descended to his wife and by reason of her death, intestate and without issue, again descended and passed to his heirs. This is what the legislature is disposing of by the terms and provisions of this statute; his estate, what belonged to him, what passed from him, on his death, to his wife. A fair interpretation of this language would include only what property he died owning, and to have this transmissible character, having descended and passed to the widow, to again pass and descend to the husband's heirs, must have come to the widow directly from her deceased husband, and not by some circuitous route from which she gets title, if it may be so called. Did Arthur B. Siess ever own the proceeds of this policy, either legally or equitably? I answer, "No, not one dollar of it." He could not have pledged it as security, that is, the policy, for his benefit, without the consent of the beneficiaries. That is established by an almost unlimited and unbroken line of authorities on the subject; and when he could get the consent of a beneficiary to pledge it as security, it would simply have the same effect as though he borrowed a promissory note from some party to pledge as security, and would be binding on the party as security only, because of it. When he caused his life to be insured for her benefit, thereby contracting for her that on his death the amount should be paid by the company to her, the transaction is as though he had bought a farm from John Brown, or some one else, paid him for it, and had Brown make the deed to her. The property would thereby become hers. Our Supreme Court has held in such cases that the legal title would prevail, and I want to call your attention to what the court has said in a case of that sort. In the 45th Ohio State Reports, 77, the court say:

"Under the statutes of descent and distribution, the course of descent of real estate is to be controlled by the legal title.

"Where the intestate's title to real estate is free from controversy, in determining its course of descent and whether it is ancestral or non-ancestral property, the statutes of descent and distribution are not to be construed and administered upon equitable principles, but by rules of law.

"In determining, in such case, whether an instrument for the conveyance of land is a deed of gift or a deed of purchase, its recitals of the payment and receipt of the consideration are material; and a recital in such deed that the conveyance by the named grantor to the grantee is made in consideration of a specified sum of money received by such gran-

tor from the grantee, so far concerns the operation and effect of the deed as that it is not competent to show by parol proof that such instrument is, in fact, a deed of gift from a person not named in it, and that the named consideration was in fact paid by him.

"A father desiring to make his daughter a wedding gift, bargained for a tract of land, paid the agreed purchase price in money, and caused the vendor to convey it to the daughter just prior to her marriage. She thereafter died intestate, and without issue, leaving her husband surviving her. Held: The title to the land did not come to her "by deed of gift from an ancestor," within the meaning of sec. 4158 of the Rev. Stat., and the land upon the death of the wife, descended to the husband in fee-simple under sec. 4159 of the Rev. Stat., which provides that if the estate came not by devise, descent or deed of gift, it shall, if there be no children or legal representatives, descend and pass to the husband or wife relict of the intestate."

Under the statute of descent and distribution, the course of descent of real estate is to be controlled by the legal title. The legal title went from the vendor across, not through the father, but across to the daughter. Where the intestate's title is free from controversy, and whether it is ancestral or non-ancestral property, the statutes of descent and distribution are not to be construed and administered upon equitable principles, but by rules of law. Now, applying that doctrine, which is announced by the Supreme Court, touching the descent of real estate, to this case, the necessary following must be that property in order to be ancestral property and to have the character of descending and passing after it vested in a husband or wife relict of the deceased husband or wife, must have come directly from the deceased husband or wife to his or her relict. Now, this land did not come directly from the father to the daughter, it went across from the vendor to the daughter. The Supreme Court has held that the legal title must control, and that the rules governing these provisions as to the descent and distribution are not to be controlled by equitable principles but by rules of law. Now it is insisted in this case, by reason of Mr. Siess having paid the premiums on this policy, paid all of them, that in equity this was a part of his estate; I say under the law it is not. While he did what produced it, he did it, for the purpose of providing for that family, his wife and his children by her, through an indirect manner, and not directly. Suppose his premiums that he paid amounted to \$2,000.00 or \$3,000.00, that he had never paid them, that he had that money, and that it descended directly to Mrs. Siess, then the matter would assume a different phase, but this did not come directly from him to Mrs. Siess, but came indirectly through an insurance company, so that it vested in her directly and she thereby became the owner of it in her own right, and it did not possess that transmissible character that would constitute it a fund if it came from him and could go back on her death, intestate and without issue, to him. The conclusion of the matter then is, Mrs. Siess, as survivor of the beneficiaries, was entitled to the whole fund. It was her property. It did not come to her from her husband's estate. He never owned it. On her death it did not pass and descend to his heirs.

Now, another question; I am asked in this agreed statement of facts to distribute the fund, after the administrator of Mrs. Siess has paid whatever amount would equal the debts and costs of administration; I do not know whether she had any debts or not, and it is not stated in the agreed statement of facts, in fact it is stated there that it is not known

what her indebtedness is, but the conclusion I have reaped is this: Here is \$5,000 in a bank, ready to be distributed: First, pay out of the funds the costs of this proceeding—I think the costs ought to be paid out of it. Second, to the administrator of Mrs. Siess, such sum as may be necessary to pay her indebtedness, if she had any, and the costs of administration. Third, pay one-fourth of the balance to Mrs. Miller's guardian for her; one-fourth to Henrietta Combs; one-fourth to John K. Eckert; and one-fourth to be divided equally between Mrs. Ebersole's heirs—I have not the names, and you may take a decree in harmony with these findings.

Baldwin & Shields, for the plaintiff.

Clark & Ambler, for defendants Eckert and Ebersole's heirs.

Day, Lynch & Day, for the other defendants.

### RAILWAY TRACKS.

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[Superior Court of Cincinnati, Special Term, June, 1893.]

CINCINNATI (CITY) v. P., C., C. & ST. L. RY. CO. ET AL.

1. Branch tracks put in by a railroad for the convenience of shippers, perform the office usually left to a dray or wagon, and do not bear the same relation to the streets they occupy that ordinary tracks do which form a part of the main line, and a grant to construct such tracks from the connection tracks to adjacent properties leaves the city the full and complete control of the street, subject only to the use named therein.
2. A general permit by a city to railroad to put in switch tracks from connection tracks to property of adjacent proprietors, applies to property on another street. The word "adjacent" does not necessarily mean "abutting" or "adjoining" but means "lying near."

HUNT, J.

The city of Cincinnati, on November 7, 1892, filed its petition to enjoin the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company from laying any tracks across Water street, between Smith & John streets. A temporary restraining order was issued, and this cause is now before the court, on the motion of the defendant, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, to dissolve the restraining order thus granted.

The petition recites, among other things, that unless restrained, the said railway company will lay four tracks across Water street, between Smith & John streets, running from private property on the north side of Water street to private property on the south side of said street; that the railway company has no right to Water street, and never obtained any permission from the city to lay said tracks, and that the laying of the same will greatly interfere with the further use of the street.

It appears that on December 28, 1863, (C. & H., Ord., 479), a resolution was passed by council granting a permission to the Cincinnati & Indianapolis and the Little Miami Railroad Companies to lay a single track of their road from a point at or near the intersection of the Cincinnati & Indianapolis Company's tracks at Smith street; thence along Water street to the public landing, to a point at or near Sycamore and Front streets; thence along Front street to connect with the track of the Little Miami Railroad Company, at or near their depot; and for the greater facility of commerce between those two points, the Cincinnati & Indianapolis and Little Miami Railroad Companies have also the privilege

granted to lay a single track of road from Sycamore street down to Front street, to connect with the track of the Cincinnati & Indianapolis Company, at or near the intersection of Smith street, so that the cars on the Little Miami Railroad destined west may pass down Front street to the Cincinnati & Indianapolis Company's track, and cars on the track of the latter company destined east may pass Water and Front streets to the track of the Little Miami Railroad Company, at or near the depot, upon certain prescribed terms.

The resolution passed by council November 15, 1867, modifying resolution of December 28, 1863, C. & H. Ord., 487, in paragraph 2, provides as follows:

"Said companies and each of them, and any other company acquiring the right to use said connections as herein provided for, shall have the privilege of constructing and using side track, from said connection track, (and also from the main track within the city limits), to other property of adjacent properties who may desire the same; provided, that before any such side tracks shall be constructed, a plat thereof shall be prepared by the company, and approved by the board of city improvements, which approval shall be indorsed on the same by the clerk of said board, and said plat so indorsed shall be filed with the city auditor; and provided further that said side track shall be laid in conformity to such plat, under the directions of the city civil engineer."

The question, then, in this case is whether the language of the section is comprehensive enough to permit the running of a switch or side track from Front street to and across Water street; or adopting the language of the plaintiff, whether or not a lot on the south side of Water street is adjacent to a connection track in Front street, within the meaning and intent of the resolutions of 1863 and 1867, especially when there is a connection track in Water street to which the lot is adjacent.

The city council on November 15, 1867, passed a resolution providing that the Cincinnati & Indianapolis and Little Miami Railroad Companies, and any other company acquiring the right to use said connection tracks, should have the privilege of constructing and using side tracks for said connection track, and also from the main track, within the city limits, to the property of adjacent properties, who may desire the same, and that, under these resolutions, the Cincinnati & Indianapolis and the Little Miami Railroad Companies laid connection tracks in Water and Front streets, and that said railroad companies have also laid the switch from said connection track, which runs east and west on Water street, to a lot adjacent thereto on Water street.

The grant made to the Little Miami Railroad Company passed to the Pittsburg, Cincinnati & St. Louis Railway Company, under a perpetual lease, which went into effect January 1, 1890. The second item of this lease relates specifically to this connection track, with all its appurtenances. A consolidation was subsequently made, which involved all the lines of the Pittsburg, Cincinnati & St. Louis Railway Company, in this state, and by which the old corporations ceased to exist, and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company became a new and independent corporation, and vested with all the rights of the constituent companies.

The defendant, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, on February 23, 1892, filed with the board of administration of the city, an application with plat attached, for permission to lay four tracks across Water street, between Smith and John streets,

"extending from the intersection of Smith and Front streets, or a point near thereto, southwardly across said Water street to private property on the south side of said Water street, owned by the Chesapeake & Ohio Railroad Company, said application stating that the said tracks were for the accommodation of the Chesapeake & Ohio Railroad Company."

The board of administration, on October 29, 1892, approved said resolution, conditioned that the same should not take effect for ten days, and with a recital that "no obstacle should be thrown in the way of granting railroads proper terminal facilities, so long as the granting of the same do not work to the detriment of the general public."

The contention of the plaintiff is that the action of the Pittsburg, Cincinnati, Chicago & St. Louis Railway company is contrary to law, for the following reasons:

First—That the city council, or the board of legislation, has never, at any time, granted permission to the Pittsburg, Cincinnati, Chicago & St. Louis Railroad Company or the Chesapeake & Ohio Railroad Company, to lay any of the tracks proposed to be laid across Water street.

Second—That the property of the said Chesapeake & Ohio Railroad Company, on the south side of Water street, is not adjacent to said track at the intersection of Smith and Front streets, but adjacent only to the connection track running east and west on Water street.

It is true that there is some conflict in decisions as to the right of a city, by virtue of its general power and control over its streets, to permit to be laid thereon the tracks of an ordinary steam railroad. This arises from the imposition upon owners of abutting property. The authority of locating a railroad in any public street is now given to municipal corporations by Rev. Stat., sec. 3283; and this has been held to include all necessary side tracks mentioned in sec. 3281; see also, the Toledo & Wabash Railway Co. v. Daniels, 16 Ohio St., 390.

The superior court of Cincinnati, in General Term, in the P. C. & St. L. R. R. Co. v. The City, 9 Dec. Re., 695, held that the city had, by law, authority to consent to the laying of a railroad track in Eggleston avenue and branches therefrom to facilitate the shifting of freight, and that the joint resolution of November 15, 1867, granted such consent. A motion for leave to file petition in error to the superior court of Cincinnati was overruled by the Supreme Court, on Tuesday, December 14, 1886.

The purpose of this grant favors a liberal construction. The resolution was intended, as the title indicates, "to perfect our present railroad facilities, and permit a southern railroad connection." The city was making an effort to provide its citizens, its merchants and manufacturers, with facilities to do business. This liberal construction was given in this grant by the court, in the case cited in 9 Dec. Re., 695, in this significant language:

"These tracks do not bear the same relation to the streets they occupy, that ordinary tracks do which form part of the main line of a railway. The latter are causes of nothing but inconvenience and annoyance, and detriment to the parties who travel its streets, and citizens who occupy adjoining property. Any general advantage from them, as part of a line, could be enjoyed as well, or better, if they were not in the street. The former are only for local convenience. They perform the same office usually left to wagon and dray. They are built in the street because it is a street, and could accomplish their purpose nowhere else;

while under proper regulations they cause little obstruction to ordinary travel."

It is a part of the history of the city that we were then greatly deficient in the possession and enjoyment of railway facilities for the transaction of business. This grant was intended to meet that difficulty, and was intended primarily to facilitate the delivery of freight by shippers to the carriers. This is the true construction of the ordinance contract.

Is the property of the Chesapeake & Ohio Railroad Company, south of Water street, adjacent property? If so it is plainly within this provision. "Adjacent" does not necessarily mean "abutting;" it does not necessarily mean "adjoining," but it means "lying near." The property on the south side of Water street, and which is sought to connect with the existing connection tracks, is adjacent property within the meaning of this resolution.

Nor does this conclusion in any way involve an abandonment of the street in question. While the privilege exists, under the grant, to construct and use side tracks from the connection track to the property of adjacent properties, there still remains in the city the full and complete control of the streets in which the grant authorizes a railroad track to be laid, subject only to the express conditions to use the streets in the manner and for the purpose named.

The motion will be granted, and the temporary order dissolved.

William M. Ramsey, George Hoadly, Jr., for the motion, and John Galvin, assistant corporation counsel, and Drausin Wulsin, *contra*.

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#### STREET RAILROAD FRANCHISES.

[Hamilton Common Pleas, August 15, 1893.]

\* MARY GALLAGHER ET AL., EX REL. CINCINNATI, v. ALBERT S. JOHNSON ET AL.

1. A bill for a franchise, in which the bidder proposes "for himself and associates," the names of his associates not appearing anywhere in the bid, imparts a personal proposal, is his individual bid, and his bond, running in his name alone, to accept the contract is regular.
2. A bid is made in good faith when the bidder makes it with the intention of complying with the terms of his bid in case it is accepted.
3. If the board of administration has any doubt as to whether the lowest bid has been made in good faith, or with the intention of complying with the terms of the bid, in case the contract is awarded to the lowest bidder, the board has the right to call the bidder before it, and to make inquiry as to his good faith.
4. In determining whether or not the lowest bid was made in good faith, the board can only take into account what is said and done by the bidder in its presence at the time of such inquiry, and the inquiry which the board has a right to make, must be confined to the question alone: Does the bidder withdraw his bid, or does he intend to comply with its terms in case the bid is accepted?

WILSON, J.

A restraining order is asked on three grounds: First—Because the contract to construct and operate a street railroad upon street railroad Route No. 25 was not awarded to the lowest bidder. Second—Because the projected route passes over private property. Third—Because no sufficient application and advertisement for the right to construct and operate a street railroad upon said route was made.

† For decision on motion to dismiss case at close of plaintiff's testimony, see 1 S. & C. P. Dec., 264.

As to the first point: Sec. 2502 of the Revised Statutes provides that no grant to construct and operate a street railroad shall be made except to the corporation, individual or individuals that will agree to carry passengers upon such projected street railroad at the lowest rates of fare. The method of ascertaining who will make such agreement is left to the discretion of the municipal corporation. When such corporation, for the purpose of ascertaining that fact, has advertised for proposals for the construction of a projected street railroad, the contract must be awarded to the lowest bidder. He is, according to the method adopted by the corporation, ascertained to be the person who will agree to carry passengers at the lowest rates of fare.

In this case the City of Cincinnati advertised for proposals to construct and operate a street railroad over Route No. 25. Among the proposals received the bid of Orris P. Cobb was the lowest. The city has awarded the contract to Albert S. Johnson and others, who were not the lowest bidders.

Unless some reason, good in law, can be shown for such award, the preliminary restraining order must issue.

It is claimed that the board of administration for good and sufficient reasons rejected Cobb's bid. Whether or not his bid was properly refused must be determined by the action of the board, upon the grounds shown in the record of its proceedings. *Knorr v. Miller*, 3 Circ. Dec., 297.

The record shows that Cobb's bid was rejected for the following reasons:

First—Because his proposal was not made in accordance with law and the ordinance establishing Route No. 25.

Second—Because his proposal was not accompanied by a valid bond properly conditioned for the performance thereof as required by the ordinance establishing the route.

Third—Because the proposal was not made in good faith.

Fourth—Because, taking into consideration that the conditions of the bonds of Messrs. Cobb and Johnson, another bidder, are alike, and all the other circumstances, there was and is collusion as well as bad faith in the preparation of the bids of Johnson and Cobb.

The first and second grounds on which Cobb's bid was rejected are the same.

Section 10 of the ordinance establishing the route provided as follows:

"Each bidder shall accompany his bid with a good and sufficient bond, to the satisfaction of the board of administration, in the sum of twenty-five thousand dollars, as liquidated damages, that he or they will if awarded the said grant, enter into a contract therefor within ten days from and after the passage of the ordinance granting such right, and give bond for its faithful performance, as hereafter provided."

Cobb's bid, in writing, and signed by him, was as follows: (Omitting the rates of fare).

"To the Board of Administration of the City of Cincinnati, Ohio.—Proposals to construct and operate street railroad Route No. 25.

"The undersigned hereby proposes for himself and associates to construct and operate street railroad Route No. 25 under and in accordance with the provisions of Ordinance No. 418 establishing said route for the

following rates of fare. \* \* \* And the undersigned accompanies this bid with his bond."

The condition of Cobb's bond was as follows:

"The condition of this bond is that the above named Orris P. Cobb, bidder for the right to construct and operate the street railroad Route No. 25, under Ordinance No. 418, will, if awarded the said grant to construct and operate said road, enter into a contract therefor within ten (10) days from and after the passage of the ordinance granting such right, and give bond for its faithful performance as provided in said ordinance."

If the bid of Cobb was his bid, and his only, the condition of his bond was good, and his bond was in accordance with the provisions of the ordinance.

It is a rule of construction that, when a man enters into a contract in which his name alone appears, and uses words which import a personal engagement, as "I promise," or, "the undersigned promises," the contract is his, and his only. 17 Ohio St., 215; 38 Ohio St., 442.

No other name appearing in the contract, and the operative words, "I promise," or, "the undersigned promises," being utterly inappropriate to charge any one but him whose name appears on the contract, the contract is his, and not the contract of himself and some other person.

A proposal is not a contract, but it may become one by acceptance. The same rule of construction should be applied to a proposal before it is accepted that is applied to it after it has become a contract by acceptance.

Applying the foregoing rule to the proposal of Cobb, it is his proposal and his alone. His name alone appears in it. The operative words in it, "the undersigned proposes," import a personal proposal.

The use of the words, "and his associates," the names of his associates not appearing anywhere in the bid, amounts to nothing. The condition of his bond corresponded with his bid, and the board of administration had no right to reject his bid on the first and second grounds.

As to the third reason assigned for rejecting Cobb's bid, the consideration of it involves the point as to whether the board of administration can inquire into the good faith of the lowest bidder. In the record of the case of Miller v. Knorr, 38-39, it appears that the question was raised as to whether the board of improvements could inquire into the good faith of Johnson, who was a bidder. Judge Cox, in passing on the question, said:

"It is now sought, as we understand, to prove that the bid made for the construction of this railroad, for the contract for it and for the franchise was made fraudulently by Johnson, and that therefore the board should not regard it, but should refuse it to him. And it is in the first place offered to be proven by testimony as to what he told Mr. Miller at some other place and by some facts and circumstances. A bidder is defined to be one who offers to do a particular thing, to pay a stipulated price for property to be sold, or to perform certain conditions to a contract. He has a right to withdraw his bid at any time before it has been accepted; but he is required to act in good faith. He may withdraw it before it is accepted, but in all he does he is required to act in good faith. Now, my opinion, and I think it is the opinion of the court, is that if there was anything done or said by Mr. Johnson in the presence of the board at the time his bid was made, or his offer to do certain things as required by statute, which should induce the board to believe that he was



acting in bad faith, and his bid was a mere sham, they would have a right to disregard it. Otherwise, if his bid corresponded to the law, if he made a bid, and that bid was at the lowest rates of fare, and that bid, that offer, entitled him to the franchise, then it was the duty of the board to grant him that franchise, and as a test of his good faith subsequently require him to furnish the bond specified in the statute. Now, we are of the opinion that what he said, if he said anything, or did anything before the board which showed that he acted fraudulently, or that his bid was a mere sham, or anything which showed that he withdrew his bid before he accepted, that may be offered, but not anything further. Now, to illustrate: Suppose that Mr. Sinton should bid for a piece of property \$90,000, at sheriff's sale, and Mr. Harrison should bid \$125,000, and it should be knocked down to Mr. Sinton, and Mr. Harrison came to ask to have that bid set aside because he was the highest bidder, and Mr. Sinton was the lower. Suppose it should be attempted to prove that Mr. Harrison said down street to some one that he was merely bidding for fun. There are certain things to be done, after a party bids, certain penalties which the court may enforce, which should test the genuineness of his bid, and it seems to the court—a majority of the court at any rate,—that nothing outside of what took place in the presence of this board can be introduced in evidence to show bad faith. The board do not seem to have acted upon that ground at all; nor does there appear any suggestion of it. But when they met his bid, although it was the lowest, they rejected, not because it was in bad faith, or was (not) the lowest bid, but because he had not obtained the consent of a majority of the property holders upon the street. The evidence will be confined to what took place before the court as tending to show the intention of Mr. Johnson to withdraw the bid."

Again, in deciding the case, the court, passing on the same point, said in *Knorr v. Miller*, supra.

"An effort was made in the trial of the case to show that Johnson's bid was made in bad faith, or he was a sham bidder. And it was claimed that the board had a right to reject the bid on that account. It is sufficient to this to say that the board did not reject Johnson's bid on that ground. The rights of the parties here must be determined by the action of the board upon the ground shown by their record. But we might say further that we do not think the board would have been justified in rejecting Johnson's bid for such reasons. He was not a sham bidder. Johnson was bidding in earnest; wanted his bid to be considered a bid, professed to be able to comply with the terms required of a bidder, and of all of which facts the board well knew. And these facts made him a bidder in good faith, so far as bidding was concerned, and this was as far as the board could look. If Johnson complied with the terms of the bid, it was the end of consideration of the board, whether Johnson was bidding in the interest of some one else, whether he could build the road and operate it, and make or lose money, whether he was building to benefit or injure any one, were questions about which the board could have no concern. The board was there to look after the rights of the public, and that was to be brought about by granting the contract to the lowest bidder."

The following propositions follow from the above:

I. A bid is made in good faith when the bidder makes it with the intention of complying with the terms of his bid in case it is accepted.

2. If the board of administration has any doubt as to whether the lowest bid has been made in good faith or with the intention of complying with the terms of the bid, in case the contract is awarded to the lowest bidder, the board has the right to call the bidder before it and to make inquiry as to his good faith.

3. In determining whether or not the lowest bid was made in good faith, the board can only take into account what is said and done by the bidder in its presence at the time of such inquiry, and the inquiry which the board has a right to make, must be confined to the question alone: Does the bidder withdraw his bid, or does he intend to comply with its terms in case the bid is accepted?

In this case the board of administration had doubts as to whether Cobb's bid was made in good faith. It is admitted that Cobb was not called before the board, and that the inquiry which the board was authorized to make was not made. Not having taken the course which the law prescribes for testing the good faith of Cobb, the board has no right to reject his bid on the third ground. For the same reason the board was not justified in rejecting Cobb's bid for the fourth ground given. The fact that the condition of Cobb's bond, which was a good bond, was like the condition in Johnson's bond, of itself amounted to nothing. As for the "other circumstances," which the board took into account, Cobb not having done or said anything in the presence of the board, there were no "other circumstances," which the board was authorized to take into account.

The board of administration having rejected Cobb's bid without sufficient reason, a temporary restraining order must issue.

At present it is not necessary to decide the two other points raised.

As to the motion to strike out certain portions of the separate answer of Albert S. Johnson et al., the motion will be granted. The only defense which Johnson and the other defendants to whom the contract has been awarded can make is to plead facts showing that the board of administration was justified in rejecting Cobb's bid. The portions of the answer covered by the motion to strike out do not set up such facts.

As to the affidavit of Albert S. Johnson that a street railroad can not be constructed and operated upon Route No. 25 for a fare of three cents, it is incompetent. In Knorr v. Miller the circuit court decided that whether a bidder would make or lose money in constructing and operating the road could not be taken into account. This court can make the same inquiry as to the good faith of Cobb which could have been made by the board of administration. It being admitted that Cobb's bid was the lowest, the burden is on the defendants to show that it was rightfully rejected because not made in good faith. Whenever competent testimony is offered on that question the court will hear it.

Harmon, Colston, Goldsmith & Hoadly, Ramsey, Maxwell & Ramsey, for plaintiff.

L. A. Russell, J. N. Wilcox, and Ed. Dienst, contra.

though the vendor is to give a warranty deed at a future day, the vendee cannot require the warranty to cover the interim taxes or assessments.

On February 8, 1886, Bohm Brothers & Co., owning two tracts of land in this county, entered into a written agreement with plaintiffs, known as the Mornington Syndicate, by which they "propose to sell" to said syndicate, the land, on eight years' time, at \$1,000 per acre, payable one-eighth each year, the syndicate to have the privilege of making streets and improving the lands, selling them, and in the event of sales, the Bohm Brothers agree to give each purchaser a warranty deed, and to give the syndicate a warranty deed after all payments are made.

"It is further agreed, that the said syndicate are to pay the taxes and insurance, if any, on the lands and the improvements thereon, dating from the time of said syndicate's purchase of the same."

This contract was signed by both parties, and the syndicate went into possession; and after paying nearly \$14,000, tendered on November 18, 1892, the balance of \$2,620.02, and demanded a warranty deed to the co-plaintiff, James E. Mooney, trustee, who had agreed to buy the tract at \$1,500 per acre, but the Bohm Brothers refused to convey, averring that they had been swindled, and that their wives would not release dower, and that they had retracted the offer.

The syndicate asks specific performance, and claim to be entitled to a warranty deed, dated as of the day of the tender of the unpaid balance.

In 1880, the legislature passed an act (87 O. L., 577) for the making by the county, of Erie avenue, which runs to within forty feet of this tract, and assessing the cost upon owners of all lands within a mile of the avenue. No mention of this appears in the pleadings.

BATES, J.

The plaintiffs are entitled to a specific performance. The tender was sufficient, and the defendants held the property before they sold it as partnership stock, hence it is not subject to dower, and the title must be quieted as against their wives. No difficult questions arise on these points; hence no report upon them is made further.

But to determine what kind of a deed the defendants must make, unavoidably involves an ascertainment of their obligations as to the Erie avenue assessment, and this being neither a settled nor easy question, the results of its examination are reported.

1. First to dispose of the authority of *Wells v. Calnan*, 107 Mass., 514, which the syndicate ingeniously seeks to dragoon into its service. In that case W. agreed to sell a farm to C., to be paid for four months afterwards, the deed to be given on payment. The day before the time for payment, the buildings, which were an important part of the subject-matter, accidentally burned down, and it was held that the loss should fall on the vendor, because he was owner and could not perform his contract to convey the property in the same state as when bargained for. The syndicate claim, under this case, as if an assessment ordered by the legislature is a misfortune from the *viz* major, as much as a fire or an earthquake falls on the vendors. The case was followed in *Wilson v. Clark*, 60 N. H., 352, and *Gould v. Murch*, 70 Me., 288; see also, *Listman v. Hickey*, 65 Hun., 8. But by examining the following cases: *Paine v. Meller*, 6 Ves., 349; *Rayner v. Preston*, 18 Ch., D., 1; *Wainscott v. Silvers*, 13 Ind., 497; *Thompson v. Norton*, 14 Ind., 187; *Johnson v. Jones*, 12 B. Mon., 326; *Marks v. Tichenor*, 85 Ky., 536; *Martin v. Carver*, (Ky.), 1 S. W. Rep., 199; *Brewer v. Herbert*, 30 Md., 301; *Bautz v. Kuhworth*, 1 Montana, 183; *Snyder v. Murdock*, 51 Mo., 175; *Mott v. Cod-*

dington, 1 Abb. Pr. N. S., 290; Morgan v. Scott, 26 P. St., 51; Greaves v. Gamble, 1 Pa. Leg. Gaz. Rep., 1; Oldham v. Kennedy, 3 Humph., 260; Christian v. Cabell, 22 Gratt., 82; Wetzler v. Duffy, 78 Wis., 170; it will appear that Wells v. Calnan can not be taken for granted as representing the law, and that interim losses and benefits fall to the vendee. But whether so or not, it has no bearing on this case, for the burden of a tax or assessment is neither a fire nor an earthquake, but falls, as I will now show, upon the vendee in possession as matter of law, and for this reason I excluded as immaterial the defendant's offer to prove that the passage of this act of the legislature was procured by the plaintiffs themselves.

2. The argument is that the syndicate, having nowhere bound themselves to buy the property or to pay, the contract is simply an option binding on one side because accepted as such, and only became a bilateral contract or an agreed purchase and sale at the date of tender and demand for a deed; and then, for the first time, the equity rule, to regard the vendee as the real owner and the vendor as trustee of the title, applied; and assessments prior to that time fall on the defendants, because they were owners when it was levied, and also because their warranty deed must date at the time the proposal to purchase was accepted by the tender on demand.

The contract itself is, however, not nearly so devoid of expressions importing reciprocal obligation as the above abridgement of facts show. For example; the defendants are to give a bond for a deed while "payments are made as agreed," i. e., agreed by plaintiffs. Moreover, the frequent use of the word "agree," though by the vendors alone, imports a concurrence, and not a mere offer. When the syndicate signed the paper and went into possession, their attitude became as much that of vendees as if they had written the word "accepted" over their signatures: Thornton v. Kelly, 11 R. I., 498; Munro v. Edwards, 85 Mich., 91; Street v. Chapman, 29 Ind., 142; Benson v. Shotwell, 87 Cal., 49; Gibbons v. Sherwin, 26 Neb., 146; Ross v. Parks, 93 Ala., 153.

If the signing and delivery of possession made an accepted contract of present sale, the fact, if it be so, that the vendees were not bound to complete the purchase, but had an option to forfeit payments made and withdrawn, is a mere additional privilege for them, which would not reduce their possessory rights or equities, or alter their relationship as present purchasers, until such abandonment; being in equity owners, the assessment falls on them as of course, and no warranty covering it can be required.

But if this is not the true construction of the contract, and there is no sale, but merely an agreement for a future sale, the law is not in doubt, as will now be shown; without stopping to consider the plaintiff's claim that their agreement to pay taxes impliedly excludes the assessment on the principles of *expressio unius, etc.*, and of *omnia potius contra proferentem*, and without considering the defendants' claim that taxes as here used should include assessments, as should also the word improvements, in the clause quoted in the statement of facts.

3. Though there is no sale, but only a contract for a future sale, yet, when the vendee is put in the enjoyment of possession under the contract, he becomes subject to the burdens of ownership. Rents and profits on the one hand and taxes on the other are mutual and compensatory, and he is in the penance of rents and profits; hence, must bear

the burdens of what he enjoys. The case of a privilege of purchase in a lease does not argue against, but rather illustrates this, for the rent is a commutation in lieu of the land and the profits, the tenant's profits being from his own labor; hence, by the above rule, the landlord being in receipt of profits pays his own taxes. Interest on the deferred purchase money received by the vendor is not analogous to rents and profits, but is merely part of the original consideration of the purchase, and not of the taxes, and as the vendor pays taxes on the debt, he would pay twice, and, moreover, should not be taxed on what he is not enjoying. Following are all the authorities in support of this—given here because they are not elsewhere collected:

*Carrodus v. Sharp*, 20 Beav., 56, the owner of a lease, agreeing to sell it, and to procure the lessor's assent to the assignment, which he procures December 1, 1854, the outgoings fall on the buyer after that date, because he could then prudently take possession and hence must pay the taxes, rates and rent from that date. This case was cited in *Sherman v. Savery*, 2 McCrary, 107, 2 Fed. R., 505, holding that the buyer of land must pay taxes after the time when he could prudently have taken possession, even though the vendor wrongfully withheld the title. In *Willard v. Blount*, 11 Ired (N. Ca.) Eq., 624, B. leased a lot to W. for ten years, rent free, W. to erect a building and to deliver it to B. at the end of the lease, it was held that W. must pay the taxes because he was the owner for the time being, by reason of possession and pernancy of profits. A landlord and tenant is an exception to the rule because the landlord is in the pernancy of the profits, for rent is in lieu of the land, and this is not a case of landlord and tenant. This case was cited in *Miller v. Corey*, 15 Iowa, 166, where C. sold a farm to M. who was to have possession May 1, 1855, and was to have a clear deed when the purchase notes were paid, it was held that the vendee, who had the possession and rents and profits, should pay the taxes; that it was unlike landlord and tenant. This ruling was followed in *Hunt v. Rowland*, 22 Iowa, 53, and in *Farber v. Purdy*, 69 Mo., 601. In *Hall v. Denkla*, 28 Ark., 506, T. sold to L. on payments running through two years, and gave a title bond to convey on payment, it was held that where the buyer exercises acts of ownership during the vendor's delay in the completion of the contract, as by putting up sign boards to let or sell and making contracts, he must pay interest on the purchase money, though the land was vacant and he received no rents or profits. See also, *Lathers v. Keogh*, 109 N. Y., 583, affg., 39 Hun., 576; *Gotthelf v. Stranathan*, 19 N. Y. Supp., 161.

4. It being then the duty of the vendee in possession to pay the taxes during the time intervening before his acquirement of the legal title, the next question is, does the vendor's contract to give a warranty deed at a future day, put the burden of taxes upon him until then by virtue of the warranty. The answer is, No! The vendor's obligation is not to convey clear of incumbrances made by the act or neglect of the vendee or on his account, but is to convey clear of incumbrances by himself or on his account. Taxes are like mortgages or judgments on the vendee's interest; they are incumbrances by his acts or omissions, and the vendor is not bound to covenant against the vendee's failure to discharge his duty. This principle, alike consonant to justice and common sense, is specifically so ruled in *Miller v. Corey*, 15 Iowa, 166; *Hall v. Denkla*, 28 Ark., 506, and *Farber v. Purdy*, 69 Mo., 601.

*Wilson v. Tappan* 6 Ohio, 172, is not against but in favor, of these conclusions, for several reasons. In that case, W. by title bond agreed

to convey to T. a good title on a future day, and it was held that W. must pay the intervening taxes; but, 1st, W. never had a title which T. could have been compelled to accept until after the date for the deed, and hence the doctrine of Carrodus v. Sharp, supra, applies; 2nd, it does not appear that T. was in possession or in the pendency of profits before that date; 3rd, it is suggested, on page 175, that had T. been the complainant he might be compelled to reimburse taxes paid by vendor, on the principle that the profits and burdens passed to him; 4th, the vendees are the plaintiffs in the case at bar, and hence, must as just suggested, pay whatever will in equity fall ultimately on them before they can demand equitable relief.

Finally, if the law were not as above stated, the plaintiff might procure the making of a dozen streets, and in each street a sewer and sidewalks, and eat up their vendors with all these assessments, while retaining for themselves the entire resulting enhanced values and benefits.

Accordingly the decree will be that the plaintiffs are entitled to specific performance, with quieting of title against dower, and a deed so drawn as to import a general warranty of the title down to the date of the contract, for any warranty for the time subsequent is only against the grantors' own acts.

Burch & Johnson, Wilby & Wald and J. B. Frenkel, for plaintiff.  
W. M. Ramsey, J. W. O'Hara and E. L. Stricker, for defendant.

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## RES ADJUDICATA.

[Franklin Probate Court, September 1, 1893.]

IN RE WILLIAM AND RUHAMA BARNES.

1. As a general rule the doctrine of *res adjudicata* applies to proceedings in *habeas corpus* where conflicting rights of parties and the custody of a minor child is determined, yet a judgment or order made in such cases will not be adjudged *res adjudicata* when the material facts existing at the time of the order have materially changed; and the court will therefore enter into an examination to ascertain from the evidence whether there has been such a material change of facts as will demand a modification of the order as to the custody of the child.
2. A judgment or order made in such cases may sometimes be binding between the parties, but will not conclude the court as to the best interest of the child, it being the duty of the court whenever the possession and custody of a child is brought in question by *habeas corpus* proceedings, to make such order as the best interests of the child demand.
3. While it is an imperative rule that full faith and credit must be given a judgment of a sister state, and that it may be pleaded as *res adjudicata* in this state, yet there is a wide difference between one originating on a debt and one involving the custody of a child. So, where a judgment has been rendered in a *nisi prius* court of a sister state in *habeas corpus* proceedings awarding the custody of a child to the father, who, while the case is pending in the Supreme Court of such state, and before it has been thus terminated, removes to another state, and there takes up a new residence; and subsequent to his removal the Supreme Court of such state reverses the judgment of the *nisi prius* court, and remands the custody of the child to its grandparents, such judgment or order will not be given effect in this state as *res adjudicata*, if since the rendition of the judgment in the trial court, the material facts and conditions have been so changed that the best interests of the child require that it should remain with its parent in this state.

4. The doctrine of *res adjudicata* must be based upon the facts found in the trial court, and not upon the facts existing at the time of the rendition of the decision by the Supreme Court on error, or of the judgment entered by the trial court in pursuance of the mandate of the Supreme Court.

HAGERTY, J.

This is a proceeding in *habeas corpus* brought by William and Ruhama Barnes, petitioners, against Asa L. Cunningham, respondent, alleging that one Thursby Cunningham is unlawfully restrained of her liberty by the said Asa L. Cunningham.

The petition sets forth a judgment rendered by the courts of West Virginia awarding the custody of the child to the said William and Ruhama Barnes, and claimed the custody of the child by reason thereof. The answer denied that the judgment was a final and conclusive order, and alleged a material change of facts from those upon which the judgment of the West Virginia court was based. Demurrer to the answer was overruled, and the case proceeded to trial.

It appears that said Asa L. Cunningham brought a *habeas corpus* proceeding in the circuit court of West Virginia in 1889, for the recovery of said Thursby from her grandparents in whose custody she had been placed upon the death of her mother. The circuit court in that proceeding, in August, 1890, gave judgment in favor of the father. The case was then taken by William and Ruhama Barnes to the Supreme Court of appeals on error, and that court, in June, 1893, reversed the decision of the circuit court, and remanded the case back, and put the custody of the child in William and Ruhama Barnes, dismissing the petition. See *Cunningham v. Barnes*, 17 S. E., 308. In July, 1890, the testimony closed in the circuit court, and judgment rendered at that date. And it is claimed here by Barnes, that the doctrine of *res adjudicata* should obtain, and that full faith and credit should be given to the decision of the Supreme Court of Appeals of West Virginia, and that the child should be placed in the custody of the said Barnes, in accordance with the terms of the decision.

I take it that this case is different from one originating on a debt; that in a case involving the custody of the child, by reason of changes of conditions and circumstances, any order of any court may be modified or changed. Therefore, we have gone into the conditions and circumstances and changes, if any, in the affairs of Mr. Barnes and his wife, and also in the changes and conditions that might be favorable to Asa L. Cunningham. Freeman on Judgments, sec. 324, and the following cases sustain this theory: *Cunningham v. Barnes*, 17 S. E., 308; *Green v. Campbell*, 35 W. Va., 699; *In re Bort*, 25 Kan., 308; *Thorndike v. Rice*, 24 Law Reporter, 19; *Allen v. Allen*, 105 N. Y., 628.

It appears that a short time before the decision of the Supreme Court of West Virginia that, Asa L. Cunningham married, and with his wife and this child, Thursby, came to Ohio, and have resided in Columbus ever since. It appears that Mr. and Mrs. Barnes have lived on a farm of one hundred and fifty acres, which they owned, where they lived when the decision of the Supreme Court was rendered; that they are respectable and industrious people, aged seventy years and sixty-eight years, respectively. Cunningham since coming to Columbus has had employment, appears to be a steady, industrious man, and it is claimed it is much better for the child to remain here because its educational advantages are superior to those in West Virginia. The people living near and about Cunningham all testify to the exemplary habits and

industry of Cunningham. It also appears that Mr. Barnes is the father of nine children, he not being able to give the exact number of his grandchildren of which Thursby Cunningham is one. And in addition to the land mentioned, it appears that said Barnes receives a pension of \$17 per month, and that in case the custody of the child is awarded to him he will remove to a small town where the child will have better advantages than previously had on his farm.

It is not essential to go into the history of this case further than the decision of the Supreme Court of West Virginia, and I therefore omit the incidents that occurred previous to the decision of the circuit court of that state, and take it that the testimony taken in the case was a true history of the whole affair.

The child is now eleven years of age, and is unusually bright and somewhat beyond its years in education. After being carefully and privately examined by the court (Clark v. Boyer, 32 Ohio St., 299,) says that she would not of her own wish return to her grandparents, but that she would prefer to live in Columbus with her father and stepmother, and protests strongly against returning to West Virginia, and says she would not be contented there although she loves her grandparents dearly. But that she loves her father, and prefers to live with him and live in Columbus where she can get the advantages of public schools.

While this is a most delicate case, and will, no doubt, grieve the grandparents greatly by not being again placed in the custody of this child, yet the court can not be unmindful of the fact that they are now two old people, and in the natural course of events their lives, at best, can not be much longer. And then it is hard to tell what the conditions may be for Thursby's welfare after either of the grandparents have died. Also, they now live in the country, twenty-five miles from a railroad, a mile or more from a school house, where schools are held on an average of about four months each year. On the other hand we find the father defending the course he has taken, and demanding that his child shall remain in his custody. While he does not receive large compensation for his labor, the testimony shows that he lives comfortably and happy on a salary of \$39 per month, and Thursby goes to school every day, has a splendid showing as to scholarship, attendance and deportment. Thursby herself pleads most earnestly that she may remain here with her father, her new formed associates and her school.

It is to the interest of the child that the court directs its entire attention. In Re Bort, 25 Kan., 308.

It appears from all the testimony that the conditions and circumstances, on the one hand Barnes and his wife being old people, yet eminently respectable and able to take care of the granddaughter Thursby; on the other hand we find the father of the child in steady employment, with a happy home, with Thursby going to school nine months in the year, with Sunday School and Church privileges not attainable in the state of West Virginia, especially in the locality where Mr. Barnes and his wife reside. Also, with the fact that Thursby, although but eleven years old, talks as if she were fifteen or sixteen, and gives her reasons why she would not like to return to West Virginia, and with the pleadings of little Thursby, this court will have to dismiss this proceeding, and remand the custody of Thursby Cunningham to her father Asa L. Cunningham.

The facts sufficiently appear in the opinion of the court.

Geo. S. Peters, for petitioner.

N. R. Hysell and E. B. Kinkead, for respondent.



## NATIONAL BANKS—DECEIT.

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[Superior Court of Cincinnati, In General Term.]

## \*H. P. LLOYD, TRUSTEE, V. WESTERN NATIONAL BANK.

E. L. Harper borrowed of defendant, \$200,000, upon accommodation notes indorsed by him. He secured the notes by depositing as collateral therefor certificates of the increased capital stock of the Fidelity National Bank of Cincinnati. The certificates were signed by Briggs Swift, the president, and by Ammi J. Baldwin as secretary of said bank. They were totally invalid. Subsequently Harper and the Fidelity Bank failed, and became insolvent. The bank then began an action in deceit against Swift to recover damages for his statement on the certificates that they represented valid shares of stock. This suit was settled by the payment by Swift to the bank of \$75,000. The makers of the notes were also insolvent. *Held:*

That notwithstanding such payment the bank was entitled to prove its claim against the estate of Harper for the full amount of \$200,000.

SMITH, J.

The case below was submitted upon an agreed statement of facts, and the judgment having been in favor of the defendant in error, the plaintiff in error now seeks a reversal of that judgment.

The statement of facts is substantially as follows:

E. L. Harper borrowed of the defendant in error, the Western National Bank, of New York, the sum of two hundred thousand dollars, (\$200,000), upon certain promissory notes executed and delivered by the makers thereof, and given to said Harper for his accommodation, which notes were secured by the deposit with the defendant in error as collateral security therefor of certificates purporting to represent sixteen hundred (1600) shares of stock of the Fidelity National Bank, of Cincinnati, Ohio, which certificates were signed by Briggs Swift, the president, and by Ammi J. Baldwin, as secretary of said bank. Subsequently, said Harper having likewise failed and become insolvent, defendant in error brought suit against Briggs Swift, for damages suffered by it by reason of the signing and the issuing of the said certificates, said certificates having been issued to represent stock which said Harper did not in fact own, for the reason that it was an over issue of the stock of the bank, the steps necessary to validate the issue having been omitted.

The suit was compromised, and plaintiff received in full settlement of his claim for damages against said Swift for deceit in stating that said certificates were valid, the sum of seventy-five thousand dollars.

Under the foregoing state of facts the bank claims the right to prove its claim against the estate of Harper, and to receive dividends upon the sum of two hundred thousand dollars, the amount of said promissory notes; while the trustee of Harper contends it is entitled to prove its claim and to receive dividends upon the sum of two hundred thousand dollars, after deducting therefrom seventy-five thousand dollars, making the provable amount one hundred and twenty-five thousand dollars.

In support of his position the trustee has cited a large number of authorities, which may be divided into two classes.

First. Those where a creditor having a claim against two debtors, proves it against the insolvent estates of both, and after having so proved it and having received a dividend thereon from one estate, is allowed to receive dividends thereafter on the balance only; and,

\*This judgment was affirmed by the Supreme Court May 26, 1896; unreported. 8 Legal News, 237.

Second. Those where a creditor, having a security given by a debtor, and having realized upon such security, is only allowed dividends upon the difference between the amount realized from the security and the face of his claim.

The cases cited are cases in bankruptcy, which are governed solely by the provisions of the statute on that subject; cases in Massachusetts, Vermont and Maryland, in which the doctrine applied in bankruptcy is adopted and applied, and cases decided by local courts.

In opposition to those cases the bank has cited decisions of other states, notably, those of New York, Pennsylvania and Illinois, where a contrary doctrine is declared, and the rule adopted that the taking of collateral security or the realization upon the same, does not affect the right of the creditor to prove his claim against the estate of the debtor, and to receive dividends for the full amount of the same until it is fully paid.

But we do not regard these authorities as applicable to the case at bar, and, therefore, we are not called upon to express any opinion as to which doctrine is supported by the greater weight of authority or the better reasoning.

In the case referred to, there has been either a receipt of a dividend from some other person who was liable upon the original debt, or there has been a realization from the collateral security. But in this case, Swift was not liable upon the original debt, nor has there been a realization from the collateral security, because the collateral security was Fidelity Bank stock, and as that stock was entirely unauthorized, there was, in fact, no stock, and nothing, therefore, was realized from it.

But it is urged that the evidence of the alleged false representation of Swift was in the printed statement upon what purported to be a certificate of stock, and as this purported certificate was pledged as collateral, the recovery of damages by reason of the false representation contained in it was a realization from the collateral security.

But there was no stock pledged. What purported to be stock was a worthless certificate not evidencing any real stock. Nothing, therefore, was realized from the collateral security.

What was secured was the fruit of an action for deceit against Swift for his representation that the security was a valid share of stock; and if we consider for a moment the measure of damages in such an action, we shall readily see that not only was this money not a realization from the collateral security, but that it was not a payment upon the note, and therefore cannot affect the right of the bank to prove its claim against the trustee for the full amount due thereon.

In the action against Swift, the measure of damages is not the value of the collateral security, but the difference between what the bank advanced Harper—the face value of the note—and the amount that it would realize from the estate of Harper. The measure of damages, therefore, necessarily assumes that the bank will prove and realize from the estate of Harper, all that is due it from the estate; and the fact that before the estate is settled, the creditor and Swift may settle as between themselves, does not affect the right of the creditor to realize from the estate all he was entitled to realize before the settlement. The payment is not on the note, but is to supply the supposed deficiency which will probably arise from the failure to realize all that the note calls for.

If the rule were otherwise and the payment were to be credited upon the note, and the provable amount against the estate were reduced *pro tanto*, it would be impossible for a creditor ever to recover the full amount of his loan, except from Swift alone.

This is well illustrated by an example given by counsel for defendant in error. Thus assume that at the time of the settlement between the bank and Swift, the estate of Harper had been converted into assets and was ready to pay fifty cents on the dollar. The amount, therefore, which in the settlement with Swift the bank would assume it would receive from the estate of Harper would be one hundred thousand dollars—fifty per cent. of its claim of two hundred thousand dollars. The amount to be paid, therefore, by Swift, would be the balance due—namely, one hundred thousand dollars. The creditor having received this amount would present its claim for two hundred thousand dollars, upon which it would expect to receive its fifty per cent. dividend. But if the position of plaintiff in error is sound, it would be met with the proof that it had already received one hundred thousand dollars, and, therefore, it must credit that amount on its claim, reducing it to one hundred thousand dollars, upon which amount it would receive the fifty per cent. dividend, namely, the fifty thousand dollars. But this amount, added to what it had received by it from Swift, would make the total amount received by it from all sources only one hundred and fifty thousand dollars. It would necessarily be obliged to call upon Swift to make up the difference, namely, fifty thousand dollars; in which case the total amount received from Swift would be one hundred and fifty thousand dollars, and the trustee of Harper would properly insist, therefore, that its claim be credited with one hundred and fifty thousand dollars received from Swift, instead of one hundred thousand dollars, as when first filed. This would leave the claim against the estate fifty thousand dollars, upon which it would be entitled to receive a fifty per cent. dividend, namely, twenty-five thousand dollars. But this amount, added to the one hundred and fifty thousand dollars received from Swift, would make only one hundred and seventy-five thousand dollars received from all sources. It would be necessary, therefore, for Swift to pay twenty-five thousand dollars more to the amount already paid by him, and this payment would leave only twenty-five thousand dollars to prove up against the estate.

And so this process would continue until the result would be that the estate of Harper would be entirely discharged from the payment of his debts for borrowed money on which he is the principal debtor, and Swift, who was not a party to the transaction, would be liable for his deceit to pay the whole of Harper's debt.

We think the bank should be allowed to prove its claim against the estate of Harper for two hundred thousand dollars, and that the judgment below should be affirmed.

MOORE and HUNT, JJ., concur.

H. P. Lloyd, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, for defendant in error.

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[Superior Court of Cincinnati.]

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RUTH J. GLIDDEN V. CINCINNATI (CITY) ET AL.

For this opinion, see 4 S. & C. P. Dec., 423.

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**MASONIC LODGES.**

[Cuyahoga Common Pleas, 1893.]

**FOREST CITY LODGE.**

The courts have jurisdiction to hear an injunction against a Masonic Lodge from expelling members for membership in a Cernau Lodge.

LAMSON, J.

The case was brought four years ago by several members of Forest City Lodge No. 388, F. & A. M., seeking to enjoin the lodge and the Grand Master from expelling them from the lodge because they were members of the branch of Masonry called the United States Jurisdiction.

The decision was directly upon a demurrer filed by the defendants which was barred upon the grounds that the courts have no authority to interfere with the lodge in determining who shall be its members. Judge Lamson overruled the demurrer, holding that the courts have the power of dealing with matters respecting the rights of individuals in secret organizations. Unless the decision is overruled in the Circuit or Supreme Court, it directly admits the entire question at issue between the Northern Jurisdiction and the Cerneaus into the courts. Exceptions were formally taken to the ruling by the attorneys for the defendants, and the question will, of course, be taken to the higher courts. [Editorial.]

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**WARRANT OF ATTORNEY.**

[Muskingum Common Pleas, 1890.]

W. S. DRAKE AND F. D. HEADLEY, ADMRS., v. JACOB SIMPSON.

Where a note and warrant of attorney are written together, over one signature, and the warrant does not state in whose favor judgment may be confessed, the latter is not void for uncertainty, but the instrument, construed as an entirety, authorizes confession of judgment in favor of the payee of the note; and after his death, the warrant is available to his administrator.

PHILLIPS, J.

At the present term, judgment by confession was entered against the defendant and in favor of plaintiffs, by virtue of a warrant of attorney embodied in a promissory note, made by defendant, and payable to the order of said Perry Sowers. The defendant moves to vacate the judgment, on the ground (1) that the warrant of attorney was invalid, and (2) that it was not available to these plaintiffs. The note and warrant of attorney are written together, over one signature, and the authority is, "to appear for me and confess judgment against me, as of any term, for above sum, with costs of suit." The contention of the defendant is, (1) that the warrant is void for uncertainty, in that it does not state in whose favor judgment may be confessed; and (2) if not void, the power could be exercised only in favor of the payee of the note, and is not available to his administrators.

So far as appears, neither question thus presented has been decided in Ohio. The former claim has been four times presented, but in each instance the case was disposed of on other ground.

In *Lewis v. Moon*, 1 Circ. Dec., 116, the warrant did not state in whose favor judgment should be confessed, and judgment thereon, in favor of the payee of the note, was held to be void, because confessed and entered before the maturity of the note; to-wit, on the third day of grace.

In *Ream v. Bank*, 1 Circ. Dec., 351, the warrant was in like form, and the action was brought by an indorsee of the note. The court held, that the warrant conferred no authority to confess judgment in favor of a transferee of the note.

In *Osborn v. Hawley*, 19 Ohio, 130, the warrant, as stated in 46 Ohio St., 440, "did not indicate in whose favor a judgment might be confessed;" but the confession being in favor of an indorsee of the note, it was held, that upon the transfer of the legal title to the note, the power became inoperative.

In *Spence v. Emerine*, 46 Ohio St., 433, the note was payable to the payee, "or bearer," and the warrant did not say in whose favor judgment might be confessed. The confession being in favor of one to whom the note had been transferred by delivery, it was held, that such warrant conferred no authority to confess judgment in favor of such transferee. In the former cases the claim that the power was void *ab initio* was apparently not urged, while in this case it was forcibly argued on both sides; yet both syllabus and opinion are confined to the proposition that there was not authority to confess judgment at the suit of such transferee, even "if such authority might be implied as to the payee." While the claim of original invalidity is not considered in the opinion, it seems to have been regarded with disfavor. Judge Dickman, says: "The plaintiff in error in executing the note might be presumed to have authorized an attorney to enter upon a judgment against him in favor of the payee, when he would not be presumed to have consented to stand in the relation of judgment debtor to a stranger or adverse holder, to whom the payee might indorse or deliver the note. The maker might well insist upon a strict construction of the power granted, when the payee, by transferring the note before maturity, might preclude a defense which he might have at maturity." Certainly, if the court had been of opinion that the warrant was not available to the original payee of the note, this would have been the true, and the only ground upon which to rest the decision; for the transfer of that which is in itself *nil*, can present no question as to the effect of the transfer. And I respectfully suggest that the claim of original invalidity presented the only new question in the case; for it had before been decided that a warrant of attorney is not negotiable, and is not available to a transferee of the note, unless made so by express terms. *Osborn v. Hawley*, 19 Ohio, 130; *Cushman v. Welsh*, 19 Ohio St., 536; *McIlvaine, J.*, in *Watson v. Paine*, 25 Ohio St., 340, and in *Clements v. Hull*, 35 Ohio St., 141.

The law regards a warrant of attorney attached to commercial paper, as a valuable security in the hands of the creditor. He has such interest therein, as a means to expedite his remedy, as to forbid its revocation by any act of the debtor. This interest of the creditor, in the warrant of attorney, makes it an instrument *inter partes*, and subjects it to the familiar canon of construction, that requires it to be effectuated, rather than defeated, if this can be done by any fair and rational construction of the language employed. Again, this note and warrant of attorney being over one signature, constitute a single instrument of writing, which

should be so construed as to make its parts consistent with each other. Scott, J., in *Spier v. Corll*, 33 Ohio St., 236; *Packer v. Roberts*, *infra*.

Following these two guiding principles—to effectuate the instrument, and to harmonize its parts—and keeping in mind that the parties are presumed not to have intended a useless and absurd thing, the clear and unmistakable intent and meaning is, that the authority to confess was to be available to the payee of the note. The words employed clearly express authority to confess judgment on the note, and by the terms of the note only the payee could sue thereon or be entitled to judgment on default of payment. The obligor was contracting with the payee, and must have had him in mind when he authorized confession of judgment on the note he then and therewith made to him. He could have had no other person in mind as the beneficiary when he made this warrant, and the payee could have had only himself in mind when he accepted it. If this was not the intention of the parties, they did a useless and absurd thing, and the two parts of this single instrument can have no consistent relation. It is well settled that such instrument is to be strictly construed and that it can not be enlarged or extended by implication. But, like other instruments, its real meaning must be ascertained from a consideration of the entire instrument; and the plain intent of the parties is not to be defeated by a technical informality that creates no doubt as to the evident purpose.

In *Packer v. Roberts*, 140 Ill., 9, 29 N. E. Rep., 668, the parties to a like instrument had used a printed form, containing the name of the Park Bank as the payee of the note and beneficiary of the warrant. The name of the bank had been erased from the note, and the name of Roberts, the payee, inserted; but they had omitted to make a like alteration in the warrant. It was held, that, construing the writing as one instrument, the purpose was plain, and that, notwithstanding the language of the instrument authorized a confession of judgment in favor of the bank, the intent was clear that the power was to be exercised in favor of the payee of the note, and not in favor of a stranger to the transaction; and a confession thereon was sustained.

The warrant being available to the payee of the note, it is available to his administrators. They represent him, and sue in his right, to enforce his right. There has been no transfer or change of ownership; and it is the transfer of the note that invalidates a warrant, not in terms available to such transferee. There is no express limitation to the payee *in vita*, and we should do violence to the plain intent of the parties, to hold that the death of the payee dissevered this instrument, and defeated his security. Motion to vacate the judgment overruled.

L. Danford, for plaintiffs.

C. L. Weems, for defendant.

**LIFE INSURANCE—BREACH OF WARRANTY.****237**

[Cuyahoga Common Pleas, April term, 1890.]

**MARY WHITE V. NATIONAL LIFE INS. CO.**

In an action by the beneficiary upon a policy of life insurance, the defense of breach of warranty of the truth of the statement of the assured in his application that no company or association had ever declined to grant a policy on his life is not made out by proof that a Mutual Benefit Association, organized under sec. 3630, Rev. Stat., had previously thereto declined to issue a certificate of membership to the assured.

**SHERWOOD, J.**

In determining this question I confess myself to be in considerable doubt with respect to the proper disposition to be made of it. In this application the question is asked: "Has any Company or Association declined to grant a policy on your life? If so, what Company or Association, and when? The applicant answers "No." It now appears that he did make application in a Mutual Benefit Association, The Peoples' Mutual Benefit Association, of Westerville; and the question arises as to whether that application for membership which, so far as the proof goes, was received by that "Peoples' Mutual Benefit Association," and by them rejected, was an application for a policy for insurance, and in refusing to grant that application, did that Company or Association refuse to grant a policy upon the life of Mr. White?

It is unnecessary to say that under the well recognized authorities which have been read, when an effort is made to maintain a defense upon a breach of a warranty, the parties maintaining that issue are entitled to have the contract maintained as written. At the same time the court is required to strictly construe all the provisions of the contract, leaning, if at all, against the warranty rather than in favor of it. One authority which I have found states that warranties are not favored, and that courts will not go any further than they are required to go in upholding them.

In consulting the authorities, so far as I have been able to consult them, to determine this question, and in reading the statutes of our state, I find that the legislature has itself made a distinction, and have used the term policy, or certificate of membership, apparently in contra distinction one to the other, the word "policy" as referring to a contract of insurance, issued by life insurance companies other than those organized under section 3630, and in that section which authorizes the organization of such companies, it provides for the issuing of certificates of membership, and that "no company or organization shall issue a certificate for a greater amount than such company or association shall be able to pay from the proceeds of one assessment." I find further in every case of a Mutual Benefit Association that the contract of insurance is termed a certificate of membership.

In the 111th Ind., it is declared to be the law that "for many and indeed the most purposes, Mutual Benefit Associations are insurance companies, and certificates issued by them are policies of life insurance, governed by the rules of law applicable to such policies;" yet it says: "There are, however, some essential differences usually existing between the contracts evidenced by such certificates, and the ordinary contract of life insurance." While I believe it to be held by the authorities that

the rules of law applicable to contracts for life insurance, as evidenced by a policy, are to govern certificates of membership issued for the purpose, which are contracts of insurance in Mutual Benefit Associations, yet there are some essential differences usually existing between contracts evidenced by such certificates and ordinary contracts of life insurance.

May, in his work on Insurance, although he defines a policy to be a contract for insurance, still says in a brief paragraph, recently inserted: "There are certain organizations prevalent in this country, and elsewhere, under the name of relief, benefit or benevolent societies, or some similar name, which generally have for their object aid to their members, or to their widows or children, after the decease of their respective members, and in some cases having both objects. These associations, though not speculative, and not based on capital paid in as an investment, have, nevertheless, a purpose of mutual protection, resorting to assessments for the procurement of the funds to discharge the mutual obligations of members, and are governed by by-laws which limit and define these obligations. Their certificates of membership often resemble, both in form and substance, ordinary policies of life insurance; and the courts have, with great uniformity, treated them as life insurance companies, applying to them and to the virtual relatives of the members, the rules and principles applicable to contracts of life insurance."

The same rules of law apply, and they resemble both in form and in substance ordinary policies of life insurance; showing that a distinction is made between certificates of membership and ordinary policies of life insurance.

Now, after the death of the person who has been a member here for two years after the issuing of a certificate of membership, who has paid all the assessments that have been made during that time, whose widow, or heir, comes in to ask this company for the amount that is due under the certificate of membership for which he has thus long paid, and when it is set up that he has violated a warranty in his application which consists in an answer to a question which involves a determination of the distinction between a policy of insurance and a certificate of membership, and the court is called upon to hold that when he said no company had declined to grant a policy on his life that he meant as well a certificate of membership in a Mutual Relief Association, and when to determine that question has raised as many doubts as it has in my mind, and has required as much investigation as it has by counsel and the court, it does seem to me it is going too far, and is not a compliance with the directions of the law which holds us to strict construction, to hold that he did mean to say in answer to that question that no company or association had declined to grant to him a certificate of membership in a Mutual Relief Association.

There is a recent case decided by the Supreme Court of Texas, vol. 37, p. 847, bearing upon the question. That was a case where the insured had warranted that he would give correct answers to the questions that were asked in his application, and the agent who wrote down the answers wrote them differently from what he stated. The defense made was a breach of warranty. The court said:

"In the case before us the agreement of the insured was that his answers made, or to be made, to the medical examiner were warranted to be true. He did not warrant his answers would be written down correctly by the medical examiner, or that the answers given by him would be correctly reported to the company. While the doctrine of



warranty should be strictly applied, it should be as strictly limited to the precise undertaking of the party making it."

Now, what is the precise undertaking of the party here? What did he warrant? He warranted the correctness of this answer that no company or association had declined to grant a policy on his life. Although a company or association had declined to grant a certificate of membership, which may, in effect, be a policy of insurance, I am constrained, in view of what seems to be the drift of the decisions and the requirements of the law, to hold that a refusal to grant a certificate of membership in a Mutual Benefit Association is not a refusal to grant a policy on the life of the decedent, and to hold that the proof introduced here does not sustain the breach of warranty; and I will therefore direct the jury to return a verdict for the plaintiff for the amount claimed in her petition, which is \$2,000, and interest thereon from the fifth day of December, 1887, to the first day of the term, which was the eighth day of April, 1890.

## APPROPRIATIONS OF PROPERTY—ASSESSMENTS. 249

[Hamilton Common Pleas, June, 1893.]

### \*CINCINNATI (CITY) V. STRIBLEY ET AL.

1. In an action to assess the compensation to property owners for the appropriation of their property by municipal corporations for public street purposes, compensation shall be awarded for its value at the time of the passage of the condemnation ordinance.
2. When the condemnation ordinance provides for the assessment of the amount awarded by the front foot upon the property abutting the street so condemned, the said ordinance fixes the rights and liabilities of the parties as to the said assessment.

#### OPINION on motion for new trial.

SAYLOR, J.

It appears in this case that an ordinance was passed by the board of legislation of the city of Cincinnati on July 31, 1891, under sec. 2232 of the Rev. Stat. whereby it is "ordained by the board of legislation of the city of Cincinnati that its intention is hereby declared to condemn and appropriate to the public use for street purposes, for the purpose of opening and extending St. James avenue, from Curtiss street to north end of St. James avenue, as now improved, in accordance with the resolution to condemn, passed April 1, 1891, and it hereby condemns and appropriates to such public use for street purposes, for the purpose of opening and extending St. James avenue as aforesaid, the following described property," etc., "and the corporation counsel are instructed to institute proceedings for an inquiry and assessment of compensation to be paid for such property; the amount so found, together with all costs and expenses of said appropriation, to be assessed per front foot on the lots and lands abutting."

The ordinance was approved by the mayor of the city on August 1, 1891.

On November 1, 1892, an application was made under sec. 2236, Rev. Stat., to the common pleas court for the inquiry into, and assessment of, compensation for the lands.

On May 17, 1893, the jury was impaneled, and the evidence being heard the jury returned its verdict assessing the compensation on May 18, 1893.

The court ruled on the trial, and charged the jury, that the measure of compensation to be allowed to the owners, was the fair and reasonable market value of the property at the time of the passage of the ordinance providing for its condemnation, to-wit: on August 1, 1891.

\*This judgment was reversed by the circuit court: Opinion, 6 Circ. Dec., 54.

To such ruling and charge the owners objected and excepted, they claiming that the market value should be determined as of a later date, to-wit; either as of the date of the filing of the application under sec. 2236, November 1, 1892, or as of the time of the rendition of the verdict, May 18, 1893.

The owners now claim that there was error in this regard and ask for a new trial.

Section 19, art. I, of the constitution provides that private property shall be held inviolate but subservient to the public welfare, when taken " \* \* \* for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money.

In cases of property taken to construct roads which shall be open to the public without charge, in which class the streets of our towns and cities belong, the rights of owners fall within the protection guaranteed by sec. 19 of art. 1st, by the provisions of which compensation is not required to be made before the property is taken. *Toledo v. Preston*, 50 O. S., 361.

I recognize that the court, in 7 Ohio St., 467, say: "If the land of a citizen or his rights in the property are commanded to be taken from him, it is beyond the power of the general assembly to authorize either to be touched until compensation is made," and this is followed in *Cincinnati St. Ry. v. Cummins*, 14 Ohio St., 524, 550; and in *Mathew v. Cinti.*, 1 Circ. Dec., 311. But Judge Bradbury in *Toledo v. Preston*, *supra*, clearly lays down the doctrine that lands may be taken by municipal corporations for street purposes for which compensation is not required to be made before the property is taken. The constitution does not confer the power of eminent domain. It simply prescribes modes for and limitations upon its exercise. The power itself is an inseparable incident of sovereignty, and its exercise was delegated by the sovereign power to the general assembly in the general grant of legislative authority. It may be defined to be the right of the sovereign, without the consent of the owner when necessary, to make private property "subservient to public welfare." *Giesy v. Ry.*, 4 Ohio St., 323, 324, "The power of eminent domain is rather a political than a judicial power, and by our constitution, its exercise is intrusted to the general assembly, so far as determining the necessity and propriety of the appropriation is concerned; while the courts are only invested with authority to determine the amount of compensation to be paid. The power may be exercised directly by that body, or through subordinate agencies; and while it would seem to be much more consistent with a proper regard for private rights, that the question of necessity as well as compensation should here, as in England, be determined by some impartial tribunal, I am not prepared to say that any well founded constitutional objection exists to committing its exercise to the corporation authorized to construct the work, as has been generally done in this state." (*Id.* 325, 326.)

Authority is conferred by section 2232 on a city or village to appropriate private property for opening, etc., streets, alleys, and avenues; secs. 2234 and 2235 direct the manner of proceeding, and the following sections of the chapter relate to the assessment of compensation by a proceeding in court, and provide that the court may direct the time and manner in which possession of the "property condemned" shall be taken or delivered (sec. 2248), and provide that if the municipal corporation fails to pay or take possession of the lands within six months after the assessment of compensation shall have been made, the right of the corporation to make such appropriation on the terms of the assessment so made shall cease and determine (sec. 2260).

The power to condemn is clearly given to the municipal corporation; the court is only invested with the authority to determine the amount of compensation and the time and manner possession shall be taken or delivered.

It seems to me therefore that by the ordinance of appropriation the rights of the parties are fixed, and they cannot be varied by subsequent events, further than that the city may fail to pay and take possession. If that be true, it seems to me to follow as a logical consequence that the market value must be fixed as of the time of the act of the appropriation.

The doctrine laid down 38 Ohio St., 32, is not at point in the case at bar. That was a case in which a railroad company sought to appropriate property under sec. 6414, of the Rev. Stat. These sections provide for proceedings in the probate court, by petition and service, and for the determination by the court of certain preliminary questions, and among them the right and necessity of making the appropriation (*Id.* 37). The judgment of the court is necessary to effect an appropriation, and as the verdict of the jury fixing the compensation is confirmed by the same judgment (*Id.* 36), the appropriation and assessment of compensation are

simultaneous, and of necessity the market value should be fixed as of the time of the rendition of the verdict. (4 Ohio St., 309.)

In the case of *Railroad Co. v. Perkins*, 49 Ohio St., 326, the company entered on the lands without right, and the owner sued under section 8448, 6449, to compel the company to appropriate, and the court held the measure of damages to be the value at the time it is assessed, on the ground that the owner was entitled to his land or its value at that time. *Ib.* 330. While it would seem that in the case of *Goodin v. Canal Co.*, 18 Ohio St., 169, in which the land had in fact been appropriated without payment made, and the owner delayed suit for a long time, (*Ib.* 180), the court held the owner entitled to the value of the land at the time it was taken. *Railroad v. Perkins*, 49 Ohio St., 327, 331.

When Judge Ranney says, in 4 Ohio St., 331, "That whether property is appropriated directly by the public, or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken," he could not have meant the time the possession is taken, as possession may be taken *s x* months after the compensation, and he must therefore have meant the time the lands were appropriated and as in condemnation of lands by a city, they are appropriated by the act of the city, the time of that act would be the time of taking; and as in condemnation of lands by a railroad company, the appropriation is by judgment of the court, the time of the judgment would be the time of taking.

When the city is vested with the right at its will to enter upon the land and possess it as a street, such right constitutes a taking, 40 N. J. L., 11. Under sec. 2232, the city is vested with the power to appropriate, enter upon and hold land for streets, and when it passes an ordinance to appropriate lands for such purposes, it would seem, under the decision of Judge Bradbury in *Toledo v. Preston*, 50 O. S., 361, to be vested with the right to enter upon the land and possess it as a street, and compensation may be thereafter made. Under section 2248 the court may direct as to time and manner in which possession may be taken or delivered; but I do not think this is intended as a limitation on the power conferred under section 2232.

In the case of *Railway Co. v. Longworth*, 30 Ohio St., 108, the owner offered in evidence a plat made before any proceedings had been taken to appropriate the lands. The court say, p. 111:

"It appears that the owners had, in good faith, and before they had any knowledge that an appropriation was sought, subdivided this tract and laid the same off into lots, streets and alleys, for the purpose of selling, and had sold some of the lots," and held that the plat should have been admitted.

This would indicate that if the plat had been made after the proceedings to condemn had commenced, or had not been made in good faith, it could not have been admitted.

In the case of *Cincinnati v. Seasongood*, 46 Ohio St., 296, the court held that the ordinance to improve a street, fixed the rights and liabilities of the owners of the abutting property, and on p. 303, say: "it is reasonable to presume that the passage of the ordinance to improve the street was not without reference to existing rights and liabilities. \* \* \* The assessment was only in aid of the improvement scheme as declared in the improvement ordinance, and did not enlarge or diminish the rights or liabilities of the defendant at the date of passage of such ordinance."

It seems to me that the ordinance to appropriate in condemnation proceedings has the same effect as the ordinance to improve has in assessment proceedings, and that the proceedings in court in the assessment of compensation are only for the purposes of carrying out, or in the aid of, the scheme as declared in the ordinance to appropriate.

In the case at bar the ordinance to appropriate the land also determines the manner of payment, viz.: by an assessment on the lands abutting by front foot. The rights of the parties as to the assessments are fixed by that ordinance. 46 Ohio St., 302.

I am of the opinion, therefore, that the fair market value of the lands at the time of the passage of the ordinance to appropriate is the measure of damages, and that there was no error in the ruling or charge of the court.

I am sustained in this by the ruling of Judge Maxwell in the case of *Cincinnati v. Neff*, 10 Dec. Re., 292.

In the case of *Toledo v. Groll*, 1 C. D., 441, the ordinance was passed appropriating property for a street, and the assessment of compensation made, in 1873; and no payment being made, the city entered on the lands in 1893. The owner did not object, and made demand of the amount awarded him by the verdict of the

jury in 1873. The court, on p. 202, hold that the owner could waive the forfeiture of the right of the city to take within six months, and to demand of the city the amount of the compensation assessed by the city, or to have the value assessed by a jury at the time the city took possession.

If the court meant by the last clause that the owner, not waiving the forfeiture of the right of the city to take in six months had a right to have the value assessed by a jury at the time the city took possession in a proceeding brought for the purpose of recovering the value of his property wrongfully taken, it is certainly good law; but if the court mean that the owner could waive the forfeiture and still had a right to have the value assessed as of the time the city took possession, then I think it is not good law. If the owner waived the forfeiture of the right of the city to take possession under the appropriation proceedings of 1873, and the city did take possession under said proceedings, then all of said proceedings, including the assessment of compensation, would be in force, and the owner would be bound by them.

The motion for new trial will be overruled.

Wright & Wright, for the property owners.

Theo. Hortsman and John G. O'Connell, corporation counsel, for the city.

## 264 EVIDENCE—LIMITATIONS—DEATHS—WILLS.

[Hamilton Common Pleas, October, 1886.]

### \*ROBERT BARR V. JOHN CHAPMAN ET AL.

1. Oral proof is competent, in the absence of a certified copy, to show the contents of a court record, which, with the original papers had been destroyed by fire, and not restored; but there must have been a journal entry or record made to establish the existence of a judgment.
2. An appeal does not lie to this court from a judgment of the probate court, refusing to admit to record therein, under sec. 5937, Rev. Stat., a certified copy of a will claimed to be executed and proven in another state—although an appeal does lie from a judgment admitting such will to record.
3. There is no error of judgment in the refusal of the probate court to admit such copy of the will to record, when the execution of the will does not appear to have been proven according to the laws of such other state, and when there is no judgment of probate on the face of the record.
4. Courts are not authorized to arrive at a judgment by founding one inference of fact upon another inference of fact.
5. A will executed and proven in another state must be admitted to record in this state, before it is effectual to pass title to land in Ohio. It may be competent as an ancient document to prove the identity of persons, for pedigree proof, and its age, sixty years, establishes its execution for purposes of such proof—but no amount of age can cure its inherent defect so as to pass title.
6. In an action to recover real estate, either party is entitled to a jury trial, but when the pleadings set forth an action for partition, neither party is entitled to a trial by jury, (except in the discretion of the court on special issues formulated), even though the title, right of property, and possession, be incidentally brought into the issues of the cause.
7. The defense of the statute of limitations is personal, and therefor it may prevail as to one co-tenant, and fail as to another, even though both may be made parties to the same suit in partition. Partition is not a proceeding *in rem* in this state.
8. An occupancy of land beginning under deeds in fee simple for the entire title, authorizes the presumption of an intent to hold and claim possession of the whole; and an occupancy beginning under deeds for the undivided part authorizes the presumption of an intent to hold and claim possession of such part for the occupant, and for the other undivided parts in trust for one's

\*This judgment was affirmed by the circuit court; opinion 1 Circ. Dec., 546. For probate decision see 9 Dec. Re., 615; 10 Dec. Re., 118. For opinion on hearing of motions, *In re Will of Robert Barr post* 910. See also *Elder v. McCasky*, 1 Ohio Fed. Dec., 325.

co-tenants; but such presumptions are not imperative and conclusive. The inferences from such facts are to be weighed with all the other facts in proof, that we may determine what in truth was the intent of the possession.

9. The tenant in possession claiming adversely to the world, may buy claims and title to the same property to quiet his own title, to avoid litigation and hold his possession in peace, without waiving his disseizin of such co-tenant claimants, although the buying and holding under a deed for the undivided part, if unexplained by any other fact in proof, would authorize the presumption of a waiver of the disseizin.
10. While ordinarily a tenant in possession is presumed to occupy for his co-tenant as well as for himself, yet he may hold adversely to his co-tenants, if he do so under a distinct claim as to the nature of his occupancy, and upon notice to his co-tenants. Such notice may be either actual or constructive. Notorious occupancy, under deeds duly recorded, claiming the entire title, is good and sufficient notice, especially to those of whose claim of co-tenancy, and of whose existence the occupying tenant did not know after diligent inquiry.
11. The presumption of death, arising from the absence of a party, unheard of, etc., is founded on a proven, unexplained absence from one's usual home, and not on the mere removal to another part of the country. Before a co-tenant can recover a larger title founded on the extinction by death of one of the collateral heir's interest, he must prove such death, without issue surviving.

#### BUCHWALTER, J.

This action is one where the claimants, as plaintiffs and cross-petitioners, assert title to, and right of possession of, an undivided interest in a certain tract of land of about 161 acres on Price Hill, in this city, as the heirs and devisees of the brothers and sisters of William Barr, Sr., the former owner of the tract in question, and ask for partition of said land, for the recovery of rents and profits, and for other general relief. All the claimants assert collateral heirship from Mary Jane Barr, deceased, through the deceased brothers and sisters of William Barr, Sr., deceased, and some of them claim additional titles as the devisees of Robert Barr, deceased, a brother of said William Barr.

The defendants deny the title of claimants to any part thereof, and assert entire title in themselves respectively to certain portions of the tract, and asserting adverse occupancy for more than twenty-one years, defend under the statute of limitations.

The land in controversy was formerly owned by William Barr, Sr., who died in 1816. It was held by the Supreme Court of the United States in 6 Wall., 458, *Poor et al. v. Considine*, that under the will of William Barr, Sr., John M. Barr, his son, took an equitable life estate, with the usufruct of the property for his own benefit, and upon his death his wife, Maria, took an equitable life estate with the usufruct of the property for the benefit of herself and their sole surviving child, Mary Jane Barr, and that said surviving child took a vested remainder in fee simple upon the death of her father, August 10, 1820, and thus terminated the disposition of the land by William Barr's will. The court further held that upon the death of Mary Jane Barr in her infancy, November 27, 1821, intestate and without issue, this estate was inherited by the brothers and sisters of the testator, William Barr, Sr., on their legal representatives.

This line of inheritance seems an unnatural disposition of undeviseed property, but nevertheless such was held to be the descent cast under the statute of Ohio enacted December 30, 1815, and in force until the act of 1835, so that the estate of the intestate descended to the brothers and sisters of her grandfather, (who had given it to her by devise,) rather than to the brothers and sisters of her father, her next of kin.

This unusual rule of inheritance is to my mind the reason these claimants remained for so many years ignorant of their interest in this estate, and thus failed to sooner assert their claims. And in fact it appears that those claiming title by deed of fee simple from the life tenant sought out and purchased the title of various other heirs and representatives of the brothers and sisters of William Barr, Sr. The life estate of Maria Bigelow terminated by her death, August 3, 1860.

Many preliminary questions have been raised during the trial, requiring numerous rulings by the court—chief among them, those touching the introduction of proof as to pedigree and as to the alleged will of Robert Barr, the asserted brother of William Barr, Sr., questions which were learnedly discussed, and interesting in examination; but for brevity's sake I will not here restate them.

Auxiliary proceedings were had in the probate court of this county, wherein the claimants as devisees under said will, sought to have it admitted to record.

Oral proof was given by which it was claimed to establish that Judge Matson, of the probate court of this county, had (prior to the destruction of the court records by fire, March 1884), ordered that said will and probate be recorded. The proof was controverted, and it was held by this court that, while it was competent to prove the record, though destroyed, yet that the proof did not establish the fact either of such record or, of any judgment or journal entry ordering the same.

Second. On an application *de novo* before Judge Goebel, (10 Dec. Re., 118), that court refused to admit said will to record, and appeal was taken to this court from such judgment, and it was held by this court that there was no provision for an appeal from the judgment of the probate court refusing to admit to record a will claimed to be probated in another state, and the appeal was dismissed for want of jurisdiction. (Since affirmed, 1 Circ. Dec., 546).

Third. Proceedings in error were then prosecuted to this court and docketed as cause No. 75,664, and, after hearing, my ruling thereon was reversed, (2 Circ. Dec., 251), until now in the final determination of other issues in this cause. This issue involves the one-sixth, or as is claimed, the one-fifth of this estate.

I am of opinion there is no error in the record. The will in question purports to be signed by Robert Barr, testator, and attested by two witnesses. It is recorded in a book among other wills in the proper office (the register's) in Westmoreland county, Pennsylvania, the domicile of the testator. There is proof taken before the register on the oath of one of the subscribing witnesses, as to all essential facts to be proven, and the further fact that he saw the other attending witness, who is since dead, sign as a witness. The proof does not show, affirmatively: that any other witness was sworn or testified as to the execution of the will, or as to the signature of the deceased witness, or of the testator.

By the law of Pennsylvania then in force, to entitle the probate of a will, each essential element of proof was required to be established by the oaths of two competent witnesses. 1 Dal. St. Pa., 1705, ch. 134, sec. 1, p. 53; Hock v. Hock, 6 S. & R., 47; Lewis v. Maris, 1 Dallas R., 278; Eyster v. Young, 3 Yeates, 511; Reynolds v. Reynolds, 16 S. & R., 97; Hays v. Harden, 6 Pa. St., 409-11; Derr v. Greenawalt, 76 Pa. St., 239; Charles v. Huber, 78 Pa. St., 448. The will on its face was duly executed, but its verity of execution according to its face, could not be proven by itself; its validity of execution under the law then in force, did not depend on the proof of the two witnesses who subscribed their names thereto. Such proof could be legally made by other witnesses, when the subscribing witnesses may be dead or cannot be produced. Hight v. Wilson, 1 Dallas, 94; Miller v. Carothers, 6 S. & R., 215; Hays v. Harden, 6 Pa. St., 409. It was the duty of the register in the probate of a will, to preserve of record all the proof of probate, and his record in this case shows the proof made by but one witness; and, although the will was recorded, there does not appear any judgment of probate, or order by the register that it be entered of record. The copy of the will, with the testimony of the one witness, is all that appears upon the record, besides the original will which was deposited and kept with the other wills left for probate. But this proof would not authorize a judgment of probate. Where a record is apparently entire, except the decree, such decree will not be presumed. Galpin v. Page, 18 Wall., 350-365; Hathaway v. Clark, 5 Pick., 490; Barstow v. Sprague, 40 N. H., 27, 32.

The record of the will was a ministerial act, but such ministerial act does not warrant the presumption that the register performed the judicial act of adjudging the will proven and ordering the record.

I am not unimindful of the rule of law in favor of the acts of public officers, that they are presumed to have performed their duty and did all things which they should have done, unless the circumstances of the case overturn such presumption (17 Ohio St., 241), and therefore that we are asked to make presumptions that the usual preliminary things were done by the register before he recorded this will, viz., heard the necessary proof of two witnesses to authorize the probate and record, but it was the express statutory duty of the register to record all the proof given on the hearing to probate the will, and by like rule of law we presume he did his duty and did record all the proof, and therefore did not hear two witnesses. These presumptions are not reconcilable, and the only inference reasonable to make, is that the register recorded all the proof offered (that given by one witness), then recorded the will in anticipation of further testimony, and deferred a judgment of probate until such other proof should be given.

It has been fervently claimed that, as the will is recorded in a book kept and used for the record of probated wills, it is to be presumed that it was ordered recorded, and if ordered recorded, that its execution was duly proven by the oaths

of two or more witnesses. But this would be establishing a fact by at least one presumption upon another presumption; and the law in an endeavor to arrive at conclusions with some degree of certainty, does not establish facts by presumptions founded upon presumptions. *Richmond v. Aiken*, 25 Vt., 324-6; *McLees v. McMurray*, 58 Pa., 126; *U. S. v. Ross*, 92 U. S., 281; *Pennington v. Yell*, 11 Ark., 212; *Fenger v. Fenger*, 8 Dec. Re., 407.

I am therefore of opinion that the will of Robert Barr does not, by such record as is in evidence, purport to have been probated by the register of wills of Westmoreland county, Pa.; and if it did so purport, I should not hold, as claimed in argument, that it was only an erroneous judgment, and conclusive on the probate court of this county, for its error would then be patent upon the face of this record, being probated upon the oath of but one witness.

It has been held by the Supreme Court of Pennsylvania, in proceedings of ejectment and partition, to be the law, that the judgment of probate was but *prima facie* evidence of the due execution of the will, *Holiday v. Ward*, 19 Pa. St., 485, and that when the record of probate showed the will to have been proven by the oath of but one witness, such defective proof overcomes the *prima facie* order of probate. *Logan v. Watts*, 5 S. & R., 212; *Miller v. Carothers*, 6 S. & R., 215. I do not understand the law to be, as claimed in argument, that such judgment or order of probate, if it had been made by the register, would be conclusive on any court in Ohio, although not on the courts of Pennsylvania.

The proposition would be plain, that under the law of Pennsylvania the will of Robert Barr could have been duly probated on proof given on the oath of some other witness, in addition to that recorded as the testimony of the witness Samuel Morehead, establishing the verity of the signature of the testator or of the deceased witness—but such was not the proof.

The execution of the will has therefore never been established; it was not probated according to the law of Pennsylvania, and therefore cannot be admitted to record (as a probated will) in any probate court in this state. And its execution by Robert Barr not being proven, the will does not become competent evidence to show transmission of title from Robert Barr to the claimants.

The judgment of the probate court will be affirmed, with costs. Affirmed, 1 Circ. Dec., 546.

The will also being offered in evidence, independent of the proceedings in the probate court of this county, and objection being made, the same will be sustained, for that such will must first be admitted to record in Ohio before it is effectual to pass title. Sections 5937-5942, Rev. Stat. *Wilson's Ex'rs v. Tappan*, 6 Ohio, 72; *Baily v. Baily*, 8 Ohio, 236, 246; *Jones v. Robinson*, 17 Ohio St., 180; *Carpenter v. DeNoon*, 29 Ohio St., 394; *Kerr v. Moon*, 9 Wheat., 565; *McCormick v. Sullivant*, 10 Wheat., 192.

The will being over sixty years old, is competent pedigree proof to show identity of persons, falling within the rule of ancient documents, and for such office its execution is presumed from its age. 2 Phil. Ev., 481, n. 4.

But the mere age of the document does not invest it with power (to supercede the strict requirement of the statute) to pass title in Ohio. Age cannot cure its defects.

The remaining issues of the case pertain to the claimants' right of recovery as heirs.

The greater portion of the testimony and evidence offered, and the time consumed in the trial, pertained to the identity of claimants, or pedigree proof. The issue of fact determined largely the issue as to the title.

I am quite persuaded by the proof that the claimants are the persons they assert they are, and the degree of certainty passes to that of beyond reasonable doubt. I will not consume time to state in detail this proof; it reaches back in time over many generations, and recalls dates prior to the Revolution. It traces the offspring of a family of brothers and sisters across the mountains, from the eastern to the western counties of Pennsylvania, and through the various states of the Union. It is found in ancient documents, in the old records of wills and releases thereunder, of land warrants and deeds, proceedings in the administration of estates, tombstone inscriptions, pedigree proof given as family tradition, lodged in the memory of aged witnesses.

The William Barr, Sr., original owner of this tract of land, came from the vicinity of Shippensburg, Pa. Among his brothers and sisters, Robert is described as having died without surviving issue, and John as the father of seven surviving children, giving their names, including William, Robert, and others. These and other specific facts are stated in the deposition of Maria Bigelow, the daughter-in-law of William Barr, Sr., married in the vicinity of Shippensburg, Pa., in 1811, and

taken in an action wherein the lineal descendants were defendants, to perpetuate testimony on behalf of defendants' grantors, Ephriam Morgan and others, in the year 1858, and supported by other proof. Among other proof, we find the will of John Barr, of the vicinity of Shippensburg, dated in 1805, duly probated in 1806. This will recites devises and bequests to seven children of the exact number given by Maria Bigelow. Then follow releases (on payment of the bequests), from the one portion of the family, by second wife, since residing at Columbus, Ohio, and of whom Ephriam Morgan and others bought title,—also releases from the other children, including Robert Barr, of Wood county, then of Westmoreland county, Pa., and William Barr, of the same county, all in 1810. These original claimants identify this William Barr as their father. His tombstone is in proof; his death in 1813, at forty years of age. From all the proof, this William Barr was the father of Samuel Barr, of the same township and county, and the other original claimants, and this same William Barr was the son of John Barr, who was the brother of William Barr, Sr., of the same vicinity. This same Robert Barr, son of John, is clearly traced to Stark county, Ohio, where he located a land warrant, and Wood county, Ohio, near Bowling Green, where he again owned land, sold, executed deeds to children and others. The releases and certified copy of the will of John Barr have been kept by the descendants of his executors and sons by the very parties with whom we would naturally expect to find them, and who are of right entitled thereto.

The proof of the relationship of Robert Barr, of Derry township, Westmoreland county, (called at the trial "Old Uncle Robert Barr,") is to my mind more clearly fixed by his will and by his family intimacy with the children of this William Barr. His will, proven to be on file with the original wills of that county, and under which these claimants took and passed title in that county, is competent proof of pedigree; and it recites the devise of the home farm to Samuel, Robert and John, sons of his nephew, William Barr, etc. They were partially raised with him in the same house. He died without children surviving him, his age, date of death, and other proof, certainly make him the brother of John, of Shippensburg, and therefore of William Barr, Sr. The identity as the brother of Jane Mewherter, of Ligonier Valley, by visits and interviews, is not so clear, but not effectively controverted by the testimony of the Mewhererts heirs.

For I take the force of the testimony to be that because their ancestor, Jane Mewherter, spoke of and described him as "Uncle Robert," they concluded that Robert Barr was her uncle rather than her brother. But human experience teaches that a parent in addressing one's own children, speaking of a relative, describes him rather by terms of relationship to them, and therefore, if Robert Barr was their uncle or grand uncle, she spoke of him as "Uncle Robert," rather than "Brother Robert."

But the defendants have made most diligent search through all the records of all these counties where the Barr family resided, and while they show other William, Robert and John Barrs, not one of them could fit the description, or could reasonably be the real John, William and Robert Barr in controversy. To make such proof effective, defendant should show that these persons were the heirs in controversy. *Jackson v. Goes*, 13 Johns, 523; *Jackson v. Cody*, 9 Cow, 150.

#### THE STATUTE OF LIMITATIONS.

The nature of the action is somewhat complex. The original claimants, Samuel Barr, Robert Barr, Jane (Barr) Chapman, and Martha (Barr) Reed, in July, 1881, filed separate actions, alleging title and right of possession as to certain undivided portions of the 160 acre tract in question, naming various defendants as co-tenants, and asking partition, with prayer generally for equitable relief.

Thereafter in this cause, wherein Robert Barr is plaintiff, the other claimants (including the devisees of John Barr, deceased), by cross-petition aver title as heirs, also by the devise under the will of "old Uncle" Robert Barr, brother of William Barr, Sr.; ask for partition, for an account to be taken of the rents and profits, and for the use and occupancy of said premises, a decree for their equitable portion thereof, and for other relief.

The defendants deny the title of claimants, pleading the statute of limitations, and ask for recovery of costs, and equitable relief generally.

To examine the pleadings, it would appear to be an action in partition, for the recovery of rents and profits, and for other equitable relief, with incidental issues as to title and right of possession. To have heard the trial satisfies the mind rather that the main issue is as to the title and possession.



The issues of title grow out of the identity of the claimants as the Barr heirs, the validity of the Robert Barr will, and the adverse possession of defendants.

I will adhere to my ruling at the beginning of the trial on the issues as pleaded, viz: by claimants averring their title as co-tenants, and right of possession, and praying for partition and equitable relief; and by defendants denying the title and right of possession of claimants, and also pleading adverse possession under the statute of limitations, and praying generally for equitable relief, that the court had jurisdiction, and that the cause was not of right triable by a jury. The pleadings fairly bring the case within the authority of *Hogg v. Beerman*, 41 Ohio St., 81.

In Ohio title is determinable in partition proceedings, while in some of the states the legal title must first be determined in a separate action at law, it being held that the partition proceedings can only establish the possession in severalty where the legal title is not in controversy between co-tenants.

It has been argued by counsel for claimants that partition is a proceeding *in rem*, and that the beginning of the action by one claimant within time saved the rights of all claimants as against all parties defendant now before the court.

In statutory proceedings in partition, where no title is determined by the court, and none acquired under the judgment or decree, it may not be a misnomer to describe it as a *quasi* proceeding *in rem*, and some authority may fairly be claimed from Judge Lane's opinion in 6 Ohio, 255, Lessee of Glover's Heirs v. Ruffin, and 9 Ohio 117, Lessee of Pillsbury et al. v. Dugan's Adm'r & Cade.

The case at bar could not have been tried under the old special proceedings for partition, for the court would be limited to the mode and extent provided by statute, nor could service by publication have been effective to have given jurisdiction as against resident defendants. The issues, legal and equitable in their nature, have broadened into a civil action wherein the judgment and decree of the decree of the court, to be responsive, must be directed to the persons as well as to the thing.

Bouvier says that an action *in rem*, is one instituted against the thing which is its object, without reference to the person of the possessor. (And see 3 Dallas, 297).

Manifestly, this action pursues the person as well as the thing,—the occupying tenants as well as the land itself. They are here summoned, not only to answer to the demand of claimants to hold a part of the thing, the land, in severalty, but each to account for the rents and profits due for the occupancy which defendants plead was in severalty, of specific entire parcels of the tract.

The statute of limitations may save title of one co-tenant while title of the other co-tenants may be barred. Such protection of title by statute, such defense, is personal. *Bronson's Lessee v. Adams*, 10 Ohio, 135, *Moore v. Armstrong*, 10 Ohio, 11, *Williams v. Presbyterian Society*, 1 O. St., 478.

If the argument of counsel for claimants be good, then those heirs who did not know of their title or of the pendency of this action, and did not authorize it brought, and whose claim would be barred by the statute of limitations, in an action to recover real property (secs. 5781 and 5783, Rev. Stat.) have nevertheless their right of action saved because some other claimant has prosecuted a partition proceeding involving incidental issues of title to such property. Likewise, it must be conceded that the form of the statement of the cause of action would determine whether the action was barred; that if Robert Barr, of Iowa, had brought his action to recover his undivided interest in this real estate as against defendants in possession, it would not be asserted that thereby the statute ceased to run against all other claimants; but, having brought it in partition and averred title in him, and that the other claimants, together with the defendants in possession, were his co-tenants, then, although such other claimants may not assert title, may not know what is asserted on their behalf, are said to have had their claim saved from the operation of the statute.

The defense of the statute of limitations is a substantial right acquired by law, and any claimant not excepted from its provisions, who omits to assert his claim during the stated permissive period, is barred from the right of recovery by adverse occupancy, if the defendant pleads the statute.

In this cause the defendants have pleaded the statute as against every claimant. I hold, therefore, that those who failed to assert their claim to this real estate for twenty-one years after the right of action accrued, as against those who have held adversely, are barred from recovery unless they come under the exception of the statute. The statute runs from the time each asserted claim to title, either by petition or cross-petition. *Miller v. McIntire*, 1 McLean, 85, (affirmed 6 Pet. 61); *Holmes v. Trout Heirs*, 1 McLean, 1, (affirmed 7 Pet. 171); *Gicard v. Davis*, 6 Peters, 124; *Shaw v. Cook*, 78 N. Y., 194.

The possession in controversy began under a deed of special warranty in fee simple from Maria Bigelow to Ephraim Morgan and Lot Pugh for the entire tract, in 1839. These original grantees thereafter convey the entire title to various parts of this tract, by metes and bounds, until by successive and numerous conveyances the respective title became vested in the present defendants, the various grantees entering into possession and continuing in their occupancy according to the terms of their respective deeds.

The manner of occupancy has been similar to that of any populous suburb. The property has been occupied for dwellings, business houses, churches, seminary, fire engine and school houses, the permanent improvements being many times more valuable than the land itself. Sub-divisions into lots have been made, streets constructed, water and gas supply carried into the streets and buildings, stone quarried, trees cut, forest cleared. The surface re-graded and dressed into handsome lawns, those in possession in all instances paying the taxes and street assessments. The transmission of the titles being by devise and by inheritance as well as by deed, many conveyances being made by involuntary sales upon decrees of the court by the public officers.

If this tract of land is to be adjudged according to the uses as a farm when in possession of the Barr family, then there has been great waste committed; but according to the demands of the new conditions, it has been greatly enhanced in value by the expenditure of the occupying tenants, and therefore if the claimants had appeared during the life tenancy of Maria Bigelow, their objection to these improvements would not have been heeded.

It is manifest that the grantees of the life tenant could do all that she had a right to do, and that irrespective of the recorded declaration of the extent of the titles under which they claimed.

But those who took possession under the grantees of Maria Bigelow, did so in every instance under deeds purporting to convey the entire title. It is true Ephraim Morgan, and others of the original owners of large tracts of this land, did, (before and after the death of Maria Bigelow, before and after the date of their conveyances of parts of the premises by deeds in fee simple with general warranty), buy and receive quit claim conveyances of titles from the heirs of one sister and certain brothers of Wm. Barr, Sr., and the heirs, the claimants, defend against the plea of the statute of limitations, on the ground that the acceptance of such deeds from their co-heirs purged the occupancy of the defendants of its adverse character.

The nature of the occupancy becomes an issue of fact. If this cause were divested of its partition character, and the case were simply for the recovery of real estate, the jury would have the duty of determining the nature of the occupancy, whether the defendants occupied with an intent to claim the whole title as against the claimants and all other persons. An occupancy beginning under deeds in fee simple for the entire title, authorizes the presumption that there was an intent to occupy and claim the entire title, and an occupancy under deeds for an undivided part of the title authorizes the presumption that there was an intent to occupy the whole for himself and to tenants, claiming for himself only his individual part. But neither of such presumptions is conclusive and imperative.

The authorized presumption is to be weighed with all the other proofs, including the circumstances and the motives of the grantee in procuring such title. The examination by court and counsel has not given us any authority that such presumption is conclusive. In the case at bar, testimony has been given by Mr. Lincoln, Sr., who was of counsel for occupying tenants, from prior to the trial in 6 Wallace, 458, to the present trial. He was a competent witness, as to the motive of purchases made by him, on his advice as attorney and trustee for those in possession.

This issue of the intent of the occupancy calls for the consideration of a multitude of facts, put in proof, and the inquiry extends in point of time to the date of the Bigelow deed, in 1839.

The argument is made that as title was taken by those in possession for some of the Barr heirs for an undivided interest, that whatever the previous intent of occupancy, from that time their duty was to occupy in trust for the claimants as co-tenants, and that they are to be presumed to have intended to be honest and true to their trust.

Relying on *Zeller's Lessee v. Eckert*, 4 Howard, 289; *Parker v. Proprietors of Canal*, 3 Met. (Mass.), 91; 7 Watts., 565.

But from all the circumstances in proof as to such purchases and as to the nature of the occupancy, it appears to me quite convincingly that the sole intent of those in possession was to hold and claim the entire title for themselves and heirs,

and not for claimants, as co-tenants, of whom it does not appear that defendants had any knowledge.

Good conscience does not require that one be charged with an intent and duty to hold and occupy land for those he does not know, and of whose existence and claim he cannot learn, especially after diligent inquiry.

I do not think it will be controverted that Dr. Wood and others, acting for Ephraim Morgan and those in possession, after diligent search for all the heirs of the brothers and sisters of William Barr, Sr., had never heard of these claimants, nor that they were heard of, or known as such heirs by the grantees when they took title by deeds at various times from other Barr heirs.

I do not overlook the information found in Maria Bigelow's deposition as taken in 1858; but it only informs us that William Barr (claimants' father) was one of John Barr's seven children—his residence in Westmoreland county not given, nor the fact of his removal from his father's home east of the mountains, nor that he was married or had children, nor of his death, which had occurred forty-five years before her deposition was taken; and it is to be remembered that when this title vested by Mary Jane Barr's death in 1821, it was directly to most of these claimants as heirs (their father William and grandfather, John Barr, brother of William Barr, Sr., being then dead).

And it appears that although Dr. William Wood, agent for Ephraim Morgan, visited Westmoreland county, Pa., and got deeds from other Barr heirs, and was solicitous to buy up all outstanding title of the collateral heirs to quiet the title they claimed under, yet he never spoke to or found these claimants, nor does it appear that the other heirs who sold their titles, informed Dr. Wood of their existence and residence in the same county. In fact the proof strongly tends to show that these claimants were not known to those grantors as relatives.

The purchase of title of other collateral Barr heirs was not a recognition by those in possession that claimants had title; for their identity as collateral heirs was an important factor in question as to whether they had or were supposed by those in possession to have title. I do not remember any proof of any act of those in possession, in purchase of title or otherwise, which admitted the identity of claimants as collateral Barr heirs. Besides, it is a fair presumption on the proof that such purchases were for the purpose of buying adverse title in order to quiet possession and protect them from litigation, and not a waiver of the disseisin of claimants. *Fox v. Widgey*, 4 Greenleaf, (Me.), 214; *Northrup v. Wright*, 7 Hill, 476-89; *Jackson v. Smith*, 13 Johns., 406-13; *Owens v. Meyers*, 20 Pa. St., 134-8; *Prescott v. Nevers*, 4 Mason, (U. S. Cir.), 326; *Freeman on Partition and Co-tenancy*, sec. 106. And many other cases cited in argument.

The rule is clearly recognized that ordinarily the co-tenant's occupancy will be presumed to be with a full recognition of the rights of the true owners of the title, and on their behalf as well as his own; but it is an equally well recognized rule that the tenant may hold adversely to his co-tenants, if he does so under distinctive claim that it is on his behalf and against his co-tenant. Such intent to hold adversely, I believe to have been clearly established in this case; but the claimants were entitled to notice of such intent and occupancy by their co-tenants in possession.

That notice may be either actual or constructive. *Warfield v. Lipdell*, 38 Mo., 561; *Forest v. Jackson*, 56 N. H., 357-62; *Weisenger v. Murphy*, 2 Head. (Tenn.), 674, 78-79; *Lodge v. Patterson*, 8 Watts. (Pa.), 74; *Greenhill v. Biggs*, 85 Ky., 155; *Bath v. Valder*, 70 Cal., 350; *Freeman on Co-tenancy*, sec. 230; *Abernathy v. Mining Co.*, 16 Nev., 269. See *Clymer's Lessee v. Dawkins*, 3 How. U. S., 689.

No actual notice has been proven, but constructive notice is established to have been given in almost every conveyance of record as to this land, by fee simple deeds for the whole title, since the death of Maria Bigelow; the notice had been many times spread upon the records of this county from her deed in fee simple to Ephraim Morgan, recorded January 3, 1839, and many other recorded conveyances down to the date of her death.

Though the claimants were not obliged to read the notices or at least to act upon them until the life tenancy was at an end, yet since that time they were obliged in law to take notice of their entire recorded title, and of all declarations and conveyances adverse to their title, whether recorded before or after the death of the life tenant. *Kinsell v. Doggett*, 11 Me., 309-14.

To have viewed the premises with its streets, houses, churches and school-houses, to have read the records in proof, could any heir have doubted but that the defendants occupying their respective parcels of this tract of land under deeds purporting to convey the entire title in fee simple, were doing so with intent and by act adversely to these claimants?

The law charges them, the claimants, with such notice as the record disclosed, and with such knowledge as to the character of the occupancy as they could get by actual view thereof since August 3, 1860.

From the proof given, it is established that the tenants in possession did occupy their respective tracts with the intent of holding for themselves the entire title and adversely to the rest of the world, and especially to the unknown Barr heirs. Such intent was manifested by the character of the holding, in proof; the occupancy was exclusive and notorious, and like that of any owner of his home in the suburbs. Has it not been "actual, continued, visible, notorious, distinct and hostile possession," as Justice Duncan says it must be to prevail as adverse possessory title?

Robert Barr, plaintiff, filed his petition in this cause against certain defendants July 28, 1881, and made sufficient averment for recovery of real estate as heir. The twenty-one years of adverse possession would not have accrued until August 3, 1881. As to such defendants as were served within sixty days thereafter, according to secs. 4987 and 4988 Rev. Stat., the plaintiff brought his action in time to save his title and right of recovery as heir.

Some nicety of distinction has been drawn in argument as to whether the claimants were the heirs of William Barr, Sr., or of Mary Jane Barr. It was the statute which directed the inheritance to return to the testator if living, and being dead, to his brothers and sisters of their representatives or heirs. The original pleadings, being entitled to liberal construction, are broad enough to cover an inheritance from Mary Jane Barr, though the heirship be averred to be from her testator, Wm. Barr, Sr. No one defending failed to comprehend the intention or meaning. The amendments which averred inheritance from Mary Jane Barr did not set up any new claim,—it was the same title more accurately described; besides, the original share claimed was larger than they are entitled to recover.

Jane Chapman filed her petition July 28, 1881, Martha Reed filed her petition July 30, 1881, Samuel Barr filed his petition July 30, 1881, and they were docketed as separate cases in this court.

They were all dismissed March 13, 1886, because they did not comply with the order of court to give security for costs, as non-residents.

On August 30, 1884, they filed cross-petitions in this case. They have continuously, since the beginning of their separate actions, been asserting their title, and the dismissal of their separate cases, being not upon the merits, their causes of action are saved under sec. 4991, Rev. Stat., as to all defendants served or entering appearance within sixty days after the filing of the original petitions.

The devisees of John Barr (a brother of plaintiff), make their first claim by cross-petition August 30, 1884, more than twenty-four years after their right of action accrued. My attention has not been called to any fact pleaded or proven, and I know of none, excepting any of the devisees from the operation of the statute. The action on their title therefore is barred.

The claims to title are for the first time asserted by the descendants and heirs claiming under Robert Barr of Wood county, Ohio, (a brother of William Barr, father of plaintiff, and a son of John Barr, brother of William Barr, Sr.), by cross-petition in this cause filed February 12, 1886, more than twenty-five years after their right of action accrued, and their action on their title therefore is barred as claimed by defendants in possession, except as to Mary J. Brewster (formerly Haunon and a granddaughter of said Robert Barr of Wood county), who married George Brewster in 1858 and became his widow in 1860, has her right of action saved under sec. 4986 Rev. Stat., as to all parties to her cause of action. And her right is not affected by the amendment of section 4978 Rev. Stat., passed 1886. Vol. 83 Ohio Laws 74.

#### RELEASES.

Robert Barr, Samuel Barr, Martha Reed and Jane Chapman gave certain executed powers of attorney to former counsel of record, Messrs. Wright and Dodds, and they as attorneys in fact executed various deeds of quitclaim as to certain lots and parcels of this land,—as to all which proof has been given. Such conveyances extinguish their respective claims as to such land conveyed by their attorney.

With the ruling heretofore made as to the will of Robert Barr, the controversy as to the extent of title conveyed, whether that claimed as heirs only or also that since claimed by devise, becomes immaterial.

## THE STREETS.

The various deeds of quitclaim recite the frontage of the lots conveyed upon certain streets. Such reference to the streets is an acknowledgment thereof and a statutory dedication of such street according to sec. 2634 Rev. Stat., and in my opinion a dedication of the interest of the grantors the entire extent of such street through the Barr tract, and not merely so much as may be in the immediate front of the lot conveyed. It is also a recognition to the grantees in the deed of the right to use the whole street in connection with the use of the lots conveyed.

As to the streets not so recognized or dedicated, and improved for such purpose and lying in front of the property now to be partitioned, it seems manifest that for the benefit of such property belonging to the claimants, they should be adopted as a part of the plan of partition.

The proportion of recovery by claimants, bringing their action in time is affected by the determination as to the shares of Sarah Grafton, sister of William Barr, Sr., and Margaret Barr, daughter of John Barr, brother of William Barr, Sr.

It has been claimed that these shares are extinguished by the presumption of law, upon the facts in proof, that Sarah Grafton and Margaret Barr died without issue.

The proof is very meager as to both of them. Some proof tends to show that Sarah Grafton moved to Natchez, Miss.; that she had three sons (other proof that she had two) who died when young, and that she had a daughter, some proof tending to show, but very unsatisfactorily, that she moved to Texas. There is no proof to show that she was absent from her domicile, or that she abandoned her home—rather, she moved away, and her relatives of remote degree testify about their lack of information—no witness who presumably had the information—no one who lived in her vicinity, or visited or talked with her at about such time has given us any proof.

The same substantially may be said as to Margaret Barr, who married Thomas Hattery, she at one time lived at Somerset, Pa., and there with her husband executed a release under her father John Barr's will. There is no proof to show she was absent from her home; no testimony of any witness who would be presumed to know; some proof tending to show she had a child and afterwards became a widow. The proof is simply meager and unsatisfactory about her and her offspring.

The presumption of death, arising from the absence of a party unheard of, etc., is founded on a proven absence unexplained, from one's usual home or domicile, and not founded on a mere removal to another part of the country. (See Bouvier's Institutes, page 100, and cases cited.)

The proof is not such as to authorize the division of the shares of Sarah Grafton and Margaret Barr. In fact, since I have announced to counsel a day to decide this cause, an application is made to make new parties of those claiming to be heirs through Daniel Grafton, son of Sarah Grafton.

Of the testator, Wm. Barr, Sr.'s family, there were seven. The lineal descendants did not inherit under the statute of 1815; Robert had no issue surviving; John Barr, grandfather of plaintiff, therefore, if living, would have taken one-fifth of the estate. He had seven children, presumably leaving issue, of whom William Barr, father of original claimants, was one. Said William had seven children, two of whom, William and Polly, died in infancy; the five remaining children took a vested title in these premises on the death of Mary Jane Barr, in 1821. The share of each would have been one-fifth of their father, William's share, if living, and one-fifth of one-seventh, or one thirty-fifth, of what their grandfather, John, would have taken, if living, or the one-fifth of one-seventh of one-fifth, or one-one-hundred and seventy-fifth ( $\frac{1}{175}$ ) of the estate of Mary Jane Barr. Therefore Robert Barr, of Iowa, Samuel Barr, of Westmoreland county, Pa., Jane Chapman's devisees of Iowa, Martha Reed's heirs, of Westmoreland county, Pa., each recover one-one-hundred and seventy-fifth ( $\frac{1}{175}$ ) part of the estate of those against whom they filed their action in time (as hereinbefore stated), and not released by quitclaim deed.

Mary Brewster was one of three children of Fanny Barr Hannon, and she was one of six children of Robert Barr, of Wood county, Ohio, (one of whom died intestate in infancy, the other five having surviving issue). She is therefore entitled to the one-third of one-fifth, or one-fifteenth ( $\frac{1}{15}$ ) of the Robert Barr, of Wood county, Ohio, inheritance.

Her mother died in 1845, and the title vested in her (subject to the life-estate of Maria Bigelow) on the death of her grandfather, Robert Barr, in 1857,—about one year before her marriage. Said Robert Barr took one-seventh of what his grandfather, John Barr, would have taken if living, or one-seventh of one-fifth, or

one thirty-fifth ( $\frac{1}{35}$ ) of the estate of Mary Jane Barr; and Mary Brewster the one-fifteenth of one-thirty-fifth, or the one-five hundred and twenty-fifth ( $\frac{1}{517}$ ) part of the estate of all persons as to whom issue is joined in this action. It does not appear that she or her ancestors gave any release or quitclaim deeds.

After first hearing from counsel, I will make order apportioning costs recovered and appoint a special master as to detail findings.

As to the improvements, the defendants in possession are entitled to have them taken into account in the partition to be made of the premises, if practicable, in actual division of land,—and if not, then to be determined in proper proceedings hereafter.

The same as to the issues made as to rents and profits, etc.

The Court: The stenographer will make a note that the claimants make demand of a statement as to conclusions of fact and law separately, and except to the affirmance of the probate court in the will case.

Samuel T. Crawford, Judge T. A. O'Connor and Col. Thurstin, for the claimants.

Lincoln, Stephens & Lincoln, Bateman & Harper, Foraker, Black & Rockhold, Simrall & Mack, J. D. Henry, Coppock, Cox & Gallagher, City Solicitors.

C. W. Baker, Benj. H. Cox, Goebel & Bettinger, Boice & Boyd, and others, for the defendants.

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## JURY—MISTAKE IN VERDICT.

[Butler Common Pleas.]

## \* ANDREW WERTZ v. THE C., H. &amp; D. R. R. Co.

1. Affidavits of jurors cannot be received to impeach their verdict by showing misconduct of jurors while engaged in their deliberations, nor for the purpose of proving bad motives or fraudulent conduct of jurors in relation to the cause on trial.
2. But such affidavits are admissible to show that the verdict as received and entered of record, by reason of a mistake in drawing it, or of a mistake made in open court when it is received, does not embody the true finding of the jury.
3. A verdict cannot be amended by the court on motion, on the affidavits of jurors made after they have been discharged, and showing such a mistake.
4. When a mistake is clearly proven, it is the duty of the court to set aside the verdict and order a new trial.
5. This may be done on the motion to amend the verdict, and without a separate motion for a new trial on file.

## VAN PELT, J.

At the May Term, 1890, this cause was tried to a jury. After deliberation the jury returned into court, and being asked if they had agreed upon a verdict, the foreman replied that they had, and handed to the clerk a paper purporting to be such verdict, in the words and figures following, to-wit: "We the jury, upon the issues joined between the parties in this case, do find for the plaintiff and assess his damages at Twenty-two hundred and fifty dollars (\$22.50.) Jacob Stillbaugh, Foreman." The clerk opened and read the verdict reading the amount "Twenty-two hundred and fifty dollars." The court then inquired of the jury if the verdict as read by the clerk was their verdict, and each and all of the jurors assented to the verdict as read, in the presence of the court and bystanders. Thereupon the jury were discharged and separated. On the morning of the next day it was first discovered by the clerk that the

\*This decision was affirmed by the circuit court. [Ed. Bull.]

verdict did not read "Twenty-two hundred and fifty dollars," but "twenty-two and fifty dollars," and that a dot appeared between the figures 22 and 50, so that while the written portion of the verdict was ambiguous, the figures seemed to make a verdict for only \$22.50. Upon the discovery of this fact the plaintiff at once filed a motion to reform or correct the verdict so that the same should read "twenty-two hundred and fifty dollars (\$22.50.); and on the next day, being the second day after the return of the verdict, plaintiff also filed a motion for a new trial assigning the alleged mistake in the verdict as one of the grounds of said motion. In support of the motion to correct the verdict plaintiff filed the separate affidavits of each and all of the twelve jurors, and his own affidavit as to what occurred when the verdict was returned into court. In opposition to the motion defendant filed the affidavit of the clerk. These several affidavits were all the evidence offered upon said motion. This motion was heard and considered by the court at the same term, and sustained, and an order was entered directing that said verdict be reformed and corrected so as to stand as a verdict for "twenty-two hundred and fifty dollars (\$2,250)." To this order the defendant excepted. The motion to correct the verdict having been sustained, plaintiff asked leave to withdraw his motion for a new trial, and the same was withdrawn. The defendant had also filed a motion for a new trial, and when the order was made correcting the verdict, defendant's motion for a new trial was overruled, and judgment entered for \$2,250. Defendant, having taken a bill of exceptions, filed a petition in error in the circuit court assigning as one of the grounds of the petition that the court erred in ordering the verdict to be amended. The case was heard at the April Term, 1891, and the court held that the common pleas had erred in ordering said amendment, and ordered that the judgment which had been entered on the amended verdict be set aside. That court, however, made no order setting the verdict aside, nor directing a new trial, but simply remanded the case to this court for further proceedings. Thereupon defendant filed its motion in this court asking that judgment be entered on said verdict, for the sum of \$22.50. This motion is resisted by plaintiff. In opposition to said motion, plaintiff had offered, again the affidavits used in evidence upon the former motion. These affidavits clearly prove the following facts. 1. That the actual sum agreed upon by the jury as their finding was \$2,250 and not \$22.50. 2. That they directed their clerk to prepare a verdict for \$2,250, and believed that he had done so. 3. That the foreman signed the paper, believing it to be a verdict for that sum. 4. That when the verdict was handed to the clerk in open court, he read it as calling for that amount. 5. That as thus read and understood, it was assented to by the jury, and received by the court. 6. That the mistake in writing and in receiving the verdict was not discovered until after the jury had separated, and not in fact, until the next day. These are the essential facts as disclosed by the record and by said affidavits. Defendant objects to the competency of the affidavits.

The first question of law which arises in the case is: are the affidavits of the jurors admissible to prove the mistake which occurred in the writing of the verdict, and the mistake in the reading of the verdict in open court at the time the verdict was received?

In the case of Jackson v. Dickenson, 15 John, 309 (8 Am. D., 236), the testimony of jurors was received to prove that, by mistake, the verdict was incorrectly entered, and was not the verdict in fact found.

The court in the opinion say: "What the jurors have deposed must be noticed by the court, because their affidavits are not as to what transpired while deliberating on their verdict, but as to what took place in open court in returning their verdict, and shows that the clerk made a mistake in entering, or the court in directing a different verdict. The information afforded by the affidavits of the jurors is not to impeach, but to support the verdict really given by them."

In *Little v. Larrabee*, 2 Greenl., 37, (11 Am., D., 43,) the verdict had been received and recorded, and the jury separated. But a joint affidavit was afterwards made by the jurors, that they misunderstood the legal terms used in their verdict, and that their intention was to return a verdict for the tenant; and that they erroneously supposed that to be the effect of the words used. The tenant's counsel moved to amend the verdict according to the facts. The court held, however, that this could not be done, as the jury had been discharged; but ordered that the verdict be set aside and a new trial had. In *Roberts v. Hughes*, 7 M. & W., 399, it was held that affidavits of jurors as to what took place in open court on the delivery of their verdict were receivable to prove that the verdict was entered for the plaintiff by mistake, and a new trial was ordered. In *Cogan v. Elsdon*, 1 Burr., 383, where the issue was as to two rights of way under which the defendant justified, the jury found for the defendant as to one, and for the plaintiff as to the other, but returned a verdict for the defendant as to both and separated. This verdict was corrected on the affidavits of eight of the jurors, the foreman refusing to make an affidavit.

*Pussell v. Knowles*, 4 How. (Miss.), 90, was an action of trespass against several defendants. The jury returned a general verdict against all of them and left the court room. Held, it was competent for them on returning immediately into court to show that the verdict had been given through mistake, and to correct it by finding against some of the defendants only. The court in the opinion say: "It has never been held to be repugnant to the principles or policy of the rule to permit the jury to fortify and sustain their verdict, or to show by affidavits the verdict which they really did find." The case of *Dalrymple v. Williams*, 63 N. J., 361, (20 Am. R., 544.) is an important and instructive case on the question of amending verdicts on the affidavits of jurors. And while it goes beyond what seems to be the weight of authority, in permitting a verdict to be amended on such affidavits after the jurors have separated, yet it is clearly in line with the authorities in holding that such testimony is admissible to prove a mistake in delivering the verdict. The weight of authority is that a verdict cannot be amended on the affidavits of jurors after they have been discharged. *Walters v. Jenkins*, 16 Serg. & R., 414 (16 Am. D., 585): *Settle v. Alison*, 8 Ga., 201 (52 Am. D., 393): *Wood v. McGuire*, 17 Ga., 361, (63 Am. D., 246): *Rigg v. Cook*, 4 Gilman, (Ill.), 336. (46 Am. D., 462): *Reitenbaugh v. Ludwick*, 31 Pa., St., 131: *Sargent v. State* 11 Ohio 472; and *Little v. Larrabee*, *supra*. The proper remedy where such mistakes is clearly shown will be discussed further on. In this case, (*Dalrymple v. Williams*), the foreman of the jury announced a verdict different from that agreed to by the jury, and the verdict was recorded. Held, that affidavits of the jurors were competent evidence to prove the mistake. This case was followed and approved by the U. S. C. Ct. for the Eastern Div. of N. J., in the case of *Burlingame v. Cent. R. R. Co.*, 23 Fed. Rep., 706.



In the case of *Johnson v. Davenport*, 3 J. J. Marsh, 390, the court held that the testimony of jurors was competent to invalidate their verdict, on the ground of mistake, when it did not subject the jury to any imputation of impure motives or palpable impropriety of conduct. This I conceive to be the true rule. While the policy of the law will not permit a verdict to be impeached by the affidavits of jurors when the object of such affidavits is to prove misconduct of the jurors while engaged in their deliberations in the jury room, nor for the purpose of showing impure motives or fraudulent or improper conduct of members of the jury; yet such affidavits are clearly admissible to show that the verdict as in fact received and entered, by reason of a mistake in drawing it, or by reason of a mistake in open court when the verdict is received, does not embody the true finding of the jury. Such testimony is not in any sense testimony impeaching the verdict. "It upholds the real verdict, and prevents miscarriage in its delivery to the court." The court is therefore of opinion that the affidavits of the jurors are admissible in evidence on the motion, and they, together with the affidavits of the plaintiff and the clerk, show beyond all doubt that the verdict as recorded is incorrect, and how the mistake occurred, and what the true finding of the jury was.

The next question is what should now be done in the premises. While there is quite a conflict in the authorities as to the power of the court to amend a verdict, in a matter of substance, after the jury has been discharged, yet the circuit court, following the weight of authority and what seems to be the better reason, held in this case that the verdict could not be amended. And it is claimed that inasmuch as the plaintiff when his motion to amend was sustained, withdrew his motion for a new trial, that he has now no standing in court, and that there is nothing now for the court to do but to enter judgment upon this mistaken and incorrect verdict as recorded. As this would be a plain and gross injustice, the court should hesitate long before concluding that it is powerless to act, or to protect itself as well as the plaintiff against such a palpable miscarriage of justice. As was said by the court in *Clark v. Lamb*, 8 Pick., 415 (19 Am. D., 332), "in all proceedings mistakes will occur, notwithstanding all ordinary care, and when they thus happen they ought if possible to be corrected without injury to either party. The course of practice adopted by the courts was founded on this principle." In *Eddomes v. Hopkins*, 1 Dougl., 361, Justice Buller said that where a general verdict had been rendered on a declaration consisting of different counts, some of which were inconsistent or bad in law, that the only proper remedy was to award a venire *de novo*. In the case of *Little v. Larrabee*, *supra*, the court held that instead of attempting to correct the verdict and make it conformable to the intentions of the jury as explained by them after it had been received, the trial court should have set it aside and granted a new trial, and it was so ordered. In that case there was, as it appears, no motion for a new trial. There was only the motion to amend the verdict. And the court, while holding that this motion should be overruled, ordered that a new trial be granted on the ground of mistake. In *Dalrymple v. Williams*, *supra*, an application was made for an order to show cause why the verdict should not be corrected to conform to the true finding of the jury. The court, in the opinion, in speaking of the competency of the affidavits of jurors, say: "If they were properly before the court, the fact alleged was clearly established and is uncontradicted, and in addition we have the fact that the judge at the circuit was satisfied of the mistake, and that the defendant was entitled to the correction asked, else he

would have denied the motion altogether or modified the relief demanded by granting a new trial. It was competent to give relief in either form, and had the judge doubted as to the right or equities of the case, he would have only set the verdict aside and put the parties to a new trial." And it seems that the weight of authority is that the latter is the proper course to pursue, although the mistake may be clearly proven, if it is not discovered until after the jurors have separated.

Now, in the case at bar the motion to amend the verdict is still before the court. The relief demanded cannot under the holding of the court and of the circuit court in this case be granted, but this court can "modify the relief demanded by granting a new trial," and sending the case to a new jury. Such relief is plainly within the scope of this motion, and the fact that the separate motion asking for a new trial was withdrawn has not left the court powerless to administer justice between these parties. And in the language of the concluding part of the opinion in *Little v. Larrabee* "it is to be regretted that such a mistake should have been made in the present cause, and that its consequences should be so serious and embarrassing to the parties. But the law is such that we cannot do anything more than set aside the verdict and grant a new trial; and under the circumstances before us, we ought not to do less." It is therefore ordered:

First—That the motion to enter judgment on the verdict for \$22.50 be overruled.

Second—That the motion to amend the verdict be overruled; and

Third—That the verdict as recorded be set aside and a new trial granted.

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## WILLS—PROOF.

[Hamilton Common Pleas.]

## MARGARET EDWARDS ET AL. V. DAVID P. DAVIS ET AL.

1. To avoid a will, it is not enough that a delusion may exist in the mind of the testator, but its connection with the testator's will must be made manifest, and shown to have influenced its provisions before the will can be set aside and declared void by reason of it.
2. The burden is on the contestants to show, not only that the delusion existed, but also that such delusion affected the testator in the very act of making the will.
3. The court may direct the jury to return a verdict sustaining a will where the testimony introduced does not tend to prove the issue on the part of the contestants, 44 Ohio St., 59.

On motion for new trial

SAYLER, J.

I think there is no evidence whatever in the case tending to show that David P. Davis exercised any undue influence over John P. Davis in the execution of his will.

Therefore, the only matter to consider, is whether there was any evidence tending to show want of sound mind and memory on the part of John P. Davis at the time he executed the will.

There was no evidence tending to show general insanity; on the contrary, the testimony of the contestants, as well as that of the defendants, show that John P. Davis was a man in every way competent to man-

age his own affairs; a man of strong will, and of good mind and memory to the time of his death; that at the time he executed his will he was capable of knowing what he was doing; of understanding to whom he gave his property, and in what proportions; of knowing and remembering his children, and of fully understanding and remembering the amount and situation of his property.

There is testimony, however, tending to show that Davis had been in the habit of calling frequently at the store of a Mr. Williamson, and of sitting and talking with him; that on one of such occasions, about two weeks before his death, Davis seemed worried, and spoke hard of his doctor, and said he believed he was trying to kill him, and said: My folks are not treating me right. I believe my folks are trying to kill me." When Mr. Williamson, saying to him, "Mr. Davis, you are sick; you are sick, and you take things too hard that you ought not to," he said, "No; my folks are trying to get me out of the way."

I think this evidence tends to prove that Davis, two or three weeks before his death, had a delusion in regard to his folks.

To avoid a will, "It is not enough that a delusion may exist, but its connection with the testator's will must be made manifest and shown to have influenced its provisions before the will can be set aside and declared void" by reason of it. *Potter v. Jones*, 20 Oregon, 239.

In the case of *Benoist v. Murrin*, 58 Mo., 307, the court say, p. 323. 324: "The correct principle is, that whenever a person imagines something extravagant to exist, which really has no existence, and he is incapable of being reasoned out of his false belief, he is in that respect insane; and if his delusion relates to his property, he is then incapable of making a will. But to invalidate the instrument it must be directly produced by the partial insanity or monomania under which the testator was laboring."

In *Boardman v. Woodman*, 47 N. H., 120, the court say, on p. 140, that the "instruction that if the testator was under a delusion, but the will and its provisions were not in any way the offspring or result of the delusion, and were not connected with or influenced by it, then she was of sane mind to make the will, was, we have no doubt, correct."

In the case of *Froser v. Jermison*, 42 Mich., 206, the court, Judge Cooley, says, *ib.*, 231: It is not an uncommon impression that a will must be set aside whenever the existence of any mental disorder at the time of the execution is established.

"That this is not the law is apparent from the fact that the testamentary disposition of monomaniacs are often sustained in spite of mental disorder. When the monomania is conceded, it is only necessary to inquire further whether the provisions of the will are or are not affected by it, and the will stands or falls by that test."

"When delusion exists in the mind of a person on one or more subjects only, it is termed partial insanity. I do not question but that partial insanity will invalidate a will which appears to have been the direct result of such insanity, though the testator, at the time of making it, may have been sane in other respects upon ordinary topics." 22 N. J. L., 156. "Partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary dispositions, is not sufficient to render a person incapable of disposing of his property by will." L. R., 5Q. B., 549.

It must therefore be shown, not only that there is a delusion, but also that such delusion influenced the testator in the act of making his will.

Under section 5862 of the statutes, on the trial of the validity of a will, the order of probate shall be *prima facie* evidence of the due attestation, execution and validity of the will or codicil.

In the case of *Mears v. Mears*, 15 Ohio St., 90, the court say: "The necessary effect of this provision is to change the burden of proof in respect to each of these subjects from the propounders or contestees to the contestants of the will. It there remains, the court and jury having thereafter only to determine upon all of the proofs given in the case, where the weight of all the evidence lies." And in 44 O. S., 68, the court say: "By the introduction of the will, and order of probate, a *prima facie* case has been made against them," and if no further testimony be introduced, it would be the duty to sustain the will.

The *prima facie* case so made includes the testamentary capacity, and it is clear that in the case at bar the burden is on the contestants to show, not only that the delusion existed, but also that such delusion affected Davis in the very act of making his will.

I think this is a different rule from the English, and that of some of the other states, and therefore the English decisions, which hold that where a delusion is shown, the burden is on the propounder of the will to show that such delusion did not effect its provisions, do not apply in this state.

It is claimed on the part of the contestants that the fact that the delusion is in regard to his children, his heirs at law, is testimony tending to establish that it in fact affected the provisions of the will.

But I do not think the authorities sustain that proposition.

In the case of *Dunham's Appeal from Probate*, 27 Conn., 191, it was claimed that the testator entertained an unreasonable aversion to her sisters, who were her heirs at law, the syllabus is, "Although a testator, at the time of executing his will, may harbor some insane delusion, fancying things to exist which have no existence, and of the existence of which he has no reasonable evidence, yet, if he has mind enough to know and appreciate his relations to the natural objects of his bounty and the character and effect of the dispositions of his will, then he has a mind sufficiently sound to enable him to make a valid will."

In the case of *Crum v. Thomley*, 47 Illinois, 192, the court held that "homicide, followed by suicide, and a disposition of property entirely at variance with long declared intentions, and the exhibition of unnatural malice towards a child, are not of themselves sufficient to raise a presumption of insanity, and the want of a disposing mind."

In the case of *Benoist v. Murrin*, 58 Mo., 307, cited above, the delusion was in regard to the property of the testator, yet the court held, that to invalidate the will it must be shown that it was produced by the delusion.

To establish an insane delusion on the part of the testator, such as will invalidate his will, something more must be shown than a mistaken notion on his part as to the feelings or intentions of his relations towards him or his property. 38 Alabama, 131.

In the case of *Will of Ebenezer W. Cole*, 49 Wis., 179, the testator conceived the idea that his wife was unchaste, and that her child was not his son. The court held that the delusion did not influence the will, and gave as one ground that there was no evidence that the delusion affected the conduct of the testator towards the child. *Ib.* 184.

In the case of *Potter v. Jones*, 20 Oregon, 239, cited above, the testator believed that his wife was unchaste, and that two of her children

were not his children; yet the court held that it was not enough to show that the delusion existed, but must also be shown that the delusion influenced the provisions of the will. "It is necessary, therefore, to show not only that he was the subject of a delusion, an insane hatred or aversion to his daughter, but that it was present when he executed his will, and influenced him in the making of it and in excluding her from its benefits. Upon this point the evidence has already been detailed, and it will be sufficient to briefly advert to it to show that those who were present at the execution of the will, including the subscribing witnesses and his physicians, all concur in the opinion that he was in the possession of all his faculties and free from any mental disturbance impairing his free agency; that he understood the extent of his property, and specified those among whom he wished it to be distributed." *Ib* 252.

It is claimed that the Circuit Court in the case of *The New Jerusalem Church v. Crockery*, 4 Circ. Dec., 575, held that the delusion as to an heir at law alone established the fact, or tended to establish the fact, that the provisions of the will were influenced by the delusion. But I do not so read that case. In that case the delusion was as to a stranger, and the court held that such delusion could not prompt the execution of the will. The court say: "The existence of delusions, which in no way relate to those who are excluded from or embraced in the provisions of a will, are not at all inconsistent with testamentary capacity. There was a substantial failure in the case presented by the contestants.

"They failed to show general insanity, or inability of the testatrix to recall the natural objects of her bounty, and to fully comprehend the transaction in which she was engaged when making her will; nor do they show any delusion affecting her relations of any of her heirs at law, or her devisees."

But the court does not hold, that had there been a delusion as to an heir at law, that such delusion alone would raise a presumption that the testator was influenced thereby in the execution of his will.

It is claimed that the will itself contains evidence tending to show that Davis was, in fact, influenced by such delusion.

The testimony of the contestants tended to show that the testator thought much more of his son David than of his other children. In the will, he gives David one-half of the personal property, and divides the balance equally between the other four children, and he gives him the real estate subject to a life estate in one-half to John.

Considering the feelings of the testator to his children, and his relations with them, as shown by the contestants' testimony, there is nothing in this division of the property indicating any influence of a delusion.

If this will is compared with the three former wills, it will appear that this will is much more favorable to at least three of the children, including the contestants, than the three former wills.

Under the first, second and third wills, he gave his two daughters and his son Gomer, only \$5 each, and the balance of the property, real and personal, went to David and John.

Under the second and third wills, the share to David was greater than to John.

Under the fourth will, the one in controversy, the two daughters and Gomer, receiving each \$500, receive much more than under the former wills. The share of the personal property to John is not so large, but

John is not complaining. The real estate is divided between David and John in same proportions as in the third will.

There is certainly nothing in this change of distribution of the property which would tend to show that the terms of the will were influenced by any delusion.

I think, therefore, there is no testimony whatever tending to show that the testator was in any way influenced in the distribution of his property by the fourth and last will by the claimed delusion, and that, therefore, the testimony as to the delusion becomes immaterial, and there was no testimony to go to the jury on the question of insanity.

That the court may direct the jury to find a verdict sustaining a will where the testimony introduced does not tend to prove the issue on the part of the plaintiffs showing incapacity of the decedent to make a will at the time the will was made, is settled by *Wagner v. Ziegler*, 44 Ohio St.. 59. 60.

I am cited to the case of *Baldwin v. Robinson*, 53 N. W. Rep., 531, to the effect that the case could not be taken from the jury. In that case the court say, that "considerable testimony was offered upon the trial in the court below tending to show undue influence." Of course, therefore, that case should not have been taken from the jury.

It is claimed the court erred in its remarks to the jury urging an agreement, and 103 N. Y., 614, is cited. But as the jury did not agree until instructed to return a verdict for the defendants, they were in no way affected by such remarks.

The testimony established beyond a doubt that John F. Davis was of sound mind and memory, and not under any restraint when he made the will in controversy, and in my opinion the court should not stand on technicalities in order that it may be set aside. As Judge Cooley says, in 42 Mich., 234, "whatever court overturns a will ought to have reasons to stand upon which are within the grasp of the common sense of mankind."

The motion for a new trial will be overruled.

Porter & Rendigs, for plaintiff.

John Follet and Wm. Strunk, for defendants.

### STREET RAILWAY GRANTS.

[Superior Court of Cincinnati, Special Term.]

**ALBERT C. BARNEY ET AL. v. MT. ADAMS & EDEN PARK INCLINED PLANE RY. CO.**

1. Abutting owners of property on a proposed street railway route or extension cannot complain in their character as abutting owners that the grant is invalid except upon the ground that the necessary consents have not been secured upon the street upon which their property abuts.
2. Non-consenting abutting owners cannot be heard to complain of the violations by the grantee of conditions imposed by those who consented when such consenting owners do not themselves complain of such violations.

SMITH, J.

Plaintiffs are owners of property abutting on McMillan street, between Highland avenue and Auburn avenue, in the city of Cincinnati, the property being improved with new and valuable buildings, occupied by the plaintiffs or their tenants as residences.

The defendant is the owner of several street railroads, one of which, known as Route No. 10, it became the owner of by purchase in 1881. This route begins at Fifth and Walnut streets in said city, and runs over different streets to Gilbert avenue, and along Gilbert avenue to Walnut Hills. In 1881 an ordinance was passed allowing Route No. 10 to extend its tracks over a large number of streets in said city, a part of said extension being as follows:

(C. & H. Ord., 600). "From Gilbert avenue westerly to McMillan street over the tracks of Route No. 16 to May street; thence continuing westwardly by double track to a turn table on Clifton avenue; thence returning on McMillan street to Vine street; thence southwardly by double track on Vine street," etc.

The ordinance declared that there had been obtained and produced to the public authorities, making the grant, "the written consents to such extension of the owners of more than one-half of the feet front of the property abutting on the streets along which said extension is [was] to be made."

It further provided that: "This permission is given on the express condition that this work of extending the line of track along McMillan street, and the whole line shall be commenced within six months after the passage hereof, and the whole extension completed for travel and operated within twelve months thereafter, and any omission of completion of roadway, or bridge along the route, shall be made good by the grantee herein by temporary provisions for a speedy conveyance of passengers along the whole route."

In 1886 another ordinance was passed, authorizing the defendant company to use "electric or any other approved system of motive power for moving cars," but requiring that "the consent of the majority of the property owners in feet front abutting on the streets along the line of streets where such cable, electric or other system is extended, shall have been previously obtained and certified to by the City Engineer before the work is begun on any of the streets on which new tracks are to be laid."

No attempt was made by the defendant to lay tracks on McMillan street between May street and Auburn ave. until 1887. Previous to that year that part of the street between May street and Hunt street was simply a dedicated street running through a rough and unimproved country; but in 1889 this part was opened and improved by the city, and a bridge built over Hunt street, thus connecting Walnut Hills and Mt. Auburn. At the time the street was thus improved, and the bridge built, the defendant company laid its tracks upon the same, and was proceeding to lay them on that part of the street between the bridge and Auburn avenue when this suit was brought by the plaintiffs as abutting owners of property to enjoin such action.

They claim the right to enjoin on the following grounds:

First—That the proposed extension is not an extension, but a new route, and is illegal in that it should have been granted after competitive bids had been received, as is provided in section 2505, Revised Statutes, for the establishment of a new route.

Second—That the inaction of the defendant and the lapse of time require the courts to declare that the franchise has been lost by abandonment.

Third—That the franchise has been forfeited and lost by reason of the failure of the company as provided in the ordinance of 1881, to

commence the work on the whole line within six months after the passage of the ordinance, and to complete and operate the same for travel within twelve months.

Fourth—That the consents of the abutting owners, given to the ordinance of 1886, contained a condition that the electric system should be completed during the year in which the signatures were obtained, and that as such completion was not accomplished, the grant is void.

Fifth—That the laying of a double track opposite the property of the plaintiffs will interfere with and cut off the access to their property.

In the decision rendered by me last term, in the case of *Glidden et al. v. Johnson et al.*, 4 S. & C. P. Dec., 423, in which the plaintiffs, as abutting owners of property, sought to prevent the construction of what is known as Route No. 25, I made a somewhat extended examination as to the right which an abutting owner, as such, and as distinguished from a taxpayer, has to complain of the unlawful construction of a street railroad in the street upon which his property abuts. It would not be profitable to repeat here at length the reasons which led to the conclusions there reached.

The following citation, however, from that opinion, gives a general statement of both the conclusions reached and the reasons for the same, and it may therefore be adopted as a part of this opinion.

“While it is true that the general taxpayer can not complain that a grant is invalid because of a failure to secure the necessary consents, so it is equally true that the abutting owner can not complain of defects in the grant other than that of a failure to secure sufficient consents. The reason of this rule is obvious.

“The right in Ohio to declare invalid a public grant, rests in the first instance with the public officers; but if they decline to act the taxpayer himself, after certain preliminaries have been complied with, may institute the necessary proceedings. The reason of this rule is that the discharge of public business belongs to public officials, and the law requires and expects that they will prevent the execution or performance by the municipality of contracts which violate its ordinances or the statutes of that state. And it is only when they fail to act, that the outside taxpayer is allowed to interfere. This is a salutary rule, and the only one which could be adopted without involving a municipality and all its rights in inconsistent, injurious and inextricable litigation.

“Now, it can not have been the intention of the statute, that when it conceded to abutting owners a voice in the question as to whether a street railway shall be constructed by requiring that a certain portion of the property shall consent thereto, that it intended, except as to the right to complain upon the question of consents, to give such owners any greater rights than other taxpayers have to complain of the invalidity of the grant. The right to complain as to the want of sufficiency of consents, gives them the right to protect themselves as to the only right which they enjoy different from other taxpayers. In other respects, where of course no special injury is complained of, they stand in the same class with other taxpayers in the community, having the same rights and subject to the same restrictions. See *Sloan v. Peoples Ry. Co. et al.*, 3 Circ. Dec., 674.

In view of these principles, it is apparent that the plaintiffs in this case can not be heard upon the first ground of their complaint, viz., that this pretended grant of an extension is in reality the grant of a new



route, and therefore void. It may therefore, be dismissed without further consideration.

For the same reason, I am of the opinion that the plaintiffs can not be heard as to the second and third grounds of their complaint, viz., (2) that the defendant company, by inaction and lapse of time, in contemplation of law, has abandoned the grant; and (3) that the ordinance of 1881, provided that the road should be begun and completed within a certain time, and that the defendant has failed to comply with this provision, and has, therefore, forfeited the grant.

In both of these grounds of complaint the general public is quite as much interested as the abutting owners; and as they do not relate to the question whether sufficient consents were obtained, such abutting owners can not be heard to complain with reference to them. Furthermore, it is undoubtedly true, as a proposition of law, that the city authorities may waive the forfeiture of a franchise, and that an abutting owner can not be permitted to enjoin the exercise of the franchise, and thus prevent the city from executing its right of waiver. *Booth on Street Railway*; section 50; *Hamilton St. Ry. & Elec. Co. v. Hamilton & Lindenwall Elec. Transit Co.*, 3 Circ. Dec., 158.

Whether as a matter of fact, or in contemplation of law, the defendant has abandoned this franchise; whether the proviso in the ordinance of 1881, that the work should be begun and completed within a certain time, is a condition the non-compliance with which renders the grant void; or whether it is a mere collateral covenant; whether a taxpayer, as such, can in any event complain of the termination of this grant by forfeiture, or whether the city alone can proceed against the grantee of the franchise, are questions which, for the reasons above given, can not be presented in this cause, and upon which, therefore, I express no opinion.

The fourth ground of complaint is, that the consents to the ordinance of 1886, by which the defendant company secured the right to substitute electricity as a motive power, were given upon the condition that the work under the ordinance should be begun and completed within a certain time, with which condition the company has failed to comply.

Waiving the question as to whether the provision contained in the consents is a mere covenant or a condition whose violation makes the consents invalid, there can be no question but that even if it is such a condition, its violation does not *ipso facto* render the consents void, but only makes them voidable at the option of the property owners who have given them.

But in this case, the plaintiffs gave no consent; they are non-consenting abutting owners. And it is quite clear to my mind that they have no right to ask a court to declare that the consents given by others who are not in court, shall be declared void because of the violation of a certain condition contained in those consents. Such a violation can be complained of by such consenters only, and, in place of complaining, they may be willing to waive it and insist upon the enforcement of the grant.

The fifth ground of complaint, viz., that the laying of a double track opposite the property of the plaintiffs will interfere with and cut off the access to their property, is not, in my judgment, sustained by the evidence. The tracks when constructed will leave a space of ten feet between the nearest track and the curb. To declare that tracks thus constructed are an interference with the access to property, would be to declare that nearly all the street railway tracks in this city are an unlawful

interference with the access to the property which abuts upon them; because, as a rule, the space which will be left in this case is quite as large as that which has ordinarily been left in laying tracks in our streets. In my opinion, there is, as a matter of fact, no interference with the access to plaintiff's property.

It follows from the foregoing opinion, that, in my judgement, the petition of plaintiffs should be dismissed, and it is so ordered.

C. B. Matthews, for plaintiffs.

W. W. Ramsey, E. W. Kittredge, and Wm. M. Ramsey, for defendant.

## 288 INVOLUNTARY ASSIGNMENT—HOMESTEAD.

[Clark Probate Court, October 23, 1893.]

IN RE SAMANTHA STAFFORD V. VICTOR Y. SMITH, TRUSTEE.

1. In an involuntary assignment under section 6344, the trustee becomes the legal owner, and entitled to the legal possession of the premises over which he has been appointed upon his qualification.
2. In such an assignment a homestead cannot be acquired after the qualification of the trustee.
3. The right to a homestead cannot be established at a time when the claimant has neither the legal title, nor the legal, actual or constructive possession of the premises.

ROCKEL, J.

On the — day of — 1891, Samantha Stafford made a deed of conveyance of the premises in question to her son Herbert Stafford. Afterwards to-wit, on the — day of — 1892, Wm. A. Young and Charles Young creditors of Samantha Stafford, brought an action in the court of common pleas, to set aside said conveyance, alleging that the same was made without consideration to defraud creditors.

On the thirteenth day of March, 1893, said court of common pleas found that said conveyance was fraudulent: Thereupon W. A. Young and Charles Young had a certified copy of the journal entry in said matter filed in this court and asked that a trustee be appointed as provided in section 6344 Rev. Stat.

On the twenty-fourth day of March, 1893, Victor Y. Smith was appointed trustee, and immediately qualified and entered upon the discharge of his duties.

The premises, consisting of a house and lot in the village of New Carlisle, Ohio, were at the time occupied by Charles Saylor, who had rented them from Herbert Stafford.

The trustee, Mr. Smith, immediately upon his appointment notified the tenant Mr. Saylor, of his appointment as such trustee, and demanded the rent, which was thereafter paid to him.

Sometime during the last week of May, 1893 two months after the qualification of the trustee, the husband of Samantha Stafford secured from Mr. Saylor a room in the house, and moved into such room a bed, chair and bedding with the intention of making that his family home. Before this neither he nor his wife had occupied any part of the premises at any time: At and previously to this time Samantha Stafford kept a boarding house in Dayton, Ohio, where the husband made his home as did also the unmarried son, Herbert Stafford.

It seems, however, that the furniture in the boarding house did not belong to either Mr. or Mrs. Stafford, and that the bed and chair moved into the New Carlisle house was probably all the furniture they had.

Since the last week in May, 1893, the husband during the week days, while working in the vicinity, occupied the room in the house on the premises in question, while the Saylor occupied the remainder of the house, until a few weeks ago when the Saylor moved out. On Saturday evening or on Sunday, the husband, Wm. Stafford, would visit his wife Samantha Stafford, who still continued the boarding house in Dayton, Ohio. His wife did his laundry work. Husband and wife both testified that they intended to make the premises in question their home.

The wife, however, never remained over night with the husband in this room where he had a bed, etc., but a few days before the hearing of this cause, having had a dinner prepared elsewhere, they ate it on the premises.

Sometime in July, 1893, the trustee had the premises appraised, when a demand was made for the setting off a homestead, which was not done. A demand is now made on the part of Samantha Stafford for a homestead in the premises and that the appraisers be required to set the same off to her.

The trustee denies the right to a homestead on two grounds:

First.—That the said Samantha Stafford having no right to a homestead (never having, nor then occupying the premises as such,) at the time the trustee was appointed and qualified, none thereafter could be acquired.

Second.—That neither the claimant nor her husband ever occupied the premises as a homestead.

The first presents a question of law upon which no reputed decision has come to my notice.

Section 5434, Rev. Stat., provides: "Husband and wife living together, a widow or widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale, on judgment or order, a family homestead not exceeding one thousand dollars in value, and the husband, or in case of his failure or refusal, the wife shall have the right to make the demand therefor; but neither can make the demand, if the other has a homestead."

Homestead means the place where the head of the family resides. It is the home of the family which the law exempts and protects. It is not that which they intend to make their home, but it is that which actually is their home.

Section 6344, Rev. Stat., under which the trustee in this case received his appointment provides:

"All transfers, conveyances or assignments, made by a debtor procured by him to be made with intent to hinder, delay or defraud creditors, shall be declared void at the suit of any creditor; and the probate judge of the proper county, after any such transfer, conveyance or assignment shall have been declared by a court of competent jurisdiction to have been made, with intent aforesaid, or in trust with the intent mentioned in the next preceding section, shall on application of any creditor appoint a trustee according to the provisions of this chapter, who, upon being duly qualified, shall proceed by due course of law to recover possession of all property so transferred, conveyed or assigned, and to administer the same as in other cases of assignment to trustees for the benefit of creditors."

It seems to me to be manifest from this section that from the very moment that the trustee qualified, he not only became the legal owner of the premises in question, but he became the legal possessor.

If he could not get possession peacefully, it became his duty to recover the premises by due process of law. No one thereafter could acquire any right in, or to the property antagonistic to the trustee.

The rights of all the parties became fixed upon the trustee's qualification. If any person could be in legal possession of the premises thereafter, it must be through the trustee or by virtue of rights existing at the time of his qualifying. Possession by any person in any other manner would be the possession of an intruder without form or semblance of law to maintain it.

The claimant in this case could acquire no right through the trustee or those under him, in the possession of the premises in question antagonistic to him; for it is axiomatic in the law that a tenant in the possession of property can acquire no rights antagonistic to his landlord.

I am unable to discover any hypothesis upon which to find a course of reasoning which will allow this claimant to lay the foundation of the right to a homestead in the premises in question at a time when she had neither the legal title nor the legal, actual or constructive possession of the premises.

It is contended, however, by claimant that by sections 6348 and 5438, Rev. Stat., a homestead could be impressed upon the premises in question any time before a sale is had, or at least up to the time an appraisement is made.

Section 6348 provides; "No assignment for the benefit of creditors shall be construed to include or cover any property exempt from levy or sale on execution, or from being any legal process applied to the payment of debts, unless in the assignment the exemption is expressly waived, or any property belonging to the wife of the assignor, nor to require the assignee to deliver up any of such property; and as to the homestead exemption and exempt property to be selected by the debtor and his wife, the appraisers appointed by the court shall, on making the appraisement, set the same off in the same way that appraisers of property levied on or attached are required to do; and if for any reason, the setting off is then omitted, the court may at any time thereafter and before sale order the same to be done by the appraisers."

It can be fairly implied that if it were not for the provisions of this section in cases of assignment, the assignor could have no homestead in the assigned property unless he would have reserved it in the deed of assignment. This section preserves to him the homestead right, unless he expressly waives it. It preserves an existing right, not the power to create a new right. There is a wide distinction between the creation of a right and the enforcement or the preservation of it.

I cannot see how this section can avail the claimant. It clearly only seeks to preserve an existing right and the manner of its enforcement. If any inference at all is to be had from this section, it is not one favorable to the creation of a homestead right that did not exist at the time the assignment was made.

The latter part of the section in which reference is made to the homestead merely indicates the manner in which it is to be set off.

Section 5434 Rev. Stat., provides: "The officer executing any writ of execution founded on a judgment or order shall, on application of the debtor, his wife, agent, or attorney, at any time before sale, if such

debtor has a family, and if the lands, or tenements about to be levied upon, or any part or parcel thereof constitute the homestead thereof, cause the inquest of appraisers, upon their oaths to set off to such debtor by metes and bounds, a homestead not exceeding one thousand dollars."

In commenting upon this section the circuit court in case of *Nixon v. Vandyke*, 1 Circ. Dec., 364, say: "The true meaning of this section, we think, is this, that if the lands and tenements seized by the officer, or about to be seized, do at that time constitute the family homestead, that is, that the debtor at that time is entitled to claim it as such then, that the officer at any time before the sale (although not demanded at the time of the levy or seizure under the writ) must, on the application of the debtor, his wife, agent or attorney, make an assignment thereof, but if at the time of the seizure of the property, the debtor was not entitled to it as a homestead, the fact that he became the head of a family thereafter would not entitle him to have a homestead therein assigned to him."

The court fixes the time of the levy or seizure of the property, as the time when the rights of the parties become fixed. That it is the time when the legal possession of the property leaves the owner and becomes the officers' executing the writ.

It has been said that a levy is a statute conveyance. *Jentt v. Whitney*, Me., 251.

The right therefore, which an officer has in property levied upon is very much similar to that of a trustee in involuntary assignments like the one in question, where the trustee became entitled to the ownership and possession by operation of law, upon his qualification.

This section, and the decision construing it, but confirms me in the opinion before herein expressed, that the rights of the claimant became fixed at the time that the legal possession of the premises became in the trustee. If she had no homestead, then by no act of hers could she thereafter acquire one therein.

The statute fixes the time of the trustee's qualification as the time when he is entitled to the possession.

It is admitted in this case that at that time, the claimant had no homestead in the premises; her application will therefore be denied.

I might further say, that even if the law permitted the creation of a homestead right after the trustee became entitled to the legal possession, it is extremely doubtful if the claimant has had such occupation of the premises as would entitle her to successfully make the claim, but as the decision of the other question determines the case, this matter will not be further considered.

Horace W. Stafford, for trustee.

B. H. Rannels, for Samantha Stafford.

290

## CONTEMPT OF COURT.

[Hamilton Common Pleas, 1898.]

WM. WOODS V. STATE OF OHIO.

A person subpoenaed from the police court, who disregards the subpoena, may be arrested for contempt and punished without written charges.

SAYLER, J.

In an action pending in the police court, a subpoena was issued for William Woods to testify on behalf of the State. The subpoena was served on Woods; but he failed to attend court in compliance with its command.

Thereupon, without any affidavit being filed, a *capias* was issued for Woods. It does not appear whether this writ was served, or whether anything was done under it.

Woods appeared in open court and admitted that he had been served with the subpoena, and that he did not answer to it; thereupon the court examined Woods touching his said disobedience of the subpoena, and found that he was guilty of contempt, and fined him \$50 and costs, and ordered that he stand committed to the jail of Hamilton county till he pay the fine and costs.

It is claimed that there is error in action of the court in causing a *capias* to issue without an affidavit; and further, that charges should have been filed under section 5641, before the court could impose a sentence.

It does not appear that the *capias* was served; I think, therefore, there was no error in this, prejudicial to the accused.

Further, in the case of Eichenlaub v State, 36 Ohio St., 140, in which the question was raised whether a prosecution could be had on information unsupported by an affidavit, Judge Okey says on page 142: "I am not aware that any attempt to proceed by information was afterwards made in any criminal case under that constitution (the Magna Charta), unless we except contempts of court, in which the necessity for any other proceeding than one of a summary character does not exist. They are, indeed, in legal strictness, not criminal cases."

By section 1791, the same powers are conferred on the police court to punish contempts as are incident to the court of common pleas.

Section 5252, of the Revised Statutes provides that "disobedience of a subpoena, a refusal to be sworn, except, etc., \* \* \* a refusal to answer as a witness or to subscribe a deposition \* \* \* may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required."

In the case of Ammon v. Johnson, 2 Circ. Dec., 149, the court hold on page 270, that refusal to answer questions by a witness may be punished under this section, and that under this section no charges in writing are required.

Clearly that section also covers a failure to answer a subpoena—disobedience of a subpoena.

The defendant, in open court, admitted that he had failed to answer the subpoena. No charges in writing were necessary, and, as in 3 C. C. Rep., 270, the court imposed the sentence.

Under sec. 7327, when sentence is a fine, the court may commit to the county jail till the fine and costs are paid.

Section 5641 providing that written charges be filed, is not applicable to sec. 5252 (3 C. C. Rep., 270); and sec. 5650 expressly provides that the chapter of which sec. 5641 is a part is not cumulative to the provisions of the chapter and division of which sec. 5252 is a part, but furnishes a remedy in cases not therein provided for.

I think there is no error in the record.

The proceedings will be affirmed.

Shay & Cogan, for plaintiff in error.

Fred. Hertenstein, for defendant in error.

## GAMBLING.

293

[Gallia Circuit Court, 1893.]

### ULSAMER V. STATE OF OHIO.

1. Games of cards, in which the loser paid for the beer, cigars or lunches, as an understood forfeit on his part accruing for the benefit of the winners, without express agreement to that effect, are for gain within the meaning of the statute, and consequently gambling.
2. While a single or an occasional game played for gain in a room would not constitute it a place kept for gambling, where such games are shown to be habitual, and well known to the proprietor, the fact that other business is carried on in the room as its main purpose of occupation, does not negative the proposition that it is kept for gambling.
3. It is no defense that the defendant and those who played the games were unaware that their acts were criminal.

The circuit court of Gallia county affirmed the judgment of the common pleas in this case.

Ulsamer had been indicted and convicted for allowing games in his saloon for the drinks and cigars last January.

The case was appealed to the circuit court, returned to the common pleas court for a new trial, and came up again in the circuit court Wednesday, when the judgment below was affirmed. Judge D. B. Hebard and White & Holcomb, of Gallipolis, defended him.

The law as laid down by Judge Sibley in the common pleas in his charge to the jury, and which was assigned as error, but affirmed by the circuit court, was as follows:

"There is no dispute on the evidence as to the playing of several of the games named in the indictment, in the defendant's saloon, and of his knowledge of the fact. The real question is, first, whether they are of the character which in law makes it gambling to play them; and second, whether knowingly allowing them to be played in his saloon at the pleasure of those who frequent it, constitutes it a room to be used for gambling.

"1. Our statute makes it gambling to play any games 'for gain.' The evidence here tends to show that many of the games played in the defendant's saloon were merely for amusement, but that running along at the same time were others, over a large part of the period in question, in which by the custom generally prevailing the loser, or losers, paid for the beer, cigars or lunches, used or ordered during or upon conclusion of the game, as an understood forfeit on his or their parts, accruing for the benefit of the winners, that is, they gained that much

in having won. Now, if on this evidence you find that such was, in fact, the character of some of the games which were played in the defendant's saloon, the playing of them was gambling, and you should so say. Moreover, it is immaterial that when the players sat down to their games, there was no express statement or agreement that the loser should pay for the beer, cigars or lunch ordered during the game, or after, if it was the custom that he was to foot the bill as a forfeit, usually acted on by its payment. Games going forward on the expectation and understanding that the winners will gain such expenses, by the fact that they win, as a rule habitually acted on, are to be regarded as played 'for gain' within the words of the statute, and consequently as 'gambling,' and you should so find.

"2. The great contention, however, is that, if playing games of the character here shown is to be regarded as gambling, still, in view of other facts before you, the allowance of them by the defendant in his saloon will not constitute it a room kept by him for that purpose.

"A single game played in a room for gain, and which, therefore, would be gambling, or an occasional repetition of it so rare as presumably not to attract the owner's attention, especially where the place was used for other objects, would not sustain a charge like that made in this case. But where such games are shown to be habitual, and well known to the proprietor, and also to extend over a period of several months, the fact that other business is carried on in the room as the main purpose of its occupation will not excuse him. It is common knowledge that a room could be kept and used both for a saloon and as a place for gambling. The one does not necessarily exclude the other. The two uses from their nature are entirely compatible and consistent. Consequently, to show that the room was kept and occupied as a saloon does not of itself negative the proposition that it also was kept and used for gambling, if the latter fact be established beyond a reasonable doubt.

"Nor is it any defense that the defendant those who played the games in question were unaware that their acts were criminal. Ignorance of the law does not excuse, no more than that the gain of the winner was trifling. It is gambling to play for a copper, equally as for a thousand dollar stake. The law does not permit primary schools in this vice, only to jump on to the higher grades in which the trained professional appears. Its policy is to suppress all gaming in which the loss on the one hand and gain upon the other turn on the result of a play."

**Ulsamers' fine is \$50, costs and ten days in jail. [Editorial.]**



## SET-OFF.

305

[Hamilton Common Pleas, October, 1893.]

## PIKE V. SHEVE ET UX.

The husband may have a judgment in his favor set off against a judgment against himself and wife. The husband's liability is several and personal, and that of the wife only that of her separate estate, and no want of mutuality exists.

Sheve had obtained judgment against Pike, which is unsatisfied. Pike now sues Sheve and wife for rent, and recovers a judgment against both, and Sheve asks to have his judgment set off against it.

BATES, J.

Although a joint claim or a joint judgment cannot be set off against a several claim or several judgment (Bates on Partnership, sec. 1078-1081), yet a judgment against husband and wife is only joint in form, and not in fact, since the husband's liability is personal, and the wife's liability is only that of her separate estate, as if it were the debtor and not she, although the execution in form is against her (see Avery v. Vansickle, 35 Ohio St., 270, 275). Hence, the husband's liability being several, no want of mutuality exists, and the set-off will be allowed as in cases of other reciprocal cross-judgments.

Granger &amp; Hunt, for plaintiff.

Marsh &amp; Gregg, for defendants.

## TAXATION.

309

[Jackson Common Pleas, 1893.]

## \* WELLSTON (CITY) V. JACKSON CO. (COMRS.).

The county commissioners may be compelled to pay to a city its quota of the road fund, to be spent by it, on its streets.

TRIPP, J.

Suit against the county commissioners of Jackson county was instituted to compel them to pay to the city its quota of the road fund. The

\* COMMUNICATED. I find a notice in your issue of last week, commenting upon the fact that Judge James M. Tripp had decided a case in favor of the city of Wellston, that was brought to compel the commissioners of Jackson county to pay to said city its proportion of road taxes. The suit was mandamus against the auditor of Jackson county, to compel him to draw an order in favor of the city of Wellston for its proportion of the road taxes levied by the board of commissioners in accordance with the provisions of sec. 2824, of the Revised Statutes. The case was taken to the circuit court, and at its June session of this year the decision of Judge Tripp was unanimously affirmed by a full bench. The court of common pleas and circuit court simply followed the holding of the Supreme Court in the case of Lima v. McBride, 34 Ohio St., 338, and a careful inspection of the statutes as they now exist will convince any one that the law remains as stated in that case. The board of commissioners have no right to control any part of the funds levied for road purposes except such as may be levied under sec. 4919; and except for turnpikes and improved roads, but the ordinary road fund levied under sec. 2824 must be apportioned among and returned to the municipal corporations and townships.

Respectfully yours,

Jackson, Ohio.

E. C. POWELL.

decision is in favor of the city and will make a sweeping change in the distribution of road money throughout Ohio, making it compulsory to spend the money in the city, town or township, where the tax is collected. Heretofore the county commissioners have had absolute control of this fund, spending it where, in their judgment, they deemed it most expedient. The roads in poor townships would greatly suffer, while on the other hand the streets of cities and towns will profit. The commissioners have appealed the case to the circuit court. [Editorial.]

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[Hamilton Common Pleas.]

STATE OF OHIO V. BENJ. F. EHRMAN ET AL.

For this opinion, see 2 S. &amp; C. P. Dec., 400.

321

[Superior Court of Cincinnati.]

CINCINNATI (CITY) V. CINCINNATI INC. PLANE RY. CO.

For this opinion, see 4 S. &amp; C. P. Dec., 507.

337

[Hamilton Common Pleas.]

JACOB SHADDINGER V. METROPOLITAN LIFE INS. CO.

For this opinion, see 2 S. &amp; C. P. Dec., 402.

339

ERROR.

[Lorain Common Pleas, 1893.]

DAVID C. LEONARD V. QUEEN INSURANCE CO.

By the amendment of sec. 6709, and the passage of sec. 6702a (90 V. 191), the legislature did not intend to take away the right to prosecute error from the courts of common pleas throughout the state to the circuit courts, but it intended to give the right to prosecute error from the superior court of Cincinnati, to the circuit court of Hamilton county.

NYE, J.

A motion has been made by the defendant in the case of David C. Leonard against Queen Insurance Company, to continue said cause, for the reason that, by an act of the legislature passed at its last session, the right to prosecute error from the court of common pleas to the circuit court was taken away in all counties except Hamilton county.

I would very much dislike to sit and try cases in a court of original jurisdiction, if I knew that my rulings and decisions could not be reviewed. But I am not sure that a want of such power would be a good ground for the continuance of causes.

It is claimed by counsel in support of this motion, that in the amendment of sec. 6709, (90 V. 191), passed last winter, the legislature has taken away the right to prosecute error from the courts of common pleas to the circuit court in all counties of the state except Hamilton

county, and that therefore the defendant ought not to be compelled to try its case without that right. I am aware of the discussion that has been going on through the columns of the newspapers and Weekly Bulletin, in reference to that act of the legislature, so that this question is not entirely new.

An examination of original sec. 6709, and the practice before the superior court of Cincinnati, will aid us in coming to a conclusion as to what the intention of the legislature was in passing this act. By an examination of secs. 499, 499a and 503, which are repealed by this act of April 18, 1893, now under consideration, it will be seen that a case on error from the superior court of Cincinnati at special term was reviewed by said superior court at general term. Their error was prosecuted from said superior court at general term to the Supreme Court, in the same manner that error is prosecuted from the circuit courts throughout the state to the Supreme Court. No case commenced in the superior court of Cincinnati was ever tried in the circuit court of Hamilton county.

Original sec. 6709, so far as it pertains to this question, provides, that: "A judgment rendered, or final order made by the common pleas court may be reversed, vacated, or modified by the circuit court for errors appearing on the record," etc.

This original section provided a uniform practice throughout the state in all cases taken up on error from the courts of common pleas.

The law as in force prior to the taking effect of the act of April 18, 1893, was not uniform as to the review of cases commenced in the common pleas and the superior court of Cincinnati. The amended sec. 6709, so far as it pertains to this section, reads as follows: "A judgment rendered or final order made by the court of common pleas or the superior court of Cincinnati may be reversed, vacated or modified by the circuit court having jurisdiction in the county wherein said superior court is located, for errors appearing on the record," etc.

While I think that the language used in this amended section was unfortunately selected, or inaptly put together, I am of the opinion from the reading of said section, that the legislature intended to make a uniform practice of reviewing cases on error from the courts of common pleas and the superior court of Cincinnati to the circuit court. In other words, I think it was the intention of the legislature to add to the cases that might be reviewed in the circuit court of Hamilton county, cases taken on error from the superior court of Cincinnati.

If there was any doubt about this question from the reading of the section thus amended, an examination of the new sec. 6709a ought to convince every one that the legislature did not intend to take away the right to prosecute error from the court of common pleas to the circuit court.

This section reads as follows: "Section 6709a. All laws providing for appeals from the court of common pleas to the circuit court, shall apply in like cases to the superior court of Cincinnati, and all laws regulating the practice, forms of process and procedure in error or appeal from the court of common pleas to the circuit court, shall be held to extend and apply to the superior court of Cincinnati as fully as they extend to the court of common pleas."

This new section recognizes the fact that the laws of practice for taking cases upon error from the courts of common pleas to the circuit courts, which have heretofore been in force, shall continue in operation, and that said laws "shall be held to extend and apply to the superior

court of Cincinnati as fully as they extend to the court of common pleas."

By the act of the legislature (sec. 445a) creating the eighth circuit of Ohio, and providing for the election of one new circuit judge in the eighth circuit and two judges in the sixth circuit, the time for the election of said judges was fixed for the first Tuesday of November, 1887. That date was one week before the regular election of that year. The law provided no means for conducting an election on the day named. The Supreme Court, in *Sawyer v. State ex rel. Horr*, 45 Ohio St., 43, in construing said statute, held that "The clause fixing the time for the election of the new judges is surplusage, should be disregarded, and the general provisions of the statutes for the election of circuit judges on the first Tuesday after the first Monday of November applies to such new judgeships." The court gave to that act what was clearly intended by the legislature, and made it harmonize with the general laws of the state. If we should apply a similar rule to sec. 6709, and omit as surplusage the words, "in the county wherein said superior court is located," the section would not have the apparent objectional character. The section would then read: "A judgment rendered or final order made by the court of common pleas, or the superior court of Cincinnati, may be reversed, vacated or modified in the circuit court having jurisdiction, for errors appearing on the record," etc. This would make the several sections of the act harmonize with each other, and with all the other statutes of the state upon the subject of reviewing cases on error. And such a construction would give to the entire act its true meaning as intended by the legislature. Again, it is quite evident that if the legislature had intended to do away the right to prosecute error to the several circuit courts of the state it would have abolished said courts.

It seems to me then very clear from the whole act that the legislature did not intend to take away the right to prosecute error from the courts of common pleas throughout the state to the circuit courts, but that it intended to give the right to prosecute error from the superior court of Cincinnati, to the circuit court of Hamilton county, and thus make the practice uniform in said county.

The motion is therefore overruled.

Q. A. Gillmore, for the motion.

E. G. Johnson and A. R. Webber, *contra*.

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### COERCION OF EMPLOYEES.

[Hamilton Common Pleas, 1893.]

#### \*L. W. DAVIS V. STATE OF OHIO.

The act of April 14, 1892, (89 Ohio Laws, 269), providing that it shall be unlawful for an employer to coerce or attempt to coerce his employee from belonging to a lawful labor organization, held to be constitutional.

SAYLER, J.

The plaintiff in error, L. W. Davis, was arrested and tried in the police court on an information charging in its first count that said Davis, who was then and there the superintendent and engineer of the Cincinnati

\* This decision affirms the decision of the police court; *ante* 786.

Edison Electric Company, did on or about the thirteenth day of April, 1893, unlawfully attempt to coerce one A. J. Roberts who was then and there in the employ of the Cincinnati Edison Electric Company, from belonging to the Brotherhood of Electrical Workers, No. 13, of Cincinnati, a lawful labor organization, by threatening to discharge said A. J. Roberts from the employ of said the Cincinnati Edison Electric Company, because of his, said A. J. Roberts', connection with said labor organization, and did then and there discharge said A. J. Roberts from the employ of the said the Cincinnati Edison Electric Company as aforesaid, because of his said A. J. Roberts connection with said labor organization as aforesaid, contrary, etc.

By the second count it is charged that said Davis did coerce said Roberts in manner as stated in the first count.

The defendant moved to quash the information for reason that there was no such crime or offense known to the law as those charged.

The court overruled said motion.

Thereupon the defendant filed a demurrer on the ground that the facts stated in the information did not constitute an offense against the laws of Ohio.

The court overruled the demurrer.

A trial was had before the court and the defendant was found guilty on the first count and sentenced to pay a fine of \$100 and costs.

A motion for a new trial was overruled, and the plaintiff in error now seeks to reverse the said judgment.

An act was passed April 14, 1892 (89 Ohio Laws, 269), which provides, "That it shall be unlawful for any individual, or member of any firm or agent, officer or employee of any company or corporation to prevent employees from forming, joining and belonging to any lawful organization, and any such individual member, agent, officer or employee that coerce or attempts to coerce employees, by discharging or threatening to discharge from their employ or the employ of any firm, company or corporation, because of their connection with such lawful labor organization, shall be guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction, shall be fined in any sum not exceeding \$100, or imprisoned for not more than six months, or both, in the discretion of the court.

It is claimed on the part of the plaintiff in error, that this law is in violation of sec. 1 of the bill of rights, under which all men have the unalienable right of acquiring, possessing and protecting property.

On this proposition I am cited to the following authorities, viz: Commonwealth v. Perry, 155 Mass., 117. This was under an act providing that no employer should impose a fine upon an employee engaged in weaving, or withhold his wages in whole or part, "for imperfections that may arise during the process of weaving." The court say that if the statute only went to the extent of imposing a fine, it might be upheld. "But when the attempt is to compel payment under a contract of the price for good work when only inferior work is done, a different question is presented." \* \* \* "If the statute is held to permit a manufacturer to hire weavers and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty to pay the contract price if the employee does his work negligently and fails to perform his contract. For it is an essential element of such contract that full payment is to be made only when the contract is performed." And the court

holds this would be an impairment of a contract, and therefore unconstitutional. The court further says: "If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one when it declares that he has a natural, essential and unalienable right of acquiring, possessing and protecting property."

In the matter of application of Jacobs, 98 N. Y., 98: In this case the court held as unconstitutional an act to improve the public health, by prohibiting the manufacture of cigars and preparation of tobacco in any form on any floor, or in any part of any floor in any tenement house, if such floor or any part of such floor is by any person occupied as a home or residence, for the purpose of living, etc., on the ground that it interfered with the profitable and free use of his property by the owner or lessee of the tenement house who is a cigarmaker, and trammelled him in the application of his industry and the disposition of his labor, and thus, in a strict legitimate sense, it arbitrarily deprived him of his property and of some portion of his personal liability. In this case, by a number of citations the court upholds the proposition that there is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner; it is nothing more nor less than the sacred right of labor. It was claimed that the law could be supported on the ground of police regulations, or protecting the health of the inmates of the house, but the court could not find that tobacco was injurious to health.

Godcharles v. Wigeman, 113 Pa. St., 431. In this case the court held the first, second, third and fourth sections of the act of June 29, 1881, as unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country can not be done; that is, prevent persons who are *sui juris* from making their own contracts.

The act of June 29, 1881, provided that persons engaged in certain kinds of business should pay their employees as provided in the act; that they should settle with them at least once a month, and pay them in cash, etc.

State v. Goodwill, 33 W. Va., 179. In this case an act similar to the act in 113 Pa. St., 431, was declared unconstitutional, and for the same reasons.

The People v. Marx, 99 N. Y., 377. In this case the court held an act unconstitutional, which prohibited the manufacture or sale as an article of food of any substitute for butter or cheese produced from pure unadulterated milk or cream, inasmuch as the prohibition is not limited to unwholesome or stimulated substitutes, but absolutely prohibits the manufacture or sale of any compound designed to be used as a substitute for butter, etc., however wholesome, etc., and however openly and fairly the character of the substance may be avowed and published. The court say: "Among these (the constitutional safeguards) no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit."

People v. Gillsore, 109 N. Y., 389. In this case an act prohibiting the sale, etc., of an article of food, on any representation or inducement that anything else will be delivered as a gift, prize, premium or reward to the purchaser, was held unconstitutional, and the same reason among others is given by the court as stated in 99 N. Y., 377, viz., that a person has the right to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit.

Millett v. The People, 117 Ill., 294. In this case an act which provided that all contracts for the mining of coal, in which the weighing of coal as provided for in that act shall be dispensed with, shall be void, is unconstitutional, because the legislation was with reference to owners and operators of mines, and not general in its provisions.

The objectionable feature of the legislation, that it applied only to a certain class, to protect some class against a fair competition with other classes, is also referred to in the 109 N. Y., 399; 99 N. Y., 385, 387; 33 W. Va., 180, 181, 182; 113 Pa. St., 434.

It was further held in 33 W. Va., 185; 98 N. Y., 107, 108; 109 N. Y., 400, that the several acts could not be upheld on the ground that they were passed by the legislature in the exercise of the police power which every sovereign state possesses.

These cases are well considered and certainly establish the propositions stated in them. But do the provisions of the Ohio statute fall within the purview of either of them?

The provisions of the act of April 14, 1892, are general in their application; any individual, or member of any firm, or agent, officer or employee of any company or corporation; all persons may come within its terms. The provisions do not amount to the impairment of a contract; nor do they interfere with the right of any individual to make a contract. They do not attempt to prevent a person from engaging in or carrying on a lawful business. Do they interfere with a person in the conduct of his business, so to bring them within the reasoning of the court in 98 N. Y., 98?

The statute prohibits an employer from coercing his employee.

Bouvier, under the title of "coercion," defines it as "the forcible inducement to do an act." He says it is positive or presumed; positive when accompanied with physical force; "it is presumed where a person is legally under subjection to another, and is induced in consequence of such subjection, to do an act contrary to his will."

The terms of the statute are not definite; but considering all of its parts it is the meaning of the statute, as I construe it, that an employer shall not coerce or attempt to coerce his employee from belonging to a lawful labor organization, *i. e.*, shall not coerce him to quit such organization by discharging or threatening to discharge such employee.

I do not think this takes away from the employer the right to discharge his employee. He may discharge him for any reason, but he shall not attempt to coerce him to quit the labor organization.

In the case of Shaffer & Nunn v. Union Mining Co., 55 Md., the act prevented the employer from paying his employees in anything except money, etc. The court held that this did not prevent the employee from assigning his claims for labor by orders drawn on the employer in favor of merchants. The court say, *Ib p.*, 83 clearly, this being a penal statute, that will not be an offense under it, which is not expressly within its prohibitions, or necessarily within its spirit."

I think the legislature has the power to enact that the coercion of one person by another may be an offense.

The only limitations to the creation of offenses by the general assembly are the guarantees contained in the bill of rights. (37 Ohio St., 23.)

In 109 N. Y., 397, the court say: "It has been frequently held, and is acknowledged by all courts as the undoubted and true rule, that a statutory enactment will not be declared unconstitutional, and therefore void, unless a clear and substantial conflict exists between it and the constitution. It has been further held, that every presumption is in favor of the constitutionality of legislative acts; that the case must be practically free from doubt, before an act of the legislature should be declared unconstitutional. \* \* \* That all property is held subject to the general police power of the state, to so regulate and control its use in a proper case, as to secure the general safety and the public welfare."

In 29 Ohio St., 118, the court say: "In the consideration of this case, I may add, we have confined ourselves, as was our duty to do, solely to the question of legislative power, without any thought or inquiry as to the wisdom of the act, or the motives which induced it. And, being unable to find a conflict between the statute and either the letter or the reason of the limitations upon legislative power contained in the constitution, it is our duty to affirm the validity of the statute."

The court say in 45 Ohio St., 64: "If the law, as to the provisions involved in this inquiry, is shown to be clearly, palpably in conflict with the constitution, so that there is no doubt or hesitancy in the mind of the court, it should be so held. But if there be any doubt upon the subject, that should be solved in favor of the law, and the court should decline to interfere; for, if a law has been enacted which is simply unwise, and does not infringe upon any constitutional limitation, the only remedy is by resort to the law-making power to procure its repeal." I do not think it is a clear case that the statute is unconstitutional, and I am therefore bound to hold it constitutional.

The judgment of the police court does not find on which count the plaintiff in error was found guilty. It is a general verdict or judgment. I think it is sufficient if the evidence justifies a judgment under either count. The opinion of the court is to the effect that the court found him guilty under the first count, that is, that the plaintiff in error attempted to coerce Roberts, and I do not think the judgment is manifestly against the weight of the evidence.

I do not think the words "lawful organization" necessarily means an incorporated company. There may be lawful organizations which are not incorporated, as many churches, etc.

The judgment of the court below will be affirmed.

Jos. B. Foraker, for plaintiff in error.

H. D. Peck and E. Hertenstein, for defendant in error.



## VACATION OF JUDGMENTS—REFERENCE.

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[Superior Court of Cincinnati, Special Term, November, 1893.]

## GLASS-EDSALL PAPER CO. V. TELEGRAM PUBLISHING CO. ET AL.

1. The power vested in the courts of common pleas under sec. 5354, Rev. Stat., to vacate or modify its own judgment or order after the term at which the same was made is also conferred on the superior court of Cincinnati by sec. 495, Rev. Stat. The superior court of Cincinnati has power to vacate or modify its own judgment or order after the expiration of the term for irregularity.
2. The trial provided by sec. 5213, before a referee should be followed by all the incidents, so far as possible, as a trial by the court. This involves a notice of the proceeding, and it is the duty of the referee to give notice to the parties in interest of the time and place of taking testimony so that not only can there be an opportunity for defense; but that proper exceptions may be taken to the evidence. The absence of such notice is such an irregularity as would authorize the court to vacate or modify its own judgment or order whereby the report is confirmed after the term at which the same is made.

HUNT, J.

The Glass-Edsall Paper Company originally brought suit against the Telegram Publishing Company to assess stockholders' liability. The summons recites that Joseph H. Rhodes, Joseph R. Megrue and L. L. Sadler were duly served by leaving a true copy of the writ with all indorsements thereon at each of their usual places of residence. The petition was filed June 23, 1888. A demurrer was filed July 22d, following. This was amended June 27, 1892.

The court, on September 2, 1880, referred the matter to a referee to find and determine who are the stockholders of the corporation, the amount in which they are stockholders, the amount of indebtedness of the corporation, its creditors, and the amount each of the stockholders is liable to contribute and pay to liquidate and pay off the corporate indebtedness. This entry was indorsed by Isaac M. Jordan, as attorney for L. L. Sadler, Joseph H. Rhodes and J. R. Megrue.

The report of the referee was filed September 30, 1892, and a judgment entry was made October 8, 1892, confirming the report of the referee.

The referee made a finding that L. L. Sadler was indebted on his stock in the sum of \$1,859.22; Joseph H. Rhodes in the sum of \$1,859.22; Joseph R. Megrue in the sum of \$2,111.12, and John M. Pattison in the sum of \$18.72.

After the reference and before the filing of the report, Isaac M. Jordan met his death.

The case comes before the court on a motion to set aside the judgment entry by which the report was confirmed, on the ground of irregularity. This irregularity, it is claimed, consists in the fact that the judgment debtors never had notice of the proceeding before the referee.

It is urged in resistance of motion that the superior court of Cincinnati has no power to vacate or modify its own judgment or order after the expiration of the term at which the same was granted. The same power which is vested in the court of common pleas to vacate or modify its own judgment or order, after the term at which the same is made under sec. 5354, Rev. Stat., is vested in the superior court by sec. 495, Rev. Stat. The superior court has power to vacate or modify its own judgment or order after the expiration of the term for irregularity.

Section 5357 provides that the proceeding to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action.

The statute provides (sec. 5213, Rev. Stat.), that the trial by a referee shall be conducted in the same manner as a trial by the court, \* \* \* and their decision must be given and may be excepted to and reviewed in like manner. The report, too, upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court.

The trial thus provided should be followed with all the incidents of a trial in a court of justice. It is fundamental that no man shall be deprived of his property without due process of law. This involves a notice of the proceeding, and it is the duty of a referee to give notice to the parties in interest of the time and place the testimony is to be taken, to the end that proper exceptions may be taken to the evidence, and that an opportunity may be given for a defense. Otherwise, the institution of a referee which is intended to facilitate the administration of justice, may become an instrument of injustice.

The defendants in this case have filed affidavits, in which they claim that no service of summons was ever made upon them in the original action; that they had no notice of the time and place of taking the testimony, and that they ceased to be stockholders before the liability had been incurred.

Freeman on Judgments, (sec. 498), quoted by McIlvaine, Judge, in *Gifford v. Morrison*, 37 Ohio St., p. 507, says that it has been held that a judgment rendered without process, and without knowledge of the defendant, may be relieved against without any showing on the question of merits, for the reason that in such case the injury consists in the rendition of the judgment against a party without notice and opportunity of defense; and that it is unjust and unconscientious to enforce a judgment so obtained.

A court of equity, however, will not interfere to set aside a judgment until it appears that the result will be other or different from that already reached. Equity is not concerned about a judgment that is in fact equitable and just, but equity is concerned about a judgment when no opportunity has been given to assert a defense.

If the defendants have a meritorious defense, and they so claim great injustice would be wrought in this case by attempting to enforce the judgment without an opportunity to be heard; if there is no defense, judgment can be enforced.

The motion will be granted.

Healy & Brannan, Burch & Johnson for the motion.

A. M. Warner, *contra*.

### 376

### RESISTING AN OFFICER.

[Hamilton Common Pleas, 1893.]

M. E. AYLMORE V. STATE OF OHIO.

In an information it is not sufficient to charge, in the language of the statute, the offense of obstructing or abusing a police officer. The facts constituting the offense must be set forth.

ON error from Police Court.

SAYLER, J.

The information charges that said "M. E. Aylmore, on or about the seventeenth day of September, 1891, with force and arms, at the city of Cincinnati, aforesaid, and within the jurisdiction of said court, did unlawfully, knowingly and willfully obstruct and abuse one Amor McCane; said Amor McCane being then and there a member of the police force of the city of Cincinnati, and being then and there in the execution of his duty as such officer, which he, the said M. E. Aylmore, then and there well knew," etc.

The statute, sec. 6908, provides that "whoever knowingly and willfully resists, obstructs or abuses any sheriff, constable, or other officer, in the execution of his office, shall be fined," etc.

It is claimed on the part of the plaintiff in error, that the facts stated in the information do not constitute an offense against the laws of Ohio.

The information charges an offense in the words of the statute. Is this sufficient?

In the case of *Lamberton v. The State*, 11 Ohio, 282, the indictment charged that Lamberton, on, etc., at, etc., with force, etc., one David Bryte, then and there being sheriff of said county, and also then and there being in the execution of his said office of such sheriff, as aforesaid, unlawfully did resist, contrary to the form of the statute, etc.

This indictment was under the ninth section of the act of March 8, 1831, Swan's Statutes, p. 242, which provided "that if any person shall resist or abuse any sheriff, constable or other officer, in the execution of his office, the person so offending shall, upon conviction thereof, be fined," etc.

The court says on p. 284, "it is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offense charged; that it should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet, of the act done, which it behooves him to contravert, and so that the court applying the law to the facts charged against him, may see that a crime has been committed," and held the indictment was not sufficient.

This would seem to determine the case at bar.

But I am cited to the case of *Davis et al. v. The State*, 32 Ohio St., 24, which is claimed by the defendant in error to have virtually overruled the eleventh Ohio case.

In the *Davis* case the court held that "on information, under sec. 8, of an 'act entitled an act to amend sec. 8 of an act for the prevention of gaming,' describing the offense in the words of the statute, is not uncertain, and states facts sufficient to constitute an offense."

Section 8 of said act provides, "that if any person shall keep or exhibit for gain, any gambling table, or faro, or keno bank, or any gaming device, on conviction thereof, shall be fined," etc.

The information charged that "on, etc., at, etc., and within the jurisdiction of that court, C. L. Davis, did unlawfully keep and exhibit for gain, certain gaming device, commonly known as keno, in the city of Cincinnati, contrary to the form of the statute," etc.

The *Davis* case being the later, it becomes an important question to determine whether it is antagonistic to the case in 11th Ohio. It does not by reference overrule it. Does it do so by implication?

In the case of *U. S. v. Almeida*, District Ct. U. S. Phil., 1847, reported in note on p. 1061 of *Wharton's Precedents of Indictments* and

Pleas, the indictment charged "that the defendants being seamen of an American vessel, to-wit: the barque Pons, with force, etc., did make a revolt on board the said ship, contrary," etc.

Section 8 of the Crimes Act of 1790, provided that if any seamen shall make a revolt in the ship, he shall be adjudged, etc.; and sec. 12 provided that if any seamen shall endeavor to make a revolt, in such ship, he shall on conviction, etc.

Judge Kane, in deciding the case, lays down the rule that "the law secures to every man who is brought to trial on a charge of crime that the acts which constitute his alleged guilt be set forth with reasonable certainty in the indictment which he is called upon to plead to."

He then says: "There are exceptions, or rather limits to the application of this principle; but they all refer themselves to the peculiar character of the offense charged. Thus, an indictment against a common barrator, 'or for keeping a common gaming house,' or 'a house of ill-fame, is good without a specification of acts'; for the essence of the offense in these cases is habitual character. So, also, when the charge is not the absolute perpetration of an offense, but its primary characteristic lies in the intent, instigation or motive of the party towards its perpetration; the acts of the accused, important only as developing the *mala mens*, and not constituting of themselves the crime, need not be spread upon the record. Such are certain cases of conspiracy, and those of attempt or solicitation, to commit a known crime, where the mental purpose may not have been matured into effectual action, or has had reference to criminal action by a third party, a class of exception, this last, which vindicate much of the judicial action under this statute."

He held that indictments in the cases under the twelfth section, drawn in the words of the statute, "endeavor to make a revolt," were good, and cites the many cases in which such indictments were sustained; but that in all the cases in which the indictments under the eighth section were in the words of the statute, the indictments were quashed, or other steps taken, so that no sentence had even been pronounced on a conviction.

In the case of *Commonwealth v. Miller*, 2 Parson's Select Eq., Cases (Pa.) 480, the indictment charged that John Miller, being and acting as judge of said election, etc., did commit willful fraud in the discharge of their duties.

The statute provides that, "if any inspector, judge or clerk shall be convicted of any willful fraud in the discharge of his duties, he shall," etc.

The court, the four judges sitting in *banc*, held that the indictment was not good. They say, "it is not sufficient in an indictment on popular action to lay the offense in the very words of the statute, unless they expressly serve to allege the very fact, with all the necessary additions, and without a grain of uncertainty or ambiguity. The special circumstances necessary to individuate the offense must be stated.

The court say, however, that there are exceptions—thus an indictment against a common barrator or one for keeping a common gaming house, is good without a specification of the acts; the essence of the offenses in these consists in its habitual character, or arises from a series of transgressions, etc.

In 5 Ohio St., 280, the information charged the offense of obtaining money by false pretenses. The court says, *Ib.*, 284, "that in an accusa-

tion for this offense, it is not sufficient simply to follow the language of the statute."

The crime charged in 32 Ohio St., 24, is the unlawful keeping and exhibiting of a gaming devise known as "keno." This comes clearly within the exceptions to the general rule, and the averment in the words of the statute is sufficient.

On the other hand, the crime charged in 11 Ohio, 282 resisting a sheriff, comes under the rule, and the facts must be set forth.

These cases do not antagonize; but each states a correct proposition of law.

The court, in 32 Ohio St., 28, cites from the case of Pogue v. State, 3 Ohio St., 229, and in the 3d Ohio St., 234, Judge Thurman cites from 11 Ohio, 282. Neither overruled the other.

In 3 Ohio St., 171, the court cites 11 Ohio, 288, and says, "in *Lamberton v. State*, 11 Ohio, 288, it was held that an indictment for resisting an officer in the execution of his duty, must set forth all the facts necessary to constitute the offense."

In 8 Ohio St., 113, the court say, "it is an invariable rule, that an indictment must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime," and cites p. 114, *Lamberton v. State*, 11 Ohio, 284, as sustaining the rules it there lays down.

In 35 Ohio St., 82, the court say, "it (the indictment) should set forth the facts constituting the offense, so that the accused may have notice of what he is to meet, and so that the court applying the law to the facts charged against him, may see that a crime has been committed," and cites *Lamberton v. State*, 11 Ohio, 284, as sustaining the proposition.

In 35 Ohio St., 269, the court, Judge Okey, says: "In charging an offense in an indictment, it is not good practice to omit the words of the statute which define the crime. The safer course is to employ them; and while this is not always indispensable to the validity of the indictment, it is clear that if they are omitted the defect will be fatal, unless the words used are the precise equivalent of the words of the act, or, at least plainly and necessarily include them (citing cases). From this, it is not to be inferred that an indictment which simply pursues the language of the statute, is sufficient, for in many cases something more is required," citing *Lamberton v. State*, 11 Ohio, 282.

Clearly the case of *Lamberton v. State* is in full force as the law of Ohio, and as the case at bar is within its purview, the information is not sufficient, and the case will be reversed.

Maxwell & Creed, for plaintiff in error.

Fred. Hertenstein, for defendant in error.

## 382

## CORPORATIONS—MORTGAGE.

[Superior Court of Cincinnati, General Term, 1893.]

OHIO VALLEY NATIONAL BANK V. WALTON ARCHITECTURAL IRON CO.  
ET AL.

## MORTGAGE BY EXECUTIVE COMMITTEE OF CORPORATION.

Under an appointment, giving the executive committee of a corporation power to discharge the duties of the board of directors, but not to incur debts except for current expenses unless specially authorized, their authority to mortgage the realty of the company to pay current expenses is denied.

## DEED OF ASSIGNMENT A CONVEYANCE.

An assignee in trust for creditors is not bound to recognize prior existing equitable considerations, and operations as an agreement for a lien, between original parties,—his assignor and the creditors. An assignment for the benefit of creditors in this state operates as a conveyance, and only such mortgages as appear to have been duly executed and afterwards recorded in the recorder's office of the county are entitled to notice at the time of the assignment.

## APPROVAL OF MINUTES.

The approval of the minutes of the preceding meeting of a board of directors is an approval of the form of statement or correctness of previous proceedings, and not a ratification of the action of the board.

## DIRECTOR'S VOTE BY PROXY.

A director cannot vote by proxy at a meeting of the directors.

## MOORE, J.

In April, 1891, the Walton Architectural Iron Company, a corporation under the laws of Ohio, was solvent, and had a board of directors, consisting of J. Frank Walton, Joseph S. Neave, A. C. Neave, Halstead Neave and J. P. Walton, of whom J. Frank Walton was president, and Joseph S. Neave secretary and treasurer.

All of the stock was owned by J. Frank Walton and Joseph S. Neave, excepting a few shares held by other directors to qualify them as directors, and the active management of the business devolved upon the secretary and treasurer, and president.

Prior to April, 1891, Joseph S. Neave had loaned to the company, at various times, considerable sums of money, which was then due. It was further understood between Joseph S. Neave and those representing the company, that a mortgage on the company's leasehold estate should be given, covering the amounts so loaned or to be loaned. Such a mortgage was executed and delivered to Joseph S. Neave in July, 1891, and signed, the J. F. Walton Architectural Iron Co., per J. F. Walton, president, and was recorded November 6, 1891, and assigned by Joseph S. Neave on November 9th, following, to the Ohio Valley National Bank, and on which day and afterwards in the afternoon the Iron Company made an assignment in trust for the benefit of all its creditors.

Prior to all this, in January, 1891, there was a meeting of the board of directors of the Iron Company, at which J. F. Walton and Joseph S. Neave were elected and constituted an executive committee, under article 12 of the constitution or code of regulations of the company, which article 12 provides "that the board of directors shall appoint an executive committee, of not less than two members of their own number, who shall by mutually agreeing have charge of the management and business affairs of the company in the interim between the meetings of directors, with power to fix prices for the company's products, determine credits,

make investments and generally to discharge the duties of the board of directors, but not to incur debts except for current expenses, unless specially authorized."

The mortgage referred to was executed by J. Frank Walton as a member of the executive committee, Joseph S. Neave not signing, but appearing as the mortgagee.

This suit is brought by the Ohio Valley National Bank to foreclose the mortgage. The assignee of the Iron Company files an answer in behalf of himself and the creditors of the Iron Company, attacking the mortgage on the grounds that the same is a preference not authorized by law, and insisting that to be a valid preference in favor of the bank the mortgage must operate, first, as a validly executed and formal mortgage of the corporation, duly recorded; or, second, as an equitable mortgage which can be sustained as a valid and subsisting lien on the property.

As to the first ground of attack made by the assignee, we are of the opinion that the executive committee had the simple power to incur debts for the current expenses of the business of the company for the convenient carrying on of the same, and although a part of or all the money borrowed of Mr. Neave went into the current expenses and may have been authorized, the mortgaging, the conveying or transferring the property of the company by the executive committee, was certainly not intended by the constitution of the company as it is here quoted. It is claimed that the action of Mr. Walton as a member of the executive committee, or as president of the company, was ratified at a meeting of the board of directors in August, 1891, whereby the action of the executive committee in agreeing to give Mr. Neave the mortgage was approved, and in November, 1891, by another meeting of the board of directors in approving the minutes of the August meeting. It appears that the August meeting consisted of three directors, J. Frank Walton and Joseph F. Neave, and Halstead Neave by proxy; there was, therefore, plainly no meeting, no quorum competent to ratify the execution of the mortgage, for the authorities hold that a director can not vote at a meeting of the directors, by proxy, are numerous. The effect of the November meeting in approving the minutes of the August meeting, was not, as claimed, an approval of the unauthorized act of the president, J. Frank Walton, in executing the mortgage; it was an approval of the correctness of the minutes, or an approval of the form of statement of previous proceedings.

We are of the opinion that there was want of power in the executive committee to execute a mortgage for current expenses, and further, that the acts of Walton, either as executive committeeman or as president, were not legally ratified.

As to the second claim of the bank, that an equitable mortgage should be established as a subsisting lien upon the company's property, on the ground that there was at least an agreement and understanding that a mortgage was to be given, we are inclined to hold that equities existing between the original parties to a contract for the mortgage in question can not now be set up against a statutory assignee for the benefit of creditors. "Unaffected by statutory proceedings an agreement in writing for a mortgage is a valid contract, fixing a specific lien upon the property agreed to be mortgaged, and will be specifically enforced by a court of chancery against the party and all subsequent purchasers from him with notice, as well as against any general assignment, either voluntary or by operation of law for the benefit of creditors." See Bloom

v. Noggle, 4 Ohio St., 45; Betz v. Snyder, 48 Ohio St., 492, and citing Bloom v. Noggle as authority for the statement that an assignment for the benefit of creditors under our statutes operates as a conveyance, and not a mere power, and that the assignee is bound to recognize only such mortgages as appear to have been duly executed and afterwards recorded in the recorder's office of the county at the time of the assignment. See, also, Hanes v. Tiffany, 24 Ohio St., 249; Blandy v. Benedict, 42 Ohio St., 295.

While there may have been an agreement in existence, or an equitable right to a specific lien, at a time prior to the assignment, between the company and Mr. Neave, as original parties, yet as the statute invested the assignee with the legal title of the property for the benefit of the company's creditors, he is not now subject to prior existing equitable considerations between the original parties.

The assignee is entitled to the relief prayed for, and plaintiff's petition is dismissed.

SMITH, J. and HUNT, J., concur.

Champion & Muir, and Herbert Jenney, for plaintiff.

Stephens, Lincoln & Smith, and Jones & James, for Charles Hoeffinghoff, assignee.

## 383

## DESCENTS.

[Hamilton Common Pleas, April Term, 1893.]

## JOSEPH HELFINGER v. CHARLES WOLFF.

The ancestral or inheritable quality of inherited property is not changed or the descent broken and a new fountain of inheritable blood created by the owner conveying away, and immediately receiving back the naked legal title without consideration, though for the sole purpose of breaking the descent.

Martin Helfinger bought a piece of city property, and on his death, childless and intestate, his wife inherited it from him in fee.

She married the defendant Chas. Wolff, and afterwards, in 1887, conveyed the property without consideration to L. J. D., who, on the same day, reconveyed it to her, both deeds containing a general warranty.

She died childless and intestate, and her husband claims the fee as her heir, while her brothers and sisters, and her first husband's brothers and sisters, claim the fee under Rev. Stat. sec. 4162, subject to Chas. Wolff's dower.

The above statement is disentangled from a complicated state of facts as being all that bears on the only legal question doubtful enough to be worthy of report.

BATES J.

The question is whether a woman, the owner of property acquired by descent, by conveying it without consideration to one who immediately reconveys to her, thereby interrupts the course of descent and becomes a new fountain of inheritable blood as a taker by purchase under the last deed.

The deed of L. J. D. was clearly not intended to give him anything but a naked legal title in trust to reconvey. No motive appears unless it



be an intent to break the course of descent. Mrs. Wolff still retained the entire equitable title, and had there been a statute of uses in Ohio, and the use been expressed in the deed, the statute would itself have executed the use at once by giving her the legal title again.

For the husband it is urged that no one is an ancestor except one from whom the estate immediately came, citing *Patterson v. Lamson*, 45 Ohio St., 77, and that the last deed alone is to be looked at so that there is no ancestor in the case. Also that Mrs. Wolff could have altered the descent by a will leaving the property to the husband as against those of the blood of the ancestor. She could effectuate the same intent and convert her title from an ancestral to a title by purchase by a deed such as that to L. J. D., and the intent should be respected.

After a diligent search I can find but one case like this, and its result is contrary to the conclusion I have reached. In *Nesbitt v. Trindle*, 64 Ind., 183, T's estate descended one-third to his wife in fee, and it was set off to her. She then became engaged to marry N, and conveyed the property to L. without consideration, in order to enable herself to sell or dispose of it as she chose, and then married N.; the deed recited a consideration of \$100, and contained a warranty, but no money passed. Within a month L. reconveyed to her, without consideration, and in pursuance of the understanding between them. This was held to vest it in her by a new title, on the ground that she had a right to convey with or without a consideration; that her motives were not material, and not a fraud on her children; that she did so dispose of it, and subsequently acquired it by a new title, and after that did not hold it by virtue of the previous marriage, but by the new title, and her husband, therefore, and not her children by the first husband, inherited from her.

In so far as this holds that if an heir parts with property absolutely, and then re-acquires, he holds as a purchaser, it is undoubtedly correct. Thus, if an owner mortgages his property, and then conveys to the mortgagee in fee, who afterwards, on being paid in full, reconveys, the owner is in of a new title, for he had parted with the legal and equitable estates. *Doe ex dem.* *Harmon v. Morgan*, 7 Term Rep. (D. & E.), 103.

That the course of descent is controlled by the legal title in determining whether property is ancestral or not, is true, and our Supreme Court has twice so stated. But this can not mean that the nature of the last deed is not to be examined, but only that it is not to be contradicted, for otherwise the unintended result would follow, that if Mrs. Wolff had happened to select a parent instead of L. J. D. as the conduit of her transfer, the last deed to her being on its face, a deed of gift, would have put the inheritance into such of her heirs as were of the blood of such grantor. The legal title was distinctly held not to control in *Bond v. Swearingen*, 1 Ohio, 395; *Douglass v. McCoy*, 5 Ohio, 522, (though these decisions were scarcely put on the right ground, and should have been, because the equitable title would not merge in the legal as against incumbrancers on the equitable.) Other cases will occur where the nature of the last transfer is examinable to determine the inheritable quality of the estate; thus, if it be found to be a mere partition deed, the ancestral character of the estate remains. See *Conkling v. Brown*, 8 Abb. Pr. N. S., 345; *Tabler v. Wiseman*, 2 Ohio St., 207; *McBain v. McBain*, 15 Ohio St., 337; *Hershizer v. Florence*, 39 Ohio St., 516, 525; *Farmer's*, etc., *National Bank v. Wallace*, 45 Ohio St., 152; 168; *Avery v. Atkins*, 74 Ind., 283; *Yancey v. Radford*, 86 Va., 638; *Davis v. Agnew*, 67 Tex., 206; and that, too, in face of the fact that generally in this country title, and not seizin,

makes the inheritable quality in land; *Thompson v. Sanford*, 13 Ga., 238; *Hillhouse v. Chester*, 3 Day, 166. It is no answer to say that partition stands on its own ground because it affects possession and not title, for the fact remains that the courts look through and beyond the deeds, and thus ascertain their nature, namely that they were mere partition deeds. If a man makes a trust deed to secure a debt, and dies, and the land is sold, the surplus proceeds descend as realty. In *re Thompson's estate*, 8 Mackey (Del.), 536.

So, where the ancestor devises to the heir an estate of the same quantity and quality that he would have inherited from the testator, the worthier means of coming to the estate prevails, and the heir is deemed in by the descent, and not by the will. See for example: *Clerk v. Smith*, 1 Salk., 241; *Smith v. Trigg*, 8 Mod., 23; *Barnitz v. Casey*, 7 Cranch, 456, 464; *Phillips v. Dashiell*, 1 Har. & J. (Md.), 478; *Gilpin v. Hollingsworth*, 3 Md., 190; *Buckley v. Buckley*, 11 Barb., 43; *Hoover v. Gregory*, 10 Yerg., 444; for, as was said in the much argued case of *Pibus v. Mitford, Ventr.*, 372, and quoted in 1 Ohio, 395, 411, "a man cannot either by conveyance at the common law, or by limitation of uses, or devise, make his right heir a purchaser."

The rule that the legal title controls the course of inheritance merely signifies that the equity doctrine, which follows land or money whatever form it takes, is not applied to uphold a descent. See *Armington v. Armington*, 28 Ind., 74. Hence, if the title comes to one in two separate streams, legal and equitable, of co-extensive quality, the legal absorbs the equitable and governs the descent. *Goodright v. Wells, Dougl.*, 771, (decided in Lord Mansfield's time.) is the leading case, and though the point there was a dictum, it has been followed (except in *Bond v. Swearingen, supra*.) ever since. In that case S. bought and paid for an estate, but died before conveyance to him, leaving his estate by will to his wife, in trust to bring up their son, and then to convey to him. The vendor of the land conveyed the fee to the wife. Thus the son derived the equitable estate *ex parte paterna*, and the legal fee *ex parte materna*; it was held that the legal and equitable estates were merged in the son, because he could not hold the legal estate in trust for himself as owner of the equity, and on his death the estates would not open to revive the trust so as to make the maternal heirs hold in trust for the paternal line. This doctrine was followed in *Selby v. Alston*, 3 Ves. Jr., 339; *Wade v. Paget*, 1 Bro. C. C., 363; *In re Douglas*, 28 Ch. D., 327; *Nicholson v. Halsey*, 1 Johns. Ch., 417; *Shepard v. Taylor*, 15 R. I., 204, and on rehearing, 13 Atl. Rep., 105; *Hopkinson v. Dumas*, 42 N. H., 296.

The doctrine of *Goodright v. Wells*, though originated with doubts, tallies perfectly with the fundamental theory that equity has in reality no jurisdiction *in rem*, and can not confer a true ownership, and the so called equitable title is merely a personal claim against the holder of the legal title, with whom the real ownership resides, (*Langdell Eq. Pl.*, sec. 184); hence the legal title controls the descent where it is not merely attendant on a term, and it will be observed that the doctrine of that case applies to the union of independent coextensive streams derived from separate sources, and not where the owner himself separates the legal and equitable titles by his own act.

As to what shall be a purchase to break a descent, the common law is complicated and perplexing, as will be seen by the examples in the note to *Wendell's Blackstone*, Vol. 2, p. 240. He says, among other things,

however, that a mere release to uses did not interrupt the inheritable quality of the estate. In Coke, Litt., 13a, it is said: A man "seized on the part of his mother maketh a feoffment in fee to the use of him and his heirs, the use being a thing in trust, and confidence shall ensue the nature, of the land, and shall descend to the heir on the part of the mother." In Harris v. Bishop of Linclon, 2 Peere Wms., 135, 137, it was held that "one seized in fee as heir of the mother's side, levies a fine and declares the use to himself in fee; this is the old use, and no diversity between an express declaration of use and one implied." The refusal to distinguish between an express and implied use was also held in Godbold v. Freestone, 3 Lev., 406, and in Abbot v. Burton, 2 Salk, 590. In the latter case, J. S., seized *a parte materna*, covenanted to levy a fine to A and B to the use of them and their heirs, to the intent that a common recovery should be suffered against said conusees to the use of J. S. for life, then several intermediate remainders, and remainder to his right heirs. After the remainders were over, the heir of J. S., *a parte materna*, took as against the general heir, "though the conusees had a seizin in fee of the estate and use vested in them by fine for a special purpose, and in strictness the estate passed, yet upon consideration of the whole conveyance, the estate did originally move from J. S., who was the conusor of the fine \* \* \* the heir *ex parte materna* shall have, it being the ancient use. "So much as remained unlimited should result to the conusee and his heirs and not to the conusor, in whom in the estate was not vested with a purpose to create in him any interest, but in order to forward and complete the conveyance of the conusor's estate."

If the fee is granted or devised in trust for purposes which fail, the heir takes the inheritable residuary equity by descent. Thus, in Hucheson v. Hammond, 3 Bro. C. C., 128, a lady conveyed an estate which came to her *ex parte materna* to trustees to such uses as she should direct, with remainder to her own right heirs. Among the uses were the payment of certain legacies which lapsed by the death of the legatees in her lifetime. The descent was held not to be broken by the uses, for the undisposed of use retained by her was the old use which came back to her with the quality of descent (maternal), and went to the heir with the same quality; and in Buchanan v. Harrison, 1 Johns. & H. 662, on a devise to trustees, one of whom was the heir on trust subject to prior estates for conversion for purposes void for remoteness, the heir takes the equitable reversionary interest as part of the old use, and it descends to him as such, and does not merge in the legal interest devised to him as trustee so as to breed the descent, and constitute him fresh stock.

And the general rule is that land ordered by will to be converted into money, is deemed to be for the purposes of the will, and if these are disappointed, descends as realty, 4 Ired. (N. Ca.), Eq., 320; 9 S. & R., 424; 20 Pa. St., 515; Roy v. Monroe, 47 N. J. Eq., 356.

The above cases, therefore, would seem to warrant the holding, that although where the legal and equitable title come from independent sources, the legal title will control, and where the owner of both estates parts with the entire interest and reacquires it, as in the Indiana case, where there was an intent to convert the estate into money, he is in as a purchaser. Yet, where, as in our case, one owning both the legal and equitable estates by descent, momentarily parts by her own act with the mere technical legal title, retaining the entire beneficial interest, which, standing alone, would have descended as ancestral, thus creating a mere dry trust, which is held to her unqualified use, the immediate

reacquirement of the naked title does not break the descent and constitute her a new source of title, for she conveyed the legal title to her own use.

One other highly important and practical consideration remains in that as the grantor might never have anticipated the ulterior legal consequences of changing the descent, and a door is opened for perpetrating a fraud on the heir by enabling those having an influence over a grantor to effect a secret purpose of which the grantor might naturally have no comprehension.

Gerard, Lampe & Stallo and Hollister & Hollister, for plaintiffs.

A. H. Bode and Louis J. Dolle, for defendants.

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## PROBATE OF WILLS.

[Hamilton Common Pleas, April 18, 1891.]

## \*ROBERT BARR'S WILL, IN RE PROBATE OF.

1. In proceedings to admit to record in this state authenticated copies of wills probated in other states, it is competent for the court to admit persons to appear in such proceedings for the purpose of adducing evidence and taking other steps adverse to the applicants.
2. In such proceedings, the court may require the applicants to furnish security for costs.
3. Courts have inherent power to require non-resident suitors to give security for costs.

SHRODER, J. (orally).

There were two motions submitted to the court; the one, by the Barr heirs, to set aside, or modify, the entry heretofore made in these proceedings, by which Closterman and other property owners were permitted to appear in the case for the purpose of adducing evidence and taking such other steps as will enable the court to be better advised in determining the questions arising upon the application made to the court as to the proof in probating an execution of the will in question.

The section of the statutes which authorizes the recording of wills executed and proved in other states, differs from that section which authorizes the probating of domestic wills. The latter section restricts the court to such evidence, only, as may be offered by parties interested in probating the domestic will. The former section, that is, the one which relates to the recording of wills probated in other states, does not restrict, or limit, the court to that class of proof only, but would permit the court to accept evidence with reference to the issues, from whatever source or by whatever person offered.

The circuit court, in passing upon a similar application of this same will, expressed the opinion that the offer for record is an *ex parte* proceeding only. In view of that opinion, this court, upon this application at bar, refrained from making Closterman and others parties to the proceeding, in the sense that they were to be adversary parties, but caused the order to be entered by which they, as *amici curiae*, might be enabled to adduce evidence which might throw light upon the question of proof and execution

\*For former decisions upon applications to probate this will see 9 Dec. Re., 615; 10 Dec. Re., 118; *ante* 862.

of the alleged will. This course is not only just and proper, and conducive to a correct conclusion of the questions raised upon the application, but is also in conformity with the spirit of the law as declared by the circuit court in the case of *Mercantile Trust Co. v. Ætna Iron Co.* in the 2 Circ. Dec., 718. It would seem to be reasonable and fair that persons whose property rights might be affected by the recording of such a will, should have an opportunity of furnishing the court with evidence upon the subject-matter under investigation. It would relieve the court from being limited to the consideration of only such evidence as the applicant would choose to produce in his own interest, and would secure for the court evidence upon facts which the applicant might find to his interest to suppress. It is obviously in the interest of justice that such an entry ought to be made, and, having been made, the court finds no reason why it should be set aside, or modified. And the motion is, therefore, overruled.

The second motion is to require the applicants to give security for costs, on the ground that they are non-residents of this state, and upon the further ground that costs incurred in the former applications for the record of this same will have not been paid by them, although, in all instances, the conclusions of the court were adverse to the application.

The applicants, by their counsel, contend that the court has no right to affix this condition, or to require security for costs to be given on their part. They base their contention upon the proposition that the only provision in the statutes, as to costs, is found in the civil code, and applies only to civil actions, and that civil actions are only those in which there are adversary parties consisting of plaintiff and defendant. No mention is made of the provision in statutes, whereby the code provisions are to govern the probate court proceedings, as far as may be applicable.

While it is not necessary for me to pass upon that point, as far as it relates to this application, yet I would be inclined to hold that the section of the code is only to apply to such proceedings in the probate court which are substantially adversary in their form and nature, and proceedings can be well imagined, and are necessary to be had, in that court, wherein the parties stand in the relation of plaintiff and defendant towards each other, and that these civil code provisions as to costs may be said to be confined, in their application, to such proceedings as I have mentioned as being had in the probate court. It might fairly be said that the civil code provisions as to costs would not apply to these proceedings at bar. It is not necessary, however, to look to the statutes for the power of the court to require a security for costs. An examination of the authorities, both at common law and in equity, lead to the conclusion that the right to demand security for costs of non-residents, is inherent in the court, in the furtherance of justice and administration of the law, and lies largely in its discretion, depending upon the exigencies of the various cases as they appear before the court.

In *Tichbourne v. Mosylyn*, *Law Reports*, 8 Common Pleas, 29, this being the second ejectment suit, the court felt authorized to require the plaintiff to pay the costs incurred in the first case before proceeding further with the second. The first case having gone as far as the introduction of evidence for the defendant, when the jury, through its foreman, notified counsel that they need go no further, whereupon plaintiff took a non-suit, the costs of the first case amounting to something like forty thousand pounds. This proceeding of the court put manifestly a quietus to the whole matter, and, notwithstanding the conclusive effect of the order, substantially denying the plaintiff any further remedy, the court

found no difficulty in requiring the costs of the first case to be paid before going on with the second.

In *Henderson v. Griffin*, 5 Peters, United States Supreme Court, 151, in the second ejectment suit proceedings were stayed until the costs of the first were paid, the Supreme Court using this language in its opinion: "Rules of this kind are granted by the courts to meet the justice and exigencies of cases as they occur \* \* \* depending on a variety of circumstances which, in the exercise of a sound discretion, may furnish a proper ground for their interference." In *Hirst's Lessees v. Jones*, 4 Dallas, Pennsylvania Circuit Court decision, the same ruling was made. In *People v. Oneida Common Pleas*, 18 Wendell, 662, is an opinion delivered by Cowan, J., in a proceeding of mandamus to compel the common pleas court to try a case, notwithstanding its order staying further proceedings until security for costs were given, the Supreme Court of New York refused a writ of mandamus, and, in the course of the opinion, held that the right to require security for costs was incidental to the powers of court, and was independent of statute; that this power was inherent in the court, and that the statutory provisions as to costs were simply cumulative. In *Jackson v. Miller*, 3 Cowan, 57, proceedings were stayed because costs in a former action had not been paid. In *Jackson v. Edwards*, 1 Cowan, 138, the same ruling. The court there cited *Tidd's Practice*, 479 and 480; 2 *Tidd's Practice*, 1141; 6th Term Reports, 228, 740; 8th Term Reports, 645; 10th Illinois, 20. In *Dyer v. Donavin* 3 Howard's Practice, 135, and *Swift v. Collins*, 1 Denio, 650, the same ruling was made in the latter case the court speaking of the statutory provision of the New York Revised Statutes under this head. In *Richardson v. White*, 27 Howard, 156, cited in the 73rd New York, 133, proceedings were stayed where former costs had not been paid. I might cite, also, 3 Cowan, 380; 10th Johnston, 364; 19th Johnston 237, on the same point. In chancery, in *Pratt v. Fenner*, 8 Rhode Island, 40, the equity court, in the case of non-residence of the complainant, followed the analogy of the law by requiring security for costs. For other chancery cases reference may be made to the 10th Johnston Ch., page 196; also to the case of *Newman v. Landrine*, 14th New Jersey Equity, 291, where the court held that the defendant in equity can require a complainant residing abroad to give security for costs; that it was an ancient and well-established rule to require such security, and to direct the proceedings to be stayed; that "it does not rest upon provisions of our statutes." In 5 New Jersey Law, 782, the court held that the power of the court to require the payment or security of costs is not restrained by the statute, the provision of the statute being cumulative only. Further reference might be made to I. Daniel's Chancery Practice, 4th edition page 28; and the same volume, page 32; also 2 Daniel's Chancery Practice, page 1605.

In this court of common pleas, in the case of *John Rahman v. Pendleton & Fifth Street Railroad*, Cox, J., now of the circuit court, then a judge of the common pleas, in March, 1867, passed upon the question in a very well considered opinion. In that case Rahman had instituted an action against the defendant in the superior court, and recovered a judgment, which judgment was finally reversed by the Supreme Court. Rahman dismissed his action in the superior court, and began an action, on the same cause in the common pleas. Upon a motion made to stay proceedings until the costs in the superior court had been paid, Judge Cox, upon a consideration of the question already referred to, came to the conclusion that the plaintiff was not to be permitted to proceed further

in this court until he had paid the costs incurred in the former suit in the superior court.

It has been argued, by counsel for the Barr heirs, that the exercise of such power of the court was unconstitutional, inasmuch as the constitution of the state expressly provides that the courts shall be open to suitors. The conclusion upon the question of costs does not militate against this constitutional provisions; for it certainly was not intended, by this constitutional provision, to break down such salutary rules and barriers as the court had set up against oppressive or unjust prosecution of causes, or undue or unfair advantage being taken over court officials in matters of costs. The constitution undoubtedly uses the word "court" as it has been held in an analogous instance, it used the word "jury": It did not intend to invent the institution of court or jury but simply dealt with them as they existed at the time the constitution was made. They took the courts with their inherent powers, and by providing that the courts shall be open to suitors they did not intend to introduce any new features, specially, by their provisions, but took the courts as they were, with their inherent powers necessary for the administration of the law in judicial proceedings.

In this case, this is the fifth application for the recording of this will. Three of these applications found their way to the Supreme Court, and one is still pending upon an order of continuance in the probate court. In all of them, in the lower courts the results were adverse to these applicants and in all but one they were adverse to them in the reviewing courts. In one proceeding in the common pleas, and one in the circuit, orders were made requiring the applicant to pay costs. Neither of these orders have been complied with, and in no case have the costs been either secured or paid. The costs are due to the clerk and to the sheriff and other court officials, persons who are, by law, required to obey and execute the orders of the court; and for aught that might appear, some of those costs might have been to stenographers, who, in the first instance, received their pay out of the county fund, and thus an indebtedness has been incurred in favor of the public represented in the county fund.

Under these circumstances, there is no hardship imposed, there is no wrong done, but, on the contrary, it is in furtherance of justice and a proper administration of justice in this matter, that the applicants who are non-residents, be required to furnish security for costs, before any further outlay, or liability, or service, is rendered in their interest in these proceedings.

The order will, therefore, be that proceedings herein be stayed until the applicants furnish sufficient security for costs.

Samuel T. Crawford, for the applicants.

J. C. Harper and Ledgard Lincoln, *contra*.





# INDEX.

## ADVERSE POSSESSION—

1. An occupancy of land beginning under deeds in fee simple for the entire title, authorizes the presumption of an intent to hold and claim possession of the whole. *Barr v. Chapman.* 862

2. An occupancy beginning under deeds for the undivided part authorizes the presumption of an intent to hold and claim possession of such part for the occupant, and for the other undivided parts in trust for one's co-tenants; but such presumptions are not imperative and conclusive. *Ib.*

3. The tenant in possession claiming adversely to the world, may buy claims and title to the same property to quiet his own title, to avoid litigation and hold his possession in peace, without waiving his disseizin of such co-tenant claimants, although the buying and holding under a deed for the undivided part, if unexplained by any other fact in proof, would authorize the presumption of a waiver of disseizin. *Ib.*

4. While ordinarily a tenant in possession is presumed to occupy for his co-tenant as well as for himself, yet he may hold adversely to his co-tenants, if he does so under a distinct claim as to the nature of his occupancy, and upon notice to his co-tenants. Such notice may be either actual or constructive. *Ib.*

5. Notorious occupancy, under deeds duly recorded, claiming the entire title, is good and sufficient notice, especially to those of whose claim of co-tenancy, and of whose existence the occupying tenant did not know after diligent inquiry. *Ib.*

## AGENCY—

1. A real estate broker, as such, has no authority to receive payment of the purchase-money for land sold through his efforts. *Frank v. Levy.* 67

2. His duty ends when he has found a purchaser and brought the parties together. *Ib.*

3. Any one paying him, in the absence of express or apparent authority in him to receive the money, pays at his peril. *Ib.*

4. His possession and delivery of the deed to the grantee is not apparent authority to receive payment, especially where the grantor lives near by and can be easily reached. *Ib.*

5. Whether one is agent for another is a question of law to be determined from what took place between the parties at the time of the creation of the claimed agency. *Ib.*

6. An affirmative answer to the question "did you give the papers to your agent" does not estop the party answering from denying the agency. *Ib.*

7. Where a person is employed to make sales on commission the employer has a right to reject sales to persons he does not consider financially good, without being liable for commissions. *Allhouse v. Baum.* 205

8. The contract of an agent for his principal, made with himself, is prima facie void, and if it shows the agent's double and antagonistic capacity on its face, it carries notice to subsequent holders. *Arnkens v. Rouse.* 380

9. In a loan upon real estate security, the fact that the borrower pays the fee for examining the title, does not make the attorney rendering the service the agent of the borrower in the transaction. *Antioch College v. Carroll.* 220

10. Authority to collect the principal debt, evidenced by a note is not implied from authority to make the loan and collect the interest unless the agent has possession of the principal note when due. *Ib.*

11. If the borrower pays the money at maturity to the attorney, and such money paid never reaches the lender, it is the borrowers loss, if, in fact appears that such attorney did not have either the note or authority to collect the same. *Ib.*

## AMENDMENTS—

Certain syndicates owning land enter into a certain contract with a partnership, which the partnership assigned to a corporation, the stockholders of which were the members of the firm and two additional persons. In an action upon the contract it was held: That it was not error

Agency—Assessments.

AGENCY—Continued—

for the court at the conclusion of plaintiff's testimony to allow the petition to be so amended as to state that the assignment was with the assent of defendants. Such amendment did not change the cause of action. *Harper v. Dalzell.* 531

ANIMALS—

In Ohio the stealing of a dog, may or may not be larceny, depending upon whether the animal is of value. *Anonymous.* 92

APPEALS—

1. The rule allowing parties to appeal to chancery against a judgment in any court, is of great strictness and inflexibility, and the court will not lend its aid, unless the party claiming its assistance can impeach the judgment by facts. *Hill v. Hotel Co.* 281

2. On appeal in replevin, judgment on default for a petition may be rendered for defendant for a restoration of the property without an answer being filed. *Wellman v. Wellman.* 815

3. There is no flexibility to the statute requiring that bond for appeal from the probate to be in double the amount where money is ordered to be paid. *In re Simkinson.* 678

4. The statute applies to appellants, other than those to whom the order to pay was directed. *Ib.*

5. An appeal does not lie to the common pleas from a judgment of the probate court, refusing to admit to record therein, under sec. 5937, Rev. Stat., a certified copy of a will claimed to be executed and proven in another state. *Barr v. Chapman.* 862

6. In a proceeding by an assignee in probate court for the sale of real estate, the court in fixing the amount of the appeal bond for a lienholder defendant appealing from the order finding amount and priority, etc., and directing payment will be governed by its discretion without regard to double the amount involved. *Hale v. Bank.* 784

ARSON—

An indictment for arson, with intent to defraud the insurer, under sec. 6832 Rev. Stat., is defective, unless it alleges that the property was insured against loss or damage by fire. *State v. Yablon.* 569

ASSESSMENTS—

1. One occupying property under a mere license which may be revoked at any time is not an owner of the same within the meaning of the

street assessment laws. *Buse v. Cincinnati.* 613

2. The occupancy of property under such license, in connection with adjoining property of which the licensee is the owner, but which is separated from a street by the property occupied under the license, does not make such adjoining property subject to an assessment for the establishment and construction of such street. *Ib.*

3. An assessment by the foot front, at an equal rate, can only be made on the property abutting on the part of the street improved. *Kline v. Cincinnati.* 630

4. As to other lands which may be assessed under sec. 2264, it must appear that such steps were taken under sec. 2277 as are necessary to equalize the burden on each lot in proportion to the benefit to that lot. *Ib.*

5. An action for recovery of overpayment on a street assessment, where the mistake was one of calculation by the city's agent is not barred by the one year limitation of sec. 5848. *Grosbeck v. Eshelby.* 819

6. Where council before an improvement is made, determines by ordinance that the cost shall be assessed per front foot upon the property abutting thereon, the question of benefits cannot be considered. *Crawford v. Cincinnati.* 378

7. The purpose of the provision of sec. 2264, Rev. Stat., is that it shall be designated in advance whether the assessment is to be on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to benefits, or according to value, or by the foot front of the property bounding and abutting upon the improvement. *Strauss v. Cincinnati.* 92

8. A failure of the common council to determine in advance, under sec. 2271 as amended April 16, 1888 (85 O. L., 339), the value of the lands to be assessed is not such a defect in the proceedings that thereby an assessment in other respects regular, is not properly made. *Ib.*

9. In appropriation proceedings for opening, widening, etc., a street, the preliminary resolution declaring the necessity of the improvement is not necessary. *Ib.*

10. For the purpose of assessment under sec. 2269, Rev. Stat. (84 O. L., 72), lots may exist without being a part of any numbered and recorded subdivision, and without appearing as such on any plat. *Gibson v. Cincinnati.* 456

## Assignments—Attorney and Client.

11. A tract of land not of greater dimensions than the fair average depth of lots in the neighborhood, although not a part of any subdivision numbered and recorded as lots, is not land "not subdivided into lots," but is a lot subject to assessment under sec. 2289, Rev. Stat. 1b.

12. Where a lot has been assessed under a petition subscribed by three-fourths of the owners abutting on any street or highway, as provided in sec. 2272, Rev. Stat., and when there is a subsequent assessment for a different street on which said lot may abut, within a period of five years, and the owner did not subscribe the petition for the same, such lot will be liable for the assessment for the second improvement in an amount not to exceed twenty-five per cent. of the value of the lot or land after the improvement is made. *Pimshon v. Cincinnati*. 490

## ASSIGNMENTS—

1. A contract with owners of separate pieces of land to pay a partnership a large sum of money when it erects a glass factory on one of the tracts of land, is a personal contract and can not be assigned without the consent of the owner of the land. *Harper v. Dalzell*. 531

2. The assent of one of the syndicates to the assignment of the contract was not the assent of all, even though such other syndicates had no notice or knowledge of such assignment. 1b.

3. They were not joint owners nor partners, and if they were this would not be within the scope of any member's authority. 1b.

## ASSIGNMENT FOR CREDITORS—

1. Assignee is not bound to recognize prior existing equitable considerations, and operations as an agreement for a lien, between original parties,—his assignor and the creditors. *Bank v. Walton*. 904

2. An assignment for benefit of creditors operates as a conveyance, and only such mortgages as appear to have been duly executed and recorded are entitled to notice at the time of the assignment. 1b.

3. A party claiming priority on funds of an insolvent estate, should clearly show that he is entitled thereto; on general principles the fund should be distributed pro rata among all creditors. *Lotze v. Hoerner*. 131

4. The probate court has no jurisdiction to punish for contempt the failure or refusal of the assignee to

perform an order judgment for payment of money. *Rowekamp, in re*. 589

5. Interest should be allowed a creditor whose claim has been rejected by the assignee, and subsequently allowed by the courts, from the date the dividend is allowed. In re assignment of Easton. 759

6. After an assignment in the probate court, a suit to foreclose a mortgage need not be filed in the common pleas court. All the rights of creditors can be worked out in the probate court. Anonymous. 252

7. The word "operative" as used in sec. 6355, Rev. Stat., includes all classes of labor, except that which might be properly distinguished as professional or scientific labor. *Akron Iron Co. v. Whitely Co*. 192

8. No distinction can obtain under this statute between resident and non-resident laborers. 1b.

9. H. borrowed \$200,000, pledging as collateral, stock in a national bank, apparently valid. Afterwards H, and the bank, both failed, and became insolvent, and the bank's president being sued by the bank in an action in deceit for the false statements contained in the certificates settled the suit for \$75,000: Held, That notwithstanding such payment the bank was entitled to prove its claim against the estate of Harper for the full amount of \$200,000. *Lloyd v. Bank*. 851.

10. A manufacturing corporation chartered in N. Y. to own property and transact business in Ohio, may, when insolvent, by a deed executed in N. Y., make a general assignment for benefit of creditors, which is valid to pass its real and personal property situated in Ohio, to an assignee, notwithstanding the fact that after it was chartered and entered upon its property and business in Ohio, a N. Y. statute was enacted which in terms prohibited such corporations from making such assignments "in contemplation of insolvency." *Hall v. Coal Co*. 71

## ATTORNEY AND CLIENT—

1. Under a petition resembling a "narr." of common counts in the old system of pleadings, attorneys may recover the value of services, either upon an express contract, or, if that was not proved, upon a contract created by law. *Holmes v. Holland*. 768

2. If such employment was by unauthorized persons for defendants, and the latter afterwards with full knowledge ratified it, they became lia-

## Banks—Building and Loan Associations.

ASSIGNMENT FOR CREDITORS—  
Concluded—

ble for the reasonable value of such services. Ib.

3. Declarations of the agents are not in themselves proof of such agency, but may be considered with other evidence tending to prove the agency. Ib.

4. Testimony of attorneys who testified to their opinions touching the value of the services is not conclusive upon the jury. Ib.

5. In estimating the reasonable value of the services, the amount involved the pecuniary advantage or disadvantage of the services to defendants, the successful termination of the case, the time, labor, skill, learning and ability of plaintiffs, as attorneys, should be considered by the jury. Ib.

6. The nature and importance of the controversy, the novelty, intricacy and doubtfulness of the questions involved, the amount in controversy, the nature of the services, the standing of the attorneys and the result accomplished, are applicable on the quantum meruit to recover attorney's fees and may be considered. *Kittredge v. Armstrong*. 661

7. The opinions of such witnesses are not to be substituted for the judgment of the jury. Ib.

8. The presentation of a claim for such services, although prima facie evidence limiting the amount, does not exclude evidence explaining the circumstances or showing the reasonable value of such services. Ib.

## BANKS—

1. In an action of deceit against the directors of a National Bank, to recover damages sustained by persons who had loaned money and taken as collateral security therefor, the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense to such directors that the bank has been placed by the comptroller of the currency in the hands of a receiver. *Barnes v. Pogue*. 798

2. Where the directors of a national bank, in pursuance to sec. 5211, U. S. Rev. Stat., make reports by which it appeared that the bank was solvent and in a highly prosperous condition, whereas, in fact, said reports were fraudulently made and said statements were almost entirely false; such directors are liable to an action for deceit to one, who relying on such statements and reports, made a loan of money to a stockholder, taking his stock as collateral. *Bank v. Thoma*. 632

3. Whether he has a right of action against the other directors, *Quare*. Ib.

## BILL OF EXCEPTIONS—

In order to correct a bill of exceptions, the fact of the mistake must be established without question. *McIntyre v. Railroad Co.* 81

## BILLS, NOTES AND CHECKS—

1. Notes of a corporation, signed in its name by its president and secretary, payable to the president's order, are presumptively unauthorized; and subsequent indorsees, though for value and in good faith and before maturity, take with notice. *Arnkens v. Rouse*. 380

2. No privity of contract exists between the holder of a check and the bank upon which it is drawn; and no action can, therefore, be maintained against a bank by the holder of a check, unless the bank has accepted the same. *Bank v. Railroad Co.* 469

## BUILDING AND LOAN ASSOCIATIONS—

1. In Ohio, a borrowing shareholder or member of a building association, incorporated under the Rev. Stat., is under personal obligation to share in losses. *Everman v. Schmitt*. 9

2. This liability is not affected by the circumstance that his dues paid and dividends credited, amount in the aggregate to the sum loaned or advanced to him on his shares, provided there has been no actual adjustment as provided in sec. 3835, Rev. Stat., (77 O. L., 208). Ib.

3. Where the conditions of the borrower's mortgage have been wholly fulfilled by him in good faith whilst the building association was in actual operation as a going corporation, and before its being placed in the hands of a receiver, the borrower is entitled to a cancellation of his mortgage, although, in the absence of an actual adjustment under the Rev. Stat., his personal liability to share in the losses continues. Ib.

4. The provision in sec. 3835, Rev. Stat., as to adjustment, does not execute itself, and until an actual adjustment is had, the terms of said provision do not come into operation. Ib.

5. The constitution of a building and loan association providing that money must be collected in legal money, etc.: Held, that payment of dues must be made in cash and, the giving of checks is not payment within the meaning of the constitution of the association. *Mueller v. Cohen*. 575

## Carriers—Conspiracy.

6. In receiving the checks of a member for the purpose of collecting them and applying the proceeds to the payment of his dues, the directors were acting as the agent of the member, and not as the agent of the corporation. Ib.

7. If one of them collects the check, appropriates the proceeds and fails to turn it over to the treasurer of the corporation, the loss falls upon the member, and not upon the corporation. Ib.

8. It is immaterial that the board of directors had frequently taken his checks before, in payment of his dues. Ib.

9. The directors have only the powers delegated to them by the constitution; beyond these their acts as regards such members of the association, are unofficial and do not affect the corporation. Ib.

10. Dividends could not be allowed on dues paid in advance, in 1884. Turner, etc., v. Woodburn, 578.

11. *Quere*, whether a building association under the law as now amended, with a constitution providing therefor, can enter into an agreement binding it to pay dividends on advance dues, or dues other than the regular stated dues? Ib.

## CARRIERS—

A common carrier may permit the consignee of goods to inspect before accepting them, even where the bill of lading requires the carrier to collect the purchase price for the shipper before delivery. Permission to inspect is not a delivery. Aaron v. Adams Ex. Co. 500

## CEMETERIES—

Where a catholic is buried in a catholic cemetery, in consecrated ground, but it is afterwards ascertained that the burial is in violation of the rules of the cemetery, the deceased not having been a communicant, the removal of the body to an unconsecrated part of the ground may be ordered, and if resisted, the court will order the sheriff to make the removal. Elder v. Henry. 138

## CHATTEL MORTGAGE—

Failure to file a valid chattel mortgage, will on condition broken, confer upon the mortgagee a right of possession superior to that given by a subsequent pledge of the same property, to secure a pre-existing indebtedness, although pledgee had neither knowledge nor notice of the existence of the mortgage. Isaacs v. Life Ins. Co. 454

## CONFLICT OF LAWS—

1. A promissory note drawn, dated and signed in Ohio, and sent by the makers to their attorney in another state, and there delivered to payee, is a contract of the latter state although the note is silent as to the place of payment, and payments were made thereon after maturity in Ohio. Baldwin v. Harrison. 1

2. A contract made in Ohio may be enforced in said state, although consideration, in whole or in part, involves the settlement and compromise of a criminal prosecution in another state, providing such contract was made with reference to the laws of the latter state, as the place of performance; and providing further that such compromise and settlement are authorized by the law of the latter state. Ib.

3. The presumption is, in absence of express agreement, that parties contract with reference to the state wherein their contract would be valid. Ib.

## CONSPIRACY—

1. Workmen may lawfully combine to obtain such wages as they may after consideration agree to insist upon receiving for their work. Perkins v. Regg. 585

2. The appointment by striking workmen of a committee to visit the neighborhood of each factory whose regular workmen are on a strike, for the purpose of reporting the number and addresses of the workmen employed by the factory may be legal or illegal according to the manner in which such mission is performed. Ib.

3. It is lawful for workmen to endeavor by reasonable argument and persuasion to induce others who have not hitherto acted with them to do so. Ib.

4. It is unlawful for them by threats, intimidation, molestation or by any form of coercion or compulsion, to interfere with the exercise of the free will of such other workman. Ib.

5. When a number of persons conspire to do an unlawful act, all are responsible for whatever any one of the conspirators may do in furtherance of the purpose of the conspiracy. Ib.

6. But where a number of persons agree to do a lawful act, in a lawful manner, and one of them for the purpose of accomplishing the concerted purpose does an unlawful act, the offending individual is alone responsible. Ib.

## Constitutional Law—Contracts.

## CONSTITUTIONAL LAW—

1. The Act of April 14, 1892, (89 O. L., 269), "to protect employees, and guarantee their right to belong to labor organizations," is constitutional. *State v. Davis*. 786

2. Empowering cities of a certain class to compel the consumption of smoke is valid. *Cincinnati v. Miller*. 788

3. The act of the general assembly passed April 23, 1891, (88 O. L., 367), is in conflict with art. VIII, sec. 6, and art. XV, sec. 1, of the Constitution of Ohio and void. *Kissell v. Columbus Grøve*. 501

4. The statute passed April 3, 1890, creating a board of public works, and making certain changes in the government of cities of the first grade of the second class is constitutional. *Bonebrake v. Wall*. 38

5. The act of the general assembly, entitled, "An act to amend sec. 2753, Rev. Stat.," passed May 18, 1886, (83 O. L., 194), is not retroactive, but prospective only in its operations. *Scott's Sons v. Raine*. 171

6. The act of April 14, 1892, (89 O. L., 269), providing that it shall be unlawful for an employer to coerce or attempt to coerce his employee from belonging to a lawful labor organization, held to be constitutional. *Davis v. State*. 894

7. The act of April 12, 1892, (89 O. L., 254), prohibiting the sale of intoxicating liquors within a mile of a particular soldier's home, is in contravention of art. II, sec. 26, of the constitution, and is void. *Rollins v. State*. 593

8. The act of the general assembly "to authorize the several counties of the state to raise money to secure the location of the Ohio Agricultural Experiment Station, and to provide for such location," (88 O. L., 353), does not contravene sec. 2, art. XII, of the constitution, and is not in violation of sec. 7, art. X, of the constitution, but is a valid law. *Wasson v. Commissioners*. 475

9. A village ordinance which imposes a license fee upon persons who are non-residents of said village only, for the privilege of selling goods therein, is illegal as discriminating against such non-residents, and in restraint of trade. *Radebaugh v. Plain City*. 612

10. If supplemental sec. 251a, Rev. Stat., lays a tax upon companies and corporations operating railroads in whole or in part, in this state, it is not a tax on property, but a tax for an exceptional purpose; and therefore, it

does not contravene acts 2 and 5 of art. 12, of the Constitution. *State v. Railroad Co.* 11

11. Section 3, (86 O. L., 120), sec. 3231-3, Rev. Stat., is void, because in contravention of the constitution, in that it attempts to place a limitation upon the judicial power of the state, and deprives a party of his property without remedy by due course of law. *Creech v. Railroad Co.* 764

12. Whether the act of April 19, 1892, creating the office of state supervisor of elections with deputy state supervisors, is constitutional—*quaere*. *State v. McKinley*. 692

13. Where the general laws make it a felony to deposit public moneys in a bank, an act which does not repeal the general act, but provides that, in some of the same counties, if the commissioners refuse to deposit the public money in a bank, they are liable to severe punishment, is unconstitutional. *State v. Somers*. 311

## CONTEMPTS—

1. The probate court has no jurisdiction to punish for contempt the failure or refusal of an assignee in trust for benefit of creditors to perform an order or judgment for payment of money. *Rowekamp in re*. 539

2. A person subpoenaed from the police court, who disregards the subpoena, may be arrested for contempt and punished without written charges. *Woods v. State*. 888

## CONTRACTS—

1. An agreement to pay a sum of money for services in procuring a husband are against public policy and void. *Anonymous*. 745

2. Where rights of innocent third persons have intervened, and it is essential to their protection that a contract, otherwise vitiated by fraud, and, therefore, voidable, should be sustained, equity requires that such contract be upheld. *Dettra v. Kestner*. 625

3. Where the description of the thing to be performed must absolutely, clearly and necessarily be satisfactory to the mind of a designated person, and furnishes no other criterion of performance, then this contract makes the mind of that person the sole test of performance. *Graveson v. Cincinnati Life Assn.* 369

4. In such case if the performance is not satisfactory to his mind, equity will not afford relief against such person's conclusions arrived at in good faith. *Ib.*

## Corporations.

5. H. & F. contracted to build waterworks, the work to be to the satisfaction of the city, they sublet part to A. H. & Co. 15 per cent. of the total value of the work done under the contracts was to be retained until completion. A. H. & Co. failed before completion, and then brought suit against H. & F., to recover the 15 per cent. Held, that performance of the work to the satisfaction of the city is a condition precedent to the right to recover on the contract and must be alleged. *Antonelle v. Huston.* 5

6. Allegations of general indebtedness on a contract are not a substitute for the necessary code allegations of performance. *Ib.*

7. An averment that an amount is due or that defendant is indebted is a legal conclusion and tenders no issue. *Ib.*

## CORPORATIONS—

1. The fiction that a corporation is a legal entity distinct from the persons who compose it can never be resorted to, when it enables the persons composing the corporation to work an injury to any one. *Sportsman Shot Co. v. Am. Shot and Lead Co.* 821

5. Where plaintiff, a corporation, describes itself as such in the caption of the petitions, but in the body there is no averment of corporate capacity to sue, it is good as against a general demurrer. *Cin. Gas L. & Coke Co. v. Dodds.* 759

3. Proof of corporate existence of plaintiff is made out by placing in evidence its articles of incorporation, its certificate of subscription to capital stock, and the record book of the company, showing election of officers, etc. *Street Ry. Co. v. Street Ry. Co.* 365

4. The corporation owes a duty to exercise care in the supervision of its agents charged with issuing and transferring stock to prevent such agents from fraudulently putting upon the market stock bearing the genuine signatures of the issuing officers, and attested with the genuine seal of the corporation. *Bank v. Railroad Co.* 703

5. For the negligent failure to exercise such care if by reason of such failure the agent is enabled to perpetrate the fraud, the corporation is responsible. *Ib.*

6. This duty is due not only to stockholders, but to all persons, who, in good faith, purchase such certificates or loan money upon the same. *Ib.*

7. In such the negligence of the corporation, and not the fraud of the agent, is the proximate cause of the injury. *Ib.*

8. The circumstance that the certificates are in favor of one of the certifying officers is not of itself sufficient to put lenders of money upon inquiry, for the failure to make which they are guilty of contributory negligence and thereby forfeit their right to recover. *Ib.*

9. In cases where a stockholder has a right to insist on the enforcement of the trust which is imposed by statutory provision upon corporate authorities, and when it is a question of the right of the stockholder to restrain the corporate body within its express or incidental powers, the stockholder may, in a proper case, be denied on the ground of his express or his intelligent, though tacit consent to the corporate action. *Hill v. Hotel Co.* 281

10. In defining the difference between a case of total want of power or ultra vires, and mere illegality of corporate action, the true inquiry is: Whether it belongs to the class of public as distinguished from private wrongs; so that the guilty party may set it up in avoidance of just obligations, and whether courts must accept the defense without regard to the situation and rights of the other party. *Ib.*

11. Where a private corporation engages in any form of business, foreign to the objects of its incorporation, it may properly be said, that such an act is in violation of a peremptory statute and within that phase of ultra vires, where the public is concerned, and therefore void, on the ground of the total want of power. *Ib.*

12. Stockholders and corporations are not the same, and, therefore, a contract personal to a firm can be assigned by them to a corporation into which they form themselves. *Harper v. Dalzell.* 531

13. An executive committee of directors empowered to discharge the duties of the board, but not to incur debts except for current expenses, has no power to give a mortgage for such purpose. *Bank v. Walton.* 904

14. The approval of the minutes of the preceding meeting of a board of directors is an approval of the form of statement or correctness of previous proceedings, and not a ratification of the action of the board. *Ib.*

## Corporations.

## CORPORATIONS—Continued—

15. A director can not vote by proxy at a meeting of the directors.

Ib.

16. D. and C., as secretary and president of a corporation, in signing and sealing certificates of stock, acted simply as ministerial agents, and were not representatives of the company so as to make it liable other than on principles of pure agency. *Railroad Co. v. Bank.*

50

17. It was not within the scope of D's agency to issue certificates in his own favor to third persons as pledges for his individual loans. Ib.

18. The directors and the president were guilty of negligence with reference to supervision of D's books so long continued as to enable him to commit the frauds, and that this was the proximate cause of defendant's losses.

Ib.

19. Defendants were guilty of a want of care in not making inquiry as to D's authority to issue and hold certificates signed by him as secretary.

Ib.

20. Silence by the company until it could get definite information as to the extent of the fraud was not a ratification of the spurious stock, but was a reasonable course for the protection of its genuine stockholders.

Ib.

21. The peril of the fact of a surrender of a spurious certificate to validate a new certificate is with the company and not with the purchaser who relies on the certificate duly executed, if the certificate is issued by the secretary in his capacity as secretary in an actual transaction with the company, however fraudulent that transaction.

Ib.

22. Persons in dealing with D, however, had to rely on D's statement, extrinsic of the certificate that it did evidence an actual transaction between him and the company and the peril of that fact was with them.

Ib.

23. D's extracting the certificates from the company's book, and filling them up and handing them to defendants were all one act, in no part of which can there be said to be the semblance of a dealing between D and the company.

Ib.

24. A creditor, who is also the assignee of the corporation, has the capacity to sue the stockholders on their unpaid stock subscriptions to payment of corporate debts; and also to subject their double liability. *Turnbull v. Salt Co.*

19

25. Such action was well brought although the debt alleged to be due

from the corporation to plaintiff had not been reduced to judgment, and without averring either a previous demand by plaintiff, or call by the company for unpaid subscriptions. Ib.

26. In a suit by a creditor for himself and the other creditors of an insolvent corporation, to recover unpaid stock subscriptions, as against a general demurrer, in order to show the liability of alleged stockholders, it is sufficient to state that they hold stock of the corporation; the amounts by them severally held; that it never was fully paid, and that on the stock held by each, a specified sum is due and unpaid; regardless of whether the alleged holders be original takers, or transferees of the stock by them respectively owned. Ib.

27. Reference to master in chancery to ascertain and report who are and have been stockholders. Ib.

28. The act of May 1, 1854, limited increase of stock "to an amount not exceeding the actual outlays and expenditures" and forbade its recognition unless the actual payment in money was paid in. Under this act a corporation increased its stock in 1856, and with this increased capital carried on business until 1887, when it failed: Held: that in a creditor's suit to enforce stockholder's double liability, it is not necessary to aver compliance with those provisions of the statute. Ib.

29. The stockholders, whether original takers, or transferees, are estopped to object as against debts arising since the increase. Ib.

30. A decree fixing the statutory liability of stockholders, and assessing to them their *pro rata* share of the debts of the corporation will be set aside, if all the stockholders within the jurisdiction of the court were not made parties. *Lemar v. Stephens.*

541

31. Where a corporation organizes under a perpetual charter a preliminary agreement to form a corporation and obtain a charter for ten years only is waived. *Cronin v. Pottery Co-op. Co.*

748

32. A by-law unanimously agreed to that the corporation shall be dissolved at the end of ten years, can be changed by the majority of the stockholders, and, hence, is a dead letter, if the majority refuse to carry it out. Ib.

33. A court of equity has not the power, in the absence of statutory authority, to dissolve or wind up a corporation at the suit of a stockholder. Ib.



## Costs—Death by Negligence.

34. Where stock of an Ohio corporation was lawfully owned by a national bank, but not registered in its name in the books of the corporation, a receiver of the bank, who by virtue of his office, acquired control of the stock, is not by reason of merely such control a stockholder within sec. 5673, Rev. Stat., and is not authorized to petition under said section, for a dissolution of the corporation. *Armstrong v. Brewing Co.* 297

35. The holder of such stock, who, as between himself and corporation, is not a legal owner (as distinguished from equitable owner) is not authorized by said section to petition for a dissolution of the corporation. *Ib.*

36. Query, as to whether such receiver, without express directions from the comptroller of currency, is authorized to cause himself to be registered as a stockholder in the books of the corporation? *Ib.*

## COSTS—

Courts have inherent power require non-resident suitors to give security for costs. *In re Barr's Will.* 910

## COURTS—

1. The general assembly has no power to compel courts to exercise political powers entirely unjudicial in their character. *In re Board of Review.* 570

2. The superior court of Cincinnati should refuse to appoint a board of review for that city. *Ib.*

3. Section 6709, Rev. Stat., as amended, (90 O. L., 191) and sec. 6702a, is not to be construed as taking away the jurisdiction of circuit courts in error. *Leonard v. Quecn Ins. Co.* 892

4. The power vested in the courts of common pleas under sec. 5354, Rev. Stat., to vacate or modify its own judgment or order after the term at which the same was made is also conferred on the superior court of Cincinnati by sec. 495, Rev. Stat. *Glass-Edsall Paper Co. v. Telegram Pub. Co.* 899

5. The probate court has no jurisdiction to punish for contempt the failure or refusal of an assignee in trust for benefit of creditors to perform an order or judgment for payment of money. *Rowekamp in re.* 534

6. The jurisdiction of the probate court to appoint an administrator by reason of his non-residence cannot be collaterally attacked, in an action

of replevin brought by such time. *Anstram v. Ten Eck.* 665

7. The probate court has power to decide upon its own jurisdiction, and the appointment is conclusive. *Ib.*

## COVENANTS—

1. Where a lessor has a lien for arrears of rent, sells and conveys the fee of a general warranty deed to a third person, though on terms subject to the lease, the warranty extinguishes his lien on the leasehold estate for the back rent. *Schmidt v. Ehler.* 425

2. An agreement for re-valuation at stated periods during a lease for ninety-nine years, by appraisers to be selected by the parties, runs with the estate though the assigns are not named, when such intention otherwise appears. *Young v. Wrightson.* 104

## DAMAGES—

1. In an action arising on a breach of contract in the sale of certain castings which proved defective, no damages are recoverable for the loss of reputation or profits in business, although there may have been an implied warranty that the castings should be fit for the purpose for which they were furnished. *Knorr v. Reedy.* 465

2. In an action for goods sold and delivered by wholesaler to retailer, and cross action by retailer for damages for non-fulfillment of guaranty contained in contract of sale of same, loss of profit on sales, by retailer, may be included in estimating damages, when they are not speculative, contingent or remote, and are such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract. *Smith v. Sipe.* 275

## DEATH—

The presumption of death, arising from the absence of a party, unheard of, etc., is founded on a proven, unexplained absence from one's usual home, and not on the mere removal to another part of the country. *Barr v. Chapman.* 862

## DEATH BY NEGLIGENCE—

1. A widow, residing in Penn., can bring and maintain an action, as such widow, for the wrongful death of her husband, in the court of common pleas of this state, notwithstanding the injury was received and death resulted in the state of Penn. *Essenwine v. Pennsylvania.* 277

2. Such an action is transitory, and can be brought and maintained,

**DEATH BY NEGLIGENCE—Con.—**

by the person in whose favor the cause of action has accrued, in any court having jurisdiction of the subject-matter where jurisdiction of the wrongdoer can be acquired. *Ib.*

3. Such action, if brought within the time limited by the statute under which the same is brought, is based upon the same grounds and governed by the same principles as an action for personal injury not resulting in the death of the party injured. *Ib.*

**DEBTOR AND CREDITOR—**

Facts establishing relation of as against trust and trustee. *Loetze v. Horner.* 131

**DECEIT—**

1. Where the directors of a national bank, in pursuance to sec. 5211 U. S., Revised Statutes made reports by which it appeared that the bank was solvent and in a highly prosperous condition, whereas, in fact said reports were fraudulently made, and said statements were almost entirely false; such directors are liable to an action for deceit to one, who relying on such statements and reports, made a loan of money to a stockholder taking his stock as collateral. *Bank v. Thoms.* 632

2. In an action of deceit against the directors of a national bank to recover damages sustained by persons who had loaned money and taken as collateral security therefor, the stock of the bank, relying upon the published statement of the directors as to its financial condition, it is no defense to such directors that the bank has been placed by the comptroller of the currency in the hands of a receiver. *Barns v. Pogue.* 798

**DEEDS—**

1. The ceremony of re-entry is not necessary in Ohio to forfeit an estate for breach of condition subsequent. *Branch v. Wesleyan Cemetery Directors.* 809

2. The power to forfeit for a future breach of the condition is not alienable and is gone if the grantor attempt to convey. *Ib.*

3. The rule in *Shelley's* case, applies to a conveyance to be held for the use of a person, and in case of his death before the same expires, for the benefit of his heirs, the trustee to pay the income to him if it so choose. *Mack v. Champion.* 327

4. This is so because if the rule does not apply to executory trusts created by deed, it means imperfectly defined trusts. *Ib.*

5. In such case the beneficiary takes the fee simple, and having assigned for benefit of creditors, the assignee takes the proceeds of the property. *Ib.*

6. In 1882 S executed a lease to B for ten years, by the terms of which a lien was reserved upon the leasehold for unpaid rent. In 1887, at which time a large amount was due from B, by a general warranty deed, conveyed the property to D, who had knowledge of the existence of the claim of S. No reservation was made in the granting clause of the deed which in any way qualified the grant, but the warranty clause provided that the grantee would "warrant and defend against all claim or claims of all persons whomsoever, as fully as he, as such executor, is authorized to do, subject, however, to a lease to Elias Ehler." *Held:* That the lien of S upon the leasehold for the unpaid rent was extinguished by his deed to B. *Schmidt v. Ehler.* 425

**DESCENTS—**

1. The ancestral or inheritable quality of inherited property is not changed or descent broken and a new fountain of inheritable blood created by the owner conveying away, and immediately receiving back the naked legal title without consideration, though for the sole purpose of breaking the descent. *Helfinger v. Wolff.* 906

2. By the statute of descents of Ohio, one who murders his parent, for the purpose of inheriting the parent's property, is not thereby prevented from inheriting such property. *Deem v. Risinger.* 492

3. Insurance money accruing after the death of the deceased property owner, while collectible by the administrator, is to be distributed as real estate. *Fleming v. Jordan.* 688

4. The proceeds of a policy of life insurance made out for the benefit of assured's wife, does not come to her as a deed of gift under sec. 4162, Rev. Stat., from her husband; and, therefore does not, on death of the beneficiary, after death of assured, but before proceeds of policy are paid, descend and pass to his heirs. *Richardson v. Michener.* 830

**DEVISE—**

1. Legacies may be a charge upon real estate by implication, such implication depending upon the intent of the testator, as gathered from the whole will. *Dean v. Nicholas.* 215

2. The payment of legacies so charged upon real estate, out of the

## Ditches.

proceeds arising upon a sale of such real estate, is a proper application of those proceeds. Ib.

3. A devise to E. and C. in fee with the words "if they die without issue," is construed to be a devise in fee with an executory devise over in case E. and C. die at any time without leaving issue at their death. *Pendleton v. Bowler.* 551

4. A bequest of the income of personality for the benefit of wife and children, and if the wife dies before the children are of age the income to go to their guardian: Held, that at the death of the wife, and the children being of age, the personalty goes to them absolutely. Ib.

5. In an action to quiet title to property, where the testator had disposed of the income of his personality and realty during life of his wife, had bequeathed the personalty and devised the realty to his children at the death of the wife, and had further provided that "in case my said children shall die without issue, then, after the death of my said wife Anne, the said property \* \* \* I give and devise," etc. Held, the death without issue referred to, is one to occur prior to the death of the widow Anne, the life tenant. Ib.

6. A restriction upon the authority to sell the fee simple before the youngest of the children should arrive at the age of forty years, necessarily implied an authority to sell when that age was reached. Ib.

7. When an estate in fee simple is once given, language cutting it down must be equally clear. Ib.

8. A devise to "my daughter and her children" vests in her and her children then *in esse* in equal moieties, to the exclusion of afterborn, and the same rule applies if the interest is equitable, as a trust for her and her children. *Soteldo v. Clement.* 802

9. A devise by P. in trust to pay the income to G. during life, and at his death to his children for life, and in fee to their children: Held, that such devise is void, as to the personalty because of perpetuity, inasmuch as there was a possibility that G. might have children conceived and born after testator's death, and thus there was a possibility that the vesting of the estate might be suspended beyond the period of a life or lives in being and twenty-one years. *Dayton v. Phillips.* 680

10. Under the common law, a devise to a class, some members of which may possibly not take within the prescribed period, is wholly void. Ib.

11. As to realty the above rules of the common law were abrogated by sec. 4200, Rev. Stat., which has no reference to time, and a devise of realty to children and grandchildren of G. is good. Ib.

12. A child of C. being in his mother's womb at the time of testator's death, will in contemplation of law be considered as then living, since it is to his interest to be so considered. Ib.

13. A will giving all the property to B. for life, with power to dispose of it as she deems advisable, and at her death devising all property to C. and D. equally and if either die before B., his portion, "that is, one-half of my estate," shall go to his children. Held, the power of disposition did not enlarge B's estate to a fee, but the remainder vested immediately in C. and D. in fee, subject to the power to sell. *Helfferich v. Helfferich.* 234 and 303

14. The power conferred on B. was only a power to sell for money; it conferred no right on B. to convey the property on mere equitable or moral considerations. Ib.

15. The exercise of the power upon such considerations is void although upon the face of the deed of conveyance it is accompanied with a pecuniary condition. Ib.

16. The will did not intend the power as one beneficial to B. alone, but intended it as executorial in its nature, to enable her to change the form of the investment for its better enjoyment or for the benefit of the estate. Ib.

## DITCHES—

1. In locating the route for a county ditch, the commissioners are not confined to that prayed for in the petition, but may change either termini. *Marsh v. Clark Co. Comrs.* 290

2. The notice to be given interested parties under sec. 4457, should contain a description of the route as located by the commissioners. Ib.

3. A mistake by the scrivener, in writing northeasterly, instead of southeasterly, the correct direction of the route, in the notice given to persons affected where it is such a palpable error that no interested party could be misled thereby, will not avoid the notice. Ib.

4. County commissioners may locate and establish a county ditch over the route of a previously established township, if the same is conducive to public health, convenience or welfare. Ib.

## Divorce and Alimony—Eminent Domain.

## DITCHES—Continued.

5. On a ditch appeal, it seems, the probate court is not a court of error to review the proceedings of the county commissioners, or to pass upon any supposed errors or irregularities therein, but can only determine the regularity of the appeal, and submit the statutory questions to a jury. *Ib.*

6. The verdict of the jury in locating a ditch, etc., under sec. 4467, Rev. Stat., will not be set aside as being against the "weight of the evidence" even though not supported by the evidence produced in the case in the presence of the judge and jury. *Marah v. Commissioners.* 442

## DIVORCE AND ALIMONY—

1. Where a ground of divorce has been condoned, the testimony of the wife as to subsequent acts relied on to revive the ground of divorce, must be corroborated. *Henry v. Heury.* 781

2. A judgment of divorce rendered on service by publication may be opened up by defendant within five years from its rendition, under sec. 5355, Rev. Stat. *Van Derveer v. Van Derveer.* 828

3. Where there has been a decree in the absence of defendant, he not knowing that the case was set for trial, it having been irregularly assigned, the trial court may set aside the decree, during the same term at which it was entered. *Kredel v. Kredel.* 421

4. Alimony *pendente lite* cannot be recovered where the petition charges that there never was a valid marriage. *Warner v. Warner.* 379

5. Payment of final alimony in installments, awarded for the support of children after divorce, can be enforced and willful non-payment punished by proceedings in the nature of contempts. *Hand v. Hand.* 202

## DOMICILE—

Where a person is killed while removing from the state, his domicile for the purposes of the appointment of an administrator is the county from which he removed, and not the one in which his death occurred, if a different one. *Gorman v. Railroad Co.* 648

## DOWER—

1. The widow is entitled to dower in insurance money accruing after the death of her husband, on property owned by him during his lifetime, in the same manner as she would have been in the insured real estate. *Fleming v. Jordan.* 688

2. Such dower should be calculated upon the total amount realized from the sale of the premises and the insurance money. *Ib.*

## EASEMENTS—

1. An easement by parol in an underground drain through another's land held good, there being nothing said of it in the deed. Knowledge of its existence at the time of sale of land sufficient to bind the grantee. The drain must be a necessity. *Brewing Co. v. Fasse.* 16

2. A right of way to a tract of land conveyed for burial and "other purposes," after being used a long time for access to the burying ground, may be enlarged so as to become a means of access to streets laid out by the owner on an adjoining subdivision of land for residence purposes. *Church v. Laws.* 743

3. A gate erected by the owner, at one end of the right of way, when the use of the land for a cemetery began, may be removed by him, if it interferes with the subsequent use to which he puts the right of way. *Ib.*

## ELECTIONS—

1. Under the Australian ballot law, the deputy supervisors therein provided for, constitute the only proper board of elections, authorized by law to canvass the returns, make abstracts thereof and sign and transmit the same to the officers designated. *State v. McKinley.* 692

2. A candidate for congress is not entitled to a writ of mandamus to compel the state canvassing board to reject the abstracts transmitted in pursuance of the act of April 19, 1892, because, his petition not showing that he received a majority or plurality of the votes cast at said election, his right to the writ is not clear. *Ib.*

3. Whether the act of April 19, 1892, creating the office of state supervisor of elections with deputy state supervisors, is constitutional—*quere.* *Ib.*

## EMINENT DOMAIN—

1. In an action to assess compensation to property owners for appropriation of their property by municipal corporations for public street purposes, compensation shall be awarded for its value at the time of the passage of the condemnation ordinance. *Cincinnati v. Stribley.* 859

2. When such ordinance provides for assessment of amount awarded by the front foot upon property abutting the street so condemned.

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 Entails—Executors and Administrators.
 

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the said ordinance fixes the rights and liabilities of the parties as to said assessment. *Ib.*

3. The common council has no authority to levy an assessment and certify the same to another in case of appropriations of land. *Mt. A. & E. P. Incl. Ry. Co. v. Cincinnati.* 149

4. Section 2251, Rev. Stat., which provides for appropriation of private land for a street by any person interested, does not contemplate any repayment, other than that found in the beneficial interest, because of this proposed appropriation. *Ib.*

5. The right of one street railroad to appropriate the use of street railway tracks laid in the streets by another street railroad, is shown by establishing that the appropriation is for a public and not merely a private purpose. *Street Ry. Co. v. Street Ry. Co.* 365

6. The inability of the parties to agree as to the compensation for the property taken is established by proof of bona fide attempts to reach a settlement, and not merely colorable, formal efforts. *Ib.*

7. No special or set forms of words is necessary, and acts showing a desire and effort to agree may be as convincing as speech itself. *Ib.*

8. The necessity for the appropriation of such street railway tracks, will not be defeated by proof that no physical impossibility exists to prevent plaintiff company from operating a slightly different route. *Ib.*

9. Proof of a street being a business center where the people largely seek to go, will establish the necessity for such appropriation. *Ib.*

#### ENTAILS—

1. Where property is entailed the estate in the first donee in tail is not a life estate merely, but has all the incidents of a fee simple, until its determination by the death of the donee in tail or his grantees. *Hollister v. Ramsey.* 817

2. Until the death of the donee in tail, the heirs have no vested interest in the estate, nor power to assert a title, and cannot be charged with neglect by not asserting a title. *Ib.*

3. An occupying claimant under a mean conveyance from the first donee in tail, cannot claim for improvements made before the death of the donee. *Ib.*

#### EQUITY—

1. Equity will not under its general powers afford relief against a forfeiture of membership in a mutual life

insurance association, where such forfeiture was caused by the member's neglect. *Graveson v. Cincinnati Life Assn.* 369

2. Where special provisions are made by the parties for relief in case of forfeiture, it seems, that equity will follow these provisions only, and grant no other relief than thus specially provided. *Ib.*

3. The court of equity will decline to extend its jurisdiction so as to restrain such torts as libels on business, or character. *Richter Bros. v. Tailors' Union.* 45

#### ESTOPPEL—

1. Legatees are presumed to know the course of administration, as shown by records duly made in the proper court, and after a great lapse of time, without their having objected thereto, they will be held as assenting to such course of administration. *Dean v. Nicholas.* 215

2. A fortiori, legatees, who have received payment of their legacies through such course of administration, are estopped from objecting to sales of real estate from which the money to pay their legacies was obtained by the executor, and from which alone it could be obtained, even though such sales were irregularly made. *Ib.*

3. Plaintiffs having by suit recovered lands on the theory that they were brought pursuant to a requirement in a will for re-investment of proceeds, are estopped thereafter to deny the validity of the re-investments or any facts essential thereto. *Ib.*

#### EVIDENCE—

1. Courts have power in the interest of justice to admit further evidence after a cause has been finally submitted and the jury are deliberating on their verdict. *Keeveny v. Ottoman.* 301

2. Oral proof is competent, in the absence of a certified copy, to show the contents of a court record, which, with the original papers had been destroyed by fire, and not restored. *Barr v. Chapman.* 862

#### EXECUTORS AND ADMINISTRATORS—

1. In a proceeding for the sale of decedent's real estate under sec. 6142, Rev. Stat., the judgment lien-holders against the interest of one of the decedent's heirs in the real estate sought to be sold to pay debts are not necessary parties. *Anonymous.* 159

2. When such lien-holders come in and answer and cross-petition in

## Findings by Court—Gambling.

**EXECUTORS AND ADMINISTRATORS—Continued—**

such a proceeding, on motion of the administrator such pleadings will be stricken from the files. *Ib.*

3. A mortgage of realty, executed by the administratrix and heirs to secure a fund to satisfy a former lien thereon created by decedent, is void as against creditors. *Cate v. Peck.* 813

4. Such mortgage will be subrogated to priorities of the lien so paid. *Ib.*

5. Where sureties of a delinquent administrant are compelled to pay, they are entitled to a set-off on the claim against them, equal to the statutory fees which were disallowed the administrant on account of his dereliction. *Candler v. Martels.* 744

6. The bar of sec. 6113, providing that an administrator shall not be held to answer to the suit of a creditor, unless it be commenced within four years, is not to the right but to the remedy. *Joyce v. Hart.* 487

7. An administrator may waive the bar of the statute of limitations, and also the bar of sec. 6113. *Ib.*

8. The jurisdiction of the probate court to appoint an administrator by reason of his non-residence, cannot be collaterally attacked, in an action of replevin brought by such time. *Antram v. Ten Eck.* 665

9. The probate court has power to decide upon its own jurisdiction, and the appointment is conclusive. *Ib.*

10. Where a person is killed while removing from this state, his domicile for the purposes of appointing an administrator is the county from which he removed, and not the one in which his death occurred, if a different one. *Gorman v. Railroad Co.* 649

**FINDINGS BY COURT—**

A finding of fact in special term will not be set aside in general term unless clearly contrary to the weight of the evidence. *Bank v. Railroad Co.* 469

**FIXTURES—**

Chandeliers and gas brackets, if annexed to a building by its owner with the intention of making it a part of the building, become fixtures, and upon a sale of the realty by the owner, pass to the vendee as a part of the same. *Cent. Trust & Safe Deposit Co. v. Hotel Co.* 348

**FORECLOSURE—**

1. A stipulation in a mortgage that in case of the default in the payment of any of the quarterly install-

ments, and that interest should remain unpaid for 60 days from the date the same became due, etc., the principal of each and every one of said bonds might be declared by the trustee, or a majority in interest of the holders of all bonds outstanding, to be due, and the same should thereupon become due and payable, notwithstanding the time limited for the payment thereof had not elapsed, which declaration should be made by an instrument in writing under seal, and a copy served on the party of the first part, is a valid one; and the finding of the court below that the principal became due and payable on the declaration made by the trustee, the party being in default, is a finding which the court had a right to make upon the facts alleged in the petition and the proof to support it, and will not be reversed on error. *Hotel Co. v. Trust Co.* 255

2. When a court orders a sale subject to certain leases, it will not be presumed that the court in special term, with all the evidence before it, directed a sale to take place which would injure the legal rights of any party to the action, nor will such decree be set aside on the claim that it grants relief not prayed for in the petition, in ordering the sale of the property involved, subject to certain incumbrances mentioned, but not specifically described in the petition. *Ib.*

**FRAUDULENT CONVEYANCE—**

The common pleas, on setting aside a conveyance as in fraud of creditors, cannot sell and distribute, but must certify the judgment to the probate court, where an assignee can be appointed. *Esterly v. Esterly & Co.* 206

**GAMBLING—**

1. Games of cards, in which the loser paid for beer, cigars or lunches, as an understood forfeit on his part accruing for benefit of winners, without express agreement to that effect, are for gain within the meaning of the statute, and consequently gambling. *Ulsamer v. State.* 889

2. While a single or an occasional game played for gain in a room would not constitute it a place kept for gambling, where such games are shown to be habitual, and well known to the proprietor, the fact that other business is carried on in the room as its main purpose of occupation, does not negative the proposition that it is kept for gambling. *Ib.*

3. It is no defense that defendant and those who played the games were unaware that their acts were criminal. *Ib.*

## Gifts—Indictment.

**GIFTS—**

The fact that U. S. bonds on which testator had always received interest, found in his safe deposit box after his death, had been registered in his son's name and were without the latter's indorsement, is not presumptive evidence of a gift to or ownership in the son. *McCammon v. Dillaby.* 824

**GUARDIAN AND WARD—**

1. To give jurisdiction to the probate court over a minor, so as to authorize the appointment of a guardian for him, such minor must at the time of appointment have an actual or a constructive residence within the county. *Commercial Gazette Co. v. Dean.* 207

2. All questions necessarily arising in the case becomes by the final order of appointment, which binds all the world until set aside or reversed by a direct proceeding for that purpose. *Ib.*

**HABEAS CORPUS—**

In a habeas corpus proceeding by the mother against the father, for the custody of infant children, other things being equal, they will be awarded to the mother. *State v. Niles.* 248

**HOMESTEAD—**

1. In an involuntary assignment under sec. 6344, the trustee becomes the legal owner, and entitled to the legal possession of the premises over which he has been appointed upon his qualification, and in such an assignment a homestead cannot be acquired after the qualification of the trustee. *Stafford v. Smith.* 884

2. The right to a homestead can not be established at a time when the claimant has neither the legal title, nor the legal, actual or constructive possession of the premises. *Ib.*

3. In allowing homestead to a widow under sec. 6155 Rev. Stat., on the proceedings of an executor to sell lands to pay debts, the dower interest need not cover the same part of the ground as the homestead so assigned. *Anonymous.* 159

**HOMICIDE—**

1. A libel written by O. against members of E's family, is no justification for E's aiding and abetting the subsequent killing of O.; nor is that fact sufficient to reduce the killing to manslaughter; nor is it enough to show that the killing was done in self-defense. *State v. Elliott.* 332

2. One day is sufficient for "cooling time." *Ib.*

3. If E. permitted his passion to be inflamed by what was not a legal provocation, and while under the influence of such passions, and moved by such passions, he aided and abetted the killing of O., he is guilty of murder. *Ib.*

4. A case in which the proof demonstrated, to an absolute certainty, the truth of the charge of murder in the first degree, although the jury only returned a verdict of murder in the second degree. *Ib.*

**HUSBAND AND WIFE—**

1. The husband may have a judgment in his favor set off against a judgment against himself and wife. *Pike v. Sheve.* 891

2. The husband's liability is several and personal, and that of the wife only that of her separate estate, and no want of mutuality exists. *Ib.*

3. It is the duty of the husband to bury his wife, from which he is not absolved by their having lived apart, and where the husband has paid the funeral expenses of his wife, he can not be reimbursed from her estate, notwithstanding her will provides that the expense shall be paid from her estate. *Richter v. Richter's Exrs.* 877

4. The undertaker may recover such expenses from the estate of the wife, or from the husband, or from both. *Ib.*

**INDICTMENT—**

1. Where the prosecution is upon a single count, and evidence is introduced tending to prove several separate and distinct offenses, the court, should require the state to elect upon which offense it will proceed. *State v. Franzreb.* 775

2. Where separate and distinct offenses, not part of the same transaction, are charged in the same indictment, the state should be required to elect. *Ib.*

3. Where several distinct offenses are charged in different counts of the same indictment, where they arise out of or are connected with the same transaction, or where they are connected by the same subject-matter, it is a matter of discretion with the court whether the prosecutor shall be required to elect upon which count he will proceed. *Ib.*

4. Where a single offense is charged in two or more counts of the same indictment, with changes in the

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 Infants—Insecure Building.
 

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## INDICTMENT—Continued.

allegations in each count to meet the proof as it may appear upon the trial, the court cannot require the prosecutor to elect upon which count he will proceed. *Ib.*

5. An indictment, with intent to defraud the insurer, under sec. 6832, Rev. Stat., is defective, unless it alleges that the property was insured against loss or damage by fire. *State v. Yablon.* 569

6. The information or indictment under sec. 8092-18 (sec. 11) S. & B. Rev. Stat., on the charge of allowing a saloon to remain open on Sunday need not state the purpose or intent for being open. *Lederer v. State.* 31

## INFANTS—

1. An infant may rescind a partnership of which he is a member. *Lyghel v. Collins.* 161

2. If he does, he can only recover his capital, less what he has received from the firm, and all partnership creditors must be first paid, and he cannot recover any allowance for services in the absence of express stipulations. *Ib.*

## INFORMATION—

1. An allegation that defendant unlawfully attempted to coerce complainant from belonging to a labor union by threatening to discharge him, and discharging him, is insufficient. *State v. Davis.* 786

2. In an information it is not sufficient to charge, in the language of the statute, the offense of obstructing or abusing a police officer. The facts constituting the offense must be set forth. *Aylmore v. State.* 900

## INJUNCTION—

1. The court of equity will decline to extend its jurisdiction so as to restrain such torts as libels on business, or character. *Richter Bros. v. Tailors' Union.* 45

2. A court of equity will enjoin a sale of real estate which would confer no title on anybody purchasing. *Deutsch v. Stone.* 436

3. The courts have jurisdiction to hear an injunction against a Masonic Lodge from expelling members for membership. *Forest City Lodge.* 854

4. The principle of equity jurisprudence which is not merely remedial but preventative of injustice, may be invoked to prevent the transfer or payment of certificate of deposit

which the city holds and is not entitled to the money. *Brush Elec. L. Co. v. Cincinnati.* 581

5. The jurisdiction of a court of equity is exercised to protect property, and it will interfere with injunction to stay any proceedings whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property. *Perkins v. Rogg.* 585

6. The proposed erection and use of poles and wires by a street railway, which are accessories of the trolley system, does not entitle an abutting lot owner to an injunction. *Sells v. Columbus St. Ry. Co.* 648

7. An abutter has no such proprietary interest in a public market in the street, so as to be entitled to an injunction against a street railway that will interfere with the market, and thereby depreciate the value of his property. *Ib.*

8. A mandatory preliminary injunction will not be granted for the payment of money only. *Sampsel v. Escher.* 351

9. A preliminary injunction will be granted to prevent the payment of the salaries of legally suspended bishops. *Ib.*

10. A private citizen claiming to be the lowest bidder for a street railroad route, and that the city council is about to pass an ordinance recommended by the board of improvements granting the right to a higher bidder, cannot obtain an injunction against the passage of such ordinance. *Johnson v. Cincinnati.* 363

11. A court of equity will not enforce a contract for personal services, by injunction unless the services contracted for were peculiar, unique, and extraordinary in their nature, and the person sought to be enjoined is shown to be a person of exceptional skill and ability, so that his place could not reasonably be filled, and that irreparable pecuniary injury would result. *Columbus Base Ball Club v. Reiley.* 272

12. On application to superior court for a temporary restraining order, and it appears that many of the questions raised have been presented to the common pleas and are likely to be soon decided, the superior court may exercise a discretion to hear the application upon such grounds before such decision. *Cincinnati v. Cin. Edison Elec. Co.* 316

## INSECURE BUILDINGS—

1. The insecure building law of 1887, being to protect life, will be



## Insurance.

liberally construed. *Cincinnati v. Moorman*. 162

2. The court will aid it by injunction against using the building on application of the inspector. And a petition in the name of the city, verified by the inspector, will be deemed to be filed on his application. *Ib.*

## INSURANCE—

1. In an action by the beneficiary upon a policy of life insurance, the defense of breach of warranty of assured in his application that no company or association had ever declined to grant a policy on his life is not made out by proof that a Mutual Benefit Association, had declined to issue a certificate of membership to the assured. *White v. Life Ins. Co.* 857

2. Where a policy holder in a mutual life insurance association has by neglect forfeited his membership, and where by the terms of the policy he could be restored by furnishing a new and satisfactory application and medical examination according to the forms of the association, held, that upon furnishing the requisite application and medical examination, a court of equity has power to enforce his restoration to membership. *Graveson v. Cincinnati Life Assn.* 369

3. Equity will not under its general powers afford relief against a forfeiture caused by the member's neglect. *Ib.*

4. It seems, where special provisions are made by the parties for relief in case of forfeiture, that equity will follow these provisions only, and grant no other relief than thus specially provided. *Ib.*

5. Where a husband and wife agreed that a policy should be taken on the life of each for the benefit of the other, and application on company's blanks were made, but the company without the husband's knowledge or consent made the policy of the wife payable to her children: Held, that the husband was entitled to the insurance money on the policy of his wife. *Fuss v. Kroner.* 85

6. In 1860, S., who was then married to A., his second wife, and had by her an infant son, and had also a daughter by a former marriage, caused his life to be insured for the sole use and benefit of his wife A., and his children by her, with a provision in the policy which states: "In case of the death of the said beneficiary before the death of the person whose life is assured, the amount of the assurance shall be payable at maturity to the heirs or assigns of the said per-

son whose life is assured." The son died in 1880, without estate or debts. S. having paid all the premiums on the policy, died in 1892, leaving surviving him A., his widow, the sole surviving beneficiary named in the policy and his said daughter by his former marriage. And his said widow died in less than a month thereafter, without issue, and intestate. The company having admitted its liability, and the parties having interpleaded as to the fund, Held, the widow, as survivor of the beneficiaries, was entitled to the whole fund. *Richardson v. Michener.* 830

7. The proceeds of the policy did not come to her as a deed of gift under sec. 4162, Rev. Stat., from her husband, and therefore did not descend and pass to his heirs. *Ib.*

8. It is no defense to assessments against the holder of a mutual policy containing a clause making him liable to be assessed to pay debts, that the agent assured him that only straight policies were issued by the company, and that there was no liability of the kind allowed under its amended charter, in reliance on which he took the policy and had held it eighteen months and is now sued by trustees winding up the company. *Mansfield v. Cincinnati Ice Co.* 617

9. Rights of innocent parties having intervened, contracts otherwise voidable by reason of fraud must be upheld particularly where defendant has slept on his rights for so long a period, and where, as in this case, no reformation of contract is sought at all, but the defense of fraud and misrepresentation is interposed only to defeat action by receiver for benefit of creditors to recover assessments on policies. *Ib.*

10. A member of an insolvent mutual fire insurance company cannot, when called upon to pay his proportion of the indebtedness, set up that it was not properly organized to do business, or had not complied with the law. *Mansfield v. Woods.* 761

11. After a party has had the benefit of the insurance, and the corporation becomes insolvent and goes in the hands of a receiver or trustee, a member cannot set up fraud as a defense after the rights of innocent creditors have intervened. *Ib.*

12. If the contract or agreement to insure be settled upon between the contracting parties, the formal execution and delivery of the policy of insurance may be subsequent; and if done as of the date of the principal act, it will relate back as having taken

## Landlord and Tenant—Marriage.

## JURY—Continued.

enforce the allowance of a claim.  
Root v. Meader. 747

2. In an action to recover real estate, either party is entitled to a jury trial, but when the pleadings set forth an action for partition, neither party is entitled to a trial by jury, (except in the discretion of the court on special issues formulated), even though the title, right of property, and possession, be incidentally brought into the issues of the cause.  
Barr v. Chapman. 862

## LANDLORD AND TENANT—

Under a revaluation clause in a lease, if the appraisers so selected fail to agree, the refusal of one of the parties to join in a new selection is equivalent to a general refusal to perform such agreement, and the court has jurisdiction, on application of the other party, to ascertain by evidence the true value of the land and fix the rent accordingly. Young v. Wrightson. 104

## LARCENY—

In Ohio the stealing of a dog, may or may not be larceny, depending upon whether the animal is of value.  
Anonymous. 92

## LEGISLATIVE RIGHTS—

1. If a right is granted by the legislature to conduct a business, and there is but one mode of conducting the same under the right granted, the person to whom the right is granted may conduct the business in that mode, even if thereby injury is done to others. Railways v. Telegraph Asso. 106

2. Where, however, in the conduct of the business, one of two modes may be employed, each equally effect, and by one of which the rights of others are not affected, and by the other of which the rights of others are injuriously affected, a court of equity will interfere and restrain the use of the mode by which the rights of others are injuriously affected. Ib.

## LICENSE—

1. A non-resident merchant tailor exhibiting samples of cloth and taking orders for suits of clothing to be made and delivered afterwards, is not a peddler or hawker within the meaning of sec. 2669, Rev. Stat. Radebaugh v. Plain City. 612

2. Such a tailor is a manufacturer and entitled to the exemptions from license under said section.

3. To the "Russell" vehicle license law, requiring owners of vehicles to pay an annual tax on them,

an amendment during a year, requiring tin tags to be put on the vehicles, does not violate the obligation of a contract, and the amendment is constitutional. Little v. State. 701

4. The amendment is not invalid because certain vehicles are excepted from the tin plate provisions, and the regulation imposed on others not excepted by the statute amended. Ib.

## LIENS—

A livery stable keeper's lien for the care and feed of horses delivered to him by an attaching constable, is subordinate to a prior mortgagee of such horses, who had not consented to such delivery. Monypeny v. Sells 615

## LIFE ESTATE—

Power of disposition does not enlarge an express life estate into a fee. Helfferich v. Helfferich. 234 and 303

## LIMITATIONS—

1. The defense of the statute of limitations is personal, and therefore it may prevail as to one co-tenant, and fail as to another, even though both may be made parties to the same suit in partition. Barr v. Chapman. 862

2. An action for recovery of overpayment on a street assessment, where the mistake was one of calculation by the city's agent, is not barred by the one year limitation of sec. 5848. Grosbeck v. Eshelby. 819

3. The bar of sec. 6113, providing that an administrator shall not be held to answer to the suit of a creditor, unless it be commenced within four years, is not to the right, but to the remedy. Joice v. Hart. 487

4. An administrator may waive the bar of the statute of limitation, and also the bar of sec. 6113. Ib.

## MARRIAGE—

1. Where parties living in Ohio, go into another state to be married, to avoid our laws, the marriage, if valid where made, is valid here, if not expressly prohibited by our laws, nor contrary to the laws of nature. Courtright v. Courtright. 413

2. Marriage by a female over twelve years of age, but under sixteen, is voidable only, and is made irrevocable by cohabitation after arriving at sixteen. Ib.

3. If such wife dies before she arrives at the age of sixteen, the validity of the marriage cannot be questioned. Ib.

4. The marriage of a person who is under a decree of lunacy and

## Master and Servant—Mortgage.

guardianship, with a woman fully informed of his mental condition, notwithstanding the satisfaction of the marriage after his having been adjudged sane and the guardianship removed, but while he is in fact insane, will be annulled at the suit of the guardian appointed under the second adjudication. *Goodheart v. Ransley.* 655

6. The decree of insanity is prima facie evidence of the fact, and the ratification is insufficient. *Ib.*

## MASTER AND SERVANT—

1. When a builder assures a carpenter employed by him that a scaffold to which the latter has objected as being constructed of insufficient material and insecure, is all right, and the carpenter mounts it and he is injured by its fall, he is not guilty of contributory negligence, if any apprehension of danger were allayed by such assurances, and an ordinarily prudent man would, under the circumstances, have relied upon them. *Davies v. Griffith & Sons.* 495

2. The builder was bound to use ordinary prudence in selecting good materials for the scaffold. *Ib.*

3. If the materials were selected by a superior, the builder would be liable, and the question as to whether he is a superior is one for the jury. *Ib.*

4. A workman may have been a superior, and part of his work may have been of the same kind as that of the injured workman. *Ib.*

5. If the materials were selected by a fellow-servant, then the builder would not be liable. *Ib.*

6. The plaintiff, a prisoner in the penitentiary, being hired, by its managers, to defendant, a manufacturer in the prison, was not, under the statute, and the contract between the manager and defendant, a servant of defendant to whom the latter owed the duty of providing safe machinery, etc.; because defendant did not employ, pay or control plaintiff. *Ray-born v. Patton.* 100

7. Liability of employer for injury to an employee. *Smith v. Powell Co.* 528

## MECHANIC'S LIEN—

1. A subcontractor or material man loses his right to acquire a mechanic's lien against property upon which a building is constructed by his head contractor when he omits to take any steps to take out a lien, or notify the owner of the property that there is money due him until the

owner has paid over to such head contractor, all that is due from the owner to the head contractor. *Courtat v. Ehrhart.* 628

2. In an action solely between the owner and claimant to enforce a mechanic's lien, and the pleadings do not disclose any other subcontractors or lien claimants, it is immaterial whether a copy of the attested account be filed in the recorder's office. *Keating v. Worthington.* 428

3. The act of 1889 providing that cognovit judgments have no priority over certain claims of operatives, although it affects debts in existence before its passage does not impair the obligation of contracts, and is not invalid for want of constitutionality. It affects merely the remedies of different classes of creditors. *Bank v. Egg Co.* 424

4. The act should be liberally construed to protect an owner who has in good faith made payments before any subcontractor's notice has been served on them. *Tollheis v. James.* 213

5. Section 3194, requiring the owner, on due notice, to detain payments for security of claims that may intervene before next payment is due or within ten days thereafter, should be construed to require him to hold an unpaid but overdue payment for ten days after the first notice. *Ib.*

6. A subcontractor waives his right to stop the fund by not giving notice within sixty days from performance of claimant's work. *Ib.*

7. An assignment by contractor of an unaccepted order by him on the owner, given to a prior creditor cannot prejudice the subcontractor's right to stop the fund, and reaches only the balance after they are paid. *Ib.*

## MORTGAGE—

1. A mortgage of realty, executed by the administratrix and heirs to secure a fund to satisfy a former lien thereon created by decedent, is void as against creditors. *Cate v. Peck.* 813

2. Upon a sale of the real estate to pay debts, and there being no intervening rights, such mortgagee may, in equity, be subrogated to the rights of and priorities of the holder of the lien so paid, without regard to the solvency of the estate. *Ib.*

3. After an assignment for creditors, as all a mortgagee's rights can now be worked out in the probate court, foreclosure need not be brought in the common pleas. *Anonymous.*

## Municipal Corporations.

## MUNICIPAL CORPORATIONS—

1. Municipal corporations are political bodies, clothed with certain legislative and discretionary powers, and equity is adverse to interfering by injunction with the exercise of such powers at the suit of a private citizen. *Johnson v. Cincinnati*. 883

2. Act of April 1, 1890, (87 O. L., 122) provides a legal remedy in the event of the abuse of corporate powers. *Ib.*

3. The statute providing when proceedings to enjoin the carrying out a contract may be instituted by a taxpayer, on behalf of the corporation, does not require written request to be first given to the solicitor, where there is no such officer. *Cope v. Wellsville*. 205

4. Section 2701, Rev. Stat., requiring money to be provided before contract is entered into is not confined to any class of contracts, and hence applies to electric lighting. *Ib.*

5. A municipal corporation has no claim for compensation for a proprietary interest if any has been sustained. *In re Hotel Alley*. 148

6. A city is not a "lot owner" within the terms of sec. 2656, Rev. Stat. *Ib.*

7. A city has no power to compel a railroad company to maintain safety gates, under sec. 2500a, Rev. Stat., at street crossings, other than those where there is a switching and coupling of cars. *State v. Heubach*. 679

8. A permit granted to an electric company by the board of improvements to open more than two consecutive squares at a time, for the purpose of laying its conduits therein, could not be revoked by a resolution of the board of legislation of said city, passed May 2, 1891. *Cincinnati v. Cincinnati Edison Elec. Co.* 315

9. When a corporation formally rejects a proposal for lighting its streets in accordance with certain plans and specifications, it cannot afterwards revive such proposal unless by the consent of the party making the original offer. *Brush Elec. L. Co. v. Cincinnati*. 581

10. A grant for establishing a public market is to be construed as implying everything necessary to its reasonable use and enjoyment. *Fenton v. Cheseldine*. 649

11. As against such grant, neither grantor, his successor in title, an abutting property owner, can acquire any right except by means of an ouster or adverse use, and such adverse use must be a denial of right in

the city to use the square so granted for market purposes. *Ib.*

12. That general authority was conferred upon the city of Cincinnati by its special charter to establish and regulate market houses and market places, and the same authority exists under the general municipal corporation act now in force. *Ib.*

13. Under sec. 1862, Rev. Stat., it is competent for a village council to prescribe a penalty of \$50.00 for any specified offense, and \$100.00 for a repetition of the offense, although the thing rendered unlawful is in its nature continuous in respect to time. *Belle Centre v. Welsh*. 41

14. The statute, passed April 3, 1890, creating a board of public works, and making certain changes in the government of cities of the first grade of the second class, is constitutional. *Bonebrake v. Wall*. 38

15. The power vested in common council to pass an ordinance is legislative, and any agreement to restrain or abridge that discretion is against public policy, and will not be entertained. *Mt. A. & E. P. Inc. Ry. Co. v. Cincinnati*. 149

16. The common council has no authority to contract to levy an assessment, and certify the same to another in case of appropriation of land. *Ib.*

17. The city has no power to borrow money in anticipation of assessment, except by issuing bonds and advertising for bids for the same, as provided in sec. 2703 and 2709, Rev. Stat. *Ib.*

18. Section 2251, Rev. Stat., which provides for appropriation of private land for a street by any person interested, does not contemplate any re-payment, other than that found in the beneficial interest, because of this proposed appropriation. *Ib.*

19. To render an ordinance invalid for the reason that it is impossible to comply with its provisions, it must clearly appear that the thing required to be done is not within the power of a man to accomplish, otherwise, the ordinance being valid in other respects, must stand and be obeyed. *Cincinnati v. Miller*. 788

20. An ordinance of a city establishing a fire limit under the provisions of sec. 9 of the act of Feb. 23, 1888 (85 O. L., 37), is an ordinance of a general nature, and under sec. 1696, Rev. Stat., does not take effect until ten days after first publication. *Reynolds v. Harris*. 509

## Mutual Benefit Societies—Negligence.

21. A frame building erected within such ten days is not enjoynable.

Ib.

22. The law in force at the time of the passage of the improvement ordinance, governs with respect to the manner of assessment and the rights and liabilities of the owners of abutting property; this rule is not affected by the fact that the owners of the abutting property petitioned for the improvement. *Shehan v. Cincinnati*.

198

23. An ordinance providing for the construction of a sidewalk upon one side only of a street under sec. 2382, Rev. Stat., and assessing the charge on owners of the lots or lands abutting on both sides of such street, and which makes no provision or allotment for space for a sidewalk on the other side, is unreasonable and in conflict with the manifest intent and meaning of this section of the statutes, and is therefore void. *Mills v. Norwood*.

416

## MUTUAL BENEFIT SOCIETIES—

1. The right of a member of a charitable, benevolent, beneficial and social organization, to any aid and assistance furnished by the same, is lost by the termination of his membership, which may be forfeited by misconduct. *Hershiser v. Williams*.

76

2. Upon becoming a member of any such organization, one necessarily subjects himself to its power, as for instance the power of expulsion,—such power having been voluntarily conferred upon it by its members, and such person is presumed to know the nature and character of the disciplinary powers over all its members. Ib.

3. By becoming a member of such organization one does not acquire a severable right to any of its property, but merely the right of a member so long as he remains a member. Ib.

4. Whether it is unmasonic conduct for a member of a masonic lodge, being a society not for profit, to become a member of the Cerneau bodies of the Ancient Accepted Scottish Rite, is one into which a court will not inquire, but is left entirely to such lodge or society. Ib.

5. A masonic lodge organized for charitable, benevolent, beneficial and social purposes, being bound to aid and assist its members and aid their widows and orphans, is a society not for profit but for masonic purposes. Ib.

6. Such lodge having power to expel its members for unmasonic con-

duct, and to determine what constitutes such misconduct can not be restrained by a court from proceeding to expel a member or members for any alleged irregularity by the lodge or its officers in the exercise of its power of expulsion. Ib.

7. The beneficiary to whom a member of a mutual benevolent order has his death certificate payable, has no vested interest therein when the laws of the order reserve a right to the member to change the direction of the fund. *Thesing v. Supreme Lodge K. of A.*

88

8. Rules and regulations of the order prescribing the method of changing the beneficiary, or imposing conditions on the right to change, are made for the benefit of the order, and not of the beneficiary, and the order does not guarantee or promise him that it will enforce or will not abrogate such rules. Ib.

9. A new certificate to another beneficiary, made at a members request without the original beneficiary's consent although the former rules required such consent, will supersede the original certificate. Ib.

10. The policy of mutual assessment associations agreeing upon loss to pay the member a fund collected by assessment upon all members not exceeding \$200, is to be construed as implying a promise to levy such assessment, and the assured need not seek specific performance, but may sue at law for the breach of such promise. *Hall v. Live Stock Assn.*

145

11. A petition on such policy counting on a promise to pay the amount on loss is demurrable. The proper averment of breach of the contract is for the neglect or refusal to levy the assessment. Ib.

12. Query, whether plaintiff may not recover the maximum amount without averring or proving what an assessment would have yielded. Ib.

13. If a member of a mutual benefit order whose children are named as beneficiaries of his death certificate, stops paying dues and assessments, separates from his family and is finally divorced, and the wife for years and until his death keeps up the dues and assessments for the children's sake, the member has thereby lost all right to change the beneficiaries, and the children are entitled to the fund at his death. *Tudor v. Tudor*.

422

## NEGLECT—

1. A person is guilty of contributory negligence in boarding a rapidly

## New Trial—Office and Officer.

## NEGLIGENCE—Continued.

moving car, without signaling it to stop. *Brooks v. Mt. Auburn Cable Co.*

746

2. Such person is guilty of contributory negligence, after getting upon the running board of the car, in not entering at the door nearest him.

Ib.

3. Such person is not a passenger while upon the running board, and is not entitled to the highest degree of care from the company, to avoid injuring him.

Ib.

4. The failure to stop an electric car on seeing that a horse is taking fright at it, does not render the company liable, unless the failure to stop the car is attributable only to a wanton or malicious disregard for the safety of the driver of the horse. *Chapman v. Zanesville St. Ry. Co.*

449

6. Liability of employer for injury to an employee. *Smith v. Powell Co.*

528

## NEW TRIAL—

1. When a mistake in a verdict is clearly proven, it is the duty of the court to set it aside and order a new trial. *Wertz v. Railroad Co.*

872

2. Where the principal petitioner in a ditch case, on solicitation from the jury, returning fatigued from their view gave them something to eat, and liquor to one who was unwell, there being no intent to influence the jury, is not sufficient to avoid the verdict. *Marsh v. Commissioners.*

442

3. Jurors saying that they have made up their minds when it is proposed to view the premises a second time, will be deemed to mean only that they are satisfied with the one view, and will not be deemed to disobey the court's injunctions not to make up their minds, and will not constitute such misconduct as will justify the setting aside of the verdict.

Ib.

4. Where the juror's misconduct consists of declarations and utterances of opinions about matters on trial, made outside of court during the pendency of the trial, and where this action implies a strong disposition for or against one side or the other, be the evidence what it may, a verdict in accordance with such prejudice will be set aside. *State v. Carter.*

123

## NOTICE—

1. The notice under sec. 4457, to be given interested parties in a county ditch, should contain a description of the route as located by the commissioners. *Marsh v. Clark Co. Com'rs.*

290.

2. A notice to a taxpayer to add to his return, requiring him to appear on the following day, to show that his return was correct, is unreasonable and void, for want of time. *Wells v. Adair.*

783

3. The notice must inform the taxpayer, wherein the return is false, and the proposed amount to be certified to the treasurer.

Ib.

## NUISANCE—

A dense smoke emitted from smoke stacks in the midst of a densely populated city is a nuisance per se. Unless it is a nuisance in fact, the act of so declaring it would not make it a nuisance. Omitting so to declare it, it is none the less a public nuisance. *Cincinnati v. Miller.*

788.

## OFFICE AND OFFICER—

1. The members of the board of review in cities of the first grade, first class are required to take and subscribe to an oath before entering upon their duties, which oath is filed with the clerk of the court appointing them. *N. C. Harmony Lodge v. Hagerty.*

595.

2. No further oath is required of the members to enable them to discharge any of the duties of their office.

Ib.

3. By reason of various acts, the administrative board of Cincinnati was frequently changed and was called successively the board of public affairs, the board of public improvements, the board of city affairs, the board of public improvements, and the board of administration. *Hafer v. Cincinnati.*

625.

4. The board of city affairs was declared unconstitutional, and the board of public improvements, which the board of city affairs had succeeded, became in turn, by reason of such decision, the successor of the board of city affairs.

Ib.

5. The board of administration, upon its creation was declared the successor of the board of public improvements.

Ib.

6. During the existence of the board of city affairs an act was passed authorizing said board or their successors to issue bonds for the improvement of a certain street in said city; but that board failed to exercise such power. Held, that each was the successor of the one which preceded it, and the power to issue the bonds passed to the board of administration.

Ib.

7. Although what was popularly known as "The New Charter Bill" for Cincinnati was passed and took effect

## Parties—Pleadings.

on March 26, 1891, yet the board of legislation, as provided therein, did not succeed the council of said city until April 15, 1891; and the board of administration did not succeed the board of public improvements until May 4, 1891. *Cinninnati v. Cin. Edison Elec. Co.* 315

8. The city council retained all its several powers and duties until the board of legislation was elected and qualified; and the board of public improvements retained all its several powers and duties until the board of administration was appointed and qualified. *Ib.*

## PARTIES—

It is not a misjoinder to sue the sureties on a guardian's original bond and those on his additional bond in a single action. *Siebern v. Meyer.* 344

## PARTITION—

1. Partition is not a proceeding in rem in this state. *Barr v. Chapman.* 862

2. A parol partition of real estate, if originally fair, is binding, when there has been long acquiescence and acts of confirmation on the part of the parties making the partition. *Dockterman v. Elder.* 506

3. A wife is dowable only in the portion assigned to her husband in the partition. *Ib.*

## PARTNERSHIPS—

1. An infant may rescind a partnership of which he is a member. *Lyghtel v. Collins.* 161

2. If he does, he can only recover his capital, less what he has received from the firm, and all partnership creditors must be first paid, and he cannot recover any allowance for services in the absence of express stipulations. *Ib.*

3. Unsecured creditors will be allowed to intervene to contest the validity of preferences set up in an equitable proceeding brought by one member of an insolvent firm against the other member for dissolution, appointment of a receiver, sale of assets and distribution of proceeds. *Bell v. Miller.* 163

4. The administrator of a deceased partner can not maintain an action at law, against the surviving partner, to recover money loaned to the firm by the intestate while he was a member of such firm. *Weidig v. Moore.* 83

## PAYMENT—

A payment of the Dow tax under protest to escape addition of a penalty, by a person not liable to the tax, is not voluntary, and can be recovered back. *Van Nest v. Brooks.* 228

## PLATS—

Section 2614, Rev. Stat., requires proceedings in court to change a plat, only when the alteration affects streets or alleys, and an owner may change, otherwise his allotment at will. *Huling v. Huffman.* 303

## PLEADINGS—

1. It is the spirit as well as the language of the code that all pleadings shall be liberally construed, with a view to substantial justice between the parties. *Hotel Co. v. Trust and Safe Deposit Co.* 255

2. It is a sufficient allegation of the execution and delivery of certain bonds when it is averred that they were issued and also that they were secured by certain mortgages then outstanding. *Ib.*

3. The allegation of presentation and offer to surrender of such bonds and coupons is unnecessary unless made so under the conditions of their issue, and the averment of a failure to pay is a sufficient averment of a breach. *Ib.*

4. Where plaintiff, a corporation, describes itself as such in the caption of the petition, but in the body there is no averment of corporate capacity to sue, it is good as against a demurrer. *Cin. Gas L. & Coke Co. v. Dodds.* 759

5. Allegations of general indebtedness on a contract are not a substitute for the necessary code allegations of performance. *Antonelle v. Huston.* 5

6. An averment that an amount is due or that defendant is indebted is a legal conclusion and tenders no issue. *Ib.*

7. A petition which sets out facts showing a liability of certain defendants as stockholders in an insolvent corporation, for unpaid stock, and also facts which show an individual liability, in addition, under a statute, states two distinct causes of action. *Turnbull v. Salt Co.* 19

8. Where there are two or more counts in a pleading, separately stated and numbered, and no reference is made by either to matter in any other, on demurrer to one count, it must stand or fall by its own averments, and can not be helped or hurt by facts in another count, however sufficient to that end in themselves. *Ib.*

9. In an action to recover rent, defendant for a first defense alleged that there was no legal or valid consideration for the lease. For a second defense he alleged that he was entitled to an accounting under the terms of said lease. By way of cross peti-

## Pledge—Reference.

## PLEADINGS—Continued.

tion he alleged that under the lease plaintiff was to pay certain liquidated damages in case of his violation of the stipulations of said lease, which he alleged had been violated. Held, not inconsistent, and defendant not compelled to elect. *Hooven & Allison Co. v. Cordage Co.* 434

11. Where the petition declares on a policy of insurance, and the reply admits that the policy was written after the destruction of the property, but alleges that it was issued in pursuance of an agreement to insure made prior to the destruction of the property, there is not such a variance in the pleadings as that a demurrer will lie to the reply. *Bennett v. Conn. Fire Ins. Co.* 429

## PLEDGE—

A pledgee of shares of stock in a corporation has merely by virtue of the pledge, no right of action against the directors to recover damages for their negligence and mismanagement whereby the assets of the corporation are lost and the shares in the same rendered valueless. *Barnes v. Exrs. of Swift.* 321

## PRINCIPAL AND AGENT—

Sales on commission—Employer has right to reject sales to persons not financially good without being liable for commissions. *Althouse v. Baum.* 205

## PROPERTY RIGHTS—

A party has a right to the lawful use and enjoyment of his own property, and a liability arises only when it is shown that such right was exercised negligently, unskillfully or maliciously. *Flicham v. Railroad Co.* 543

## RAILROADS—

1. A city has no power to compel a railroad company to maintain safety gates, under sec. 2500a, Rev. Stat., at street crossings, other than those where there is a switching and coupling of cars. *State v. Heubach.* 679

2. Branch tracks put in by a railroad for the convenience of shippers, perform the office usually left to a dray or wagon, and do not bear the same relation to the streets they occupy that ordinary tracks do which form a part of the main line. *Cincinnati v. Railroad Co.* 837

3. A grant to construct such tracks from the connection tracks to adjacent properties leaves the city the full and complete control of the street, subject only to the use named therein. *Ib.*

4. A general permit by a city to railroad to put in switch tracks from connection tracks to property of adjacent proprietors, applies to property on another street. *Ib.*

5. The word "adjacent" does not necessarily mean "abutting" or "adjoining" but means "lying near." *Ib.*

6. An adjacent land owner can not maintain an action at law for consequential damages from the operation of its cars unless he can show a negligent exercise by the railway company of its legal rights. *Flicham v. Railroad Co.* 543

7. Any annoyance incident to the running of the cars on the road with reasonable care is *damnum absque injuria.* *Ib.*

8. Under the provisions of sec. 3283, Rev. Stat., a railroad company will be held responsible for any special injury or depreciation to property which may result from the occupancy of any street or road. *Ib.*

9. The same rule of compensation for such injuries will apply to the owner of the property "near to" such street or road as to the owner of property abutting thereon. *Ib.*

10. As a general rule no one has any special private property or interest in the public highway other or different from the general public. *Ib.*

4. A railway company will not be answerable in damages for properly running its cars across such street or public highway to an abutting property owner who may have suffered only such inconvenience or damages as may be common to all who have occasion to use such street or public highway. *Ib.*

## RECEIVERS—

A court of equity will generally, though not always, in deciding the rights of labor claimants, in the administration of receiverships, be guided and controlled by the analogies to the law relating to insolvent debtors. *Akron Iron Co. v. Whately Co.* 197

## REFERENCE—

1. The trial provided by sec. 5213, before a referee should be followed by all the incidents, as far as possible, as a trial by the court. *Glass-Edsall Paper Co. v. Telegram Pub. Co.* 899

2. The referee should give notice to the parties of the time and place of taking testimony. *Ib.*

3. The absence of such notice is such an irregularity as would authorize the court to vacate or modify its own judgment or order whereby the



## Religious Societies—Roads.

report is confirmed after the term at which the same is made. Ib.

## RELIGIOUS SOCIETIES—

1. A pew in a church is real estate, and hence, cannot be levied on by a constable and the rate will be enjoined. *Deutsch v. Stone.* 436

2. The nature of property cannot be changed by agreement of parties. Ib.

3. The pecuniary rights of the members to any of the association's funds and property, so far as by its discipline, they depend upon his church relationship or status, depend upon the decision of the proper church judiciary, which is as conclusive, when assailed in the civil tribunals, as any other judgment. *Sampsell v. Escher,* 351

4. If the judgment of the church judicatory comes in question in a civil court, the merits of the issues cannot be inquired into. Ib.

5. Such judgments will not be affected by informalities, and can only be impeached for want of jurisdiction, or fraud working a patent and gross deprivation of justice. Ib.

6. A provision that if the bishop is accused of immoral conduct three elders shall examine him, does not require them to go to him in person, if he has previously refused to submit to the examination. Ib.

7. Where the discipline provides that if the elders believe him guilty they shall call a trial conference; and they do call a trial conference and report that the charges are so serious and well founded as to require thorough investigation, this will let in oral proof to show that they were actually of such opinion. Ib.

8. A discharge of the examining committee being plead as depriving the trial conference of jurisdiction: Held, such examination is merely preliminary to a trial, and a discharge thereon is not a bar to another examination, or to a trial, either by legal analogy or the practice of the church judicatories. Ib.

9. This is a defense which should have been plead at the trial conference, and which cannot be interposed now. Ib.

10. If members of the trial conference were disqualified, or prejudiced, they should have been challenged at the trial. Ib.

11. If this is not done, and the failure so to do is not caused by fraud or violence, it is now too late to raise the objection in this hearing. Ib.

12. A finding of the trial conference that charges were sufficiently

sustained to convict of conduct unbecoming a minister and bishop is sufficiently certain to be valid and the civil courts cannot hold the judgment void. Ib.

## REPLEVIN—

1. Where a defendant, in replevin, undertakes in a second action to replevy property taken from him, though he make the affidavit required by statute, the truth of the allegation that the property was not taken on process issued against him may be inquired into on motion. *Twine & Cordage Co. v. Hooven & Allison Co.* 120

2. Where a writ of replevin is wrongfully and improperly obtained, the property being in the possession of the office, the court may recall and set aside the writ and order a redelivery. Ib.

3. On appeal in replevin, judgment on default for a petition may be rendered for defendant for a restoration of the property without an answer being filed. *Wellman v. Wellman.* 815

## RESCISSION—

A large number of shot companies desiring to unite their interests organized a corporation which should be the owner of all their properties. Subsequently one of the companies becoming dissatisfied with the arrangement, brought an action against the new corporation for a rescission of the sale: Held, That as the plaintiff could not tender back all the shares of stock received by it for its property, it could not ask for a rescission. *Sportsman Shot Co. v. Am. Shot & Lead Co.* 821

## ROADS—

1. Where a change in the grade of a road is made by the county under a special act which made no provision for compensation for damages done, and none having been assessed or provided for, an injured abutting owner can sue the county in the common pleas, originally. *Rief v. Commissioners.* 455

2. Plaintiff has a right to have his compensation assessed by a jury, and there being no authority in the act for such proceeding, he is not compelled to submit it to the commissioners, and does not waive his rights by failure to do so. Ib.

3. Not being compelled to submit his claim to the commissioners, the jurisdiction of the common pleas is original, and not appellate. Ib.

## Robbery—Street Railroads.

## ROBBERY—

One who goes into a hardware store, asking to see a revolver, and when shown one, loading it, pointing it at the clerk and backing out of the store, is guilty of robbery. *McNeal v. State.* 782

## SAFE DEPOSIT AND TRUST CO.—

Safe deposit and trust companies contemplated by secs. 3821a and 3821b, Rev. Stat., have power to receive and hold money and property in trust, and can act as trustees under a mortgage in a case *germain* to the purposes of their incorporation. *Hotel Co. v. Trust and Safe Deposit Co.* 255

## SCHOOLS—

1. The neglect of the principal of a school to make the report required by sec. 11 of the act of April 25, 1890, is an offense against the act, and is punishable by a fine as prescribed in sec. 13. *State v. Quigley.* 340

2. Said offense is within the jurisdiction of the court of common pleas, and may be prosecuted by indictment. *Ib.*

## SET-OFF—

1. The husband may have a judgment in his favor set off against a judgment, against himself and wife. *Pike v. Sheve.* 891

2. The amount paid by a borrower at a bank on account of his subscription to a proposed increase of capital stock of the bank, which had never become effective because of the insolvency of the bank, was a proper set-off *pro tanto* against a note held against him by the bank for a loan. *Armstrong v. Law.* 461

3. The bank having become insolvent and suspended payment of all demands against it, it was not necessary for such subscriber to make a demand for payment before his claim could become available as a set-off to his note. *Ib.*

## SIDEWALKS—

1. It is the primary duty of the city, and not of abutting lot owners, to see that the sidewalks, as well as the main street, is kept in a safe condition, and in good repair. *Collins v. Schmidt.* 103

2. For failure to do so, if the city has notice of defect in a sidewalk, or, in the exercise of due care, ought have known of such defect, it, and not the abutting land owner, is liable for injuries resulting from such defect where such defect is not caused by any act of commission by such lot owner. *Ib.*

## SLANDER AND LIBEL—

1. In an action of libel where the meaning of defendant, by the language employed, is equivocal or doubtful, the question whether the publication is libelous or not is one for the jury. *Getchell v. Tailor's Exchange.* 390

2. Whether the meaning of defendant by the language used, was what the innuendo avers it to be, if fairly susceptible of that meaning, is a question of fact and not of law. *Ib.*

3. In an action for libel in publishing that plaintiff procured an appointment as guardian by false statements to the court, the defendant may prove such fact. This is not a collateral attack on a decree of court. *Commercial Gazette Co. v. Dean.* 207

## SPECIFIC PERFORMANCE—

1. A good title must be tendered within a reasonable time after sale of real estate in order to entitle plaintiff to specific performance of contract. *Ursuline Community v. Huneke.* 30

2. Specific performance of an agreement to purchase land will be refused if there is outstanding a pending suit by third persons materially involving the title without collusion, and not groundless. *Ambrose v. Kuhn.* 338

3. In such case the court will not form or announce any opinion as to the validity of the title or upon the issues in said pending action. *Ib.*

4. The merits of the other suit will not be looked into further than to see that it is not frivolous. *Ib.*

## STATUTES—

By the amendment of sec. 6708, and the passage of sec. 6702a, (90 O. L., 191), the legislature did not intend to take away the right to prosecute error from the courts of common pleas throughout the state to the circuit courts. *Leonard v. Queen Ins. Co.* 892

## STREET RAILROADS—

1. A bid for a franchise, in which the bidder proposes "for himself and associates," the names of his associates not appearing, imparts a personal proposal, is his individual bid, and his bond, running in his name alone, to accept the contract is regular. *Gallagher v. Johnson.* 840

2. A bid is made in good faith when the bidder makes it with the intention of complying with the terms of his bid in case it is accepted. *Ib.*

3. If the board of administration has any doubt as to whether the lowest bid has been made in good faith, it

## Summons.

has the right to call the bidder before it, and to make inquiry as to his good faith. *Ib.*

4. In determining this the board can only take into account what is said and done by the bidder in its presence at the time of such inquiry, the inquiry being as to whether he intended to withdraw or carry out his bid. *Ib.*

5. Under sec. 2502, Rev. St., the consents of abutting property owners inure to the benefit of the lowest bidder *Knorr v. Miller.* 165

6. Under sec. 1778, the taxpayer is an agency created by the legislature, to represent the interests of the public, in cases provided for in that section. *Ib.*

7. Under sec. 2502, the legislature has placed positive and absolute restrictions and limitations upon the authority of municipal council and officials, in granting street railroad franchises. No discretion is vested in them to make the grant to any other than the "lowest bidder." *Ib.*

8. Under sec. 1779, the court has no power to ignore, or disregard, either directly or indirectly, the express and direct prohibition of sec. 2502, or to give effect to any municipal action done in excess of the restricted and limited power by this section conferred upon municipal authorities. *Ib.*

9. After a street railway has been properly located and constructed, and it desires to put in additional switches, etc., it must first obtain the written consent of a majority of the abutting property owners. *Harner v. Columbus St. Ry. Co.* 807

10. Where a city in its grant of a street railroad route, requires such road to pay to the city \$4 per lineal foot per annum upon each car run by it, and in addition 2½ per cent. of the gross earnings from every source. *Held*, that the 2½ per cent. applied to all the earnings of this road, though the road was extended through an adjoining village. *Cincinnati v. Mt. A. Cable Ry. Co.* 667

11. It was further held that the \$4 charge was a license fee for the payment of which the company was granted the privilege for one year of running over its tracks the number of lineal feet paid for. *Ib.*

12. A street railway, whether operated by electricity or animal power, if duly authorized by the local authorities, is not per se an additional servitude on the soil of a public street. *Sells v. Columbus St. Ry. Co.* 643.

13. The proposed erection and use of poles and wires, which are ac-

cessories of the trolley system, does not entitle an abutting lot-owner to an injunction. *Ib.*

14. A street railway located so as not to leave room for vehicles to stand between it and the sidewalk, is not per se a perversion of the street to private uses, or an unlawful infringement of street easements appurtenant to abutting property. *Ib.*

15. The right of one street railroad to appropriate the use of street railway tracks laid in the street by another street railroad, is shown by establishing that the appropriation is for a public and not merely a private purpose. *Street Ry. Co. v. Street Ry. Co.* 365

16. The necessity for the appropriation of such street railway tracks will not be defeated by proof that no physical impossibility exists to prevent plaintiff company from operating a slightly different route. *Ib.*

17. The discretion conferred upon council to first pass upon the necessity and need for a street railway is not to be disregarded by the court. *Ib.*

18. Seniority of rights in a street confers no priority of right, and a junior street railway company is entitled to take a joint and equal use of tracks with a senior company. *Ib.*

19. Proof of a street being a business center where the people largely seek to go, will establish the necessity for such appropriation. *Ib.*

20. The police powers of the city are ample to regulate the joint use of the tracks by the different companies. *Ib.*

21. Abutting owners on a proposed street railway route or extension cannot complain in their character as abutting owners that the grant is invalid except upon the ground that the necessary consents have not been secured upon the street upon which their property abuts. *Barney Mt. A. & E. P. Incl. Pl. Ry. Co.* 880

22. Non-consenting abutting owners cannot be heard to complain of the violations by the grantee of conditions imposed by those who consented when such consenting owners do not themselves complain of such violations. *Ib.*

## SUMMONS—

1. Service made on a non-resident, under sec. 5052, Rev. Stat., by a sheriff in another state duly authorized and deputized is valid. *Holland v. Holland.* 760

2. A service of summons on a corporation "by delivering a true copy of this writ with all the endorsements

## Trial—Verdicts.

## TRADE-MARK—Continued.

3. A misrepresentation in connection with the property protected by a trade-mark, must be of a material fact, to bring it within the class of cases as to which a court of equity refuses to give its aid. *Ib.*

4. Delay for two years to object to infringement will disentitle him to an account of profit, but injunction will be granted. *Ib.*

## TRIAL—

Courts have power in the interest of justice to admit further evidence after a cause has been fully submitted and the jury are deliberating on their verdict. *Keeveny v. Ottoman* 301

## TRUSTS—

1. Where the owners of the entire beneficial interest in a trust are *sui juris*, and unite in requesting its termination and no object to be accomplished by continuing the trust appears, the court should terminate the trust, though in advance of its natural expiration, and give the beneficiaries their estate absolutely. *Soteldo v. Clement*. 802

2. A party claiming priority on funds of an insolvent estate, should clearly show that he is entitled thereto; on general principles the fund should be distributed *pro rata* among all creditors. *Lotze v. Hoerner*. 131

3. A trust fund may be followed so long as the fund has been kept separate and apart from the assets of the trustee; when the fund becomes indistinguishably mingled with the assets of the trustee, the relation of debtor and creditor arises. *Ib.*

4. A trustee with power to manage, control, etc., and in a certain contingency, to sell real estate, the beneficial ownership of which was then in his *cestuis que trustent*, purchased said estate, at a sale made by the sheriff pursuant to a decree rendered in a partition suit which was brought by the trustee himself, the *cestuis que trustent* then not being *sui juris*. Held, The beneficiaries may avoid the sale at their election; because the trustee did not have their consent, or the permission of the court, to buy; and because the court did not confirm his purchase, "after a full disclosure of all the facts." *English v. Monypenny*. 394

5. The facts, that the trustee was then the owner of one-half of the property; that the legal property was not vested in him, that the sale was not made by him; and that the contingency upon whose happening he could

sell the trust property, had not occurred, do not, nor does either of them, affect this conclusion. *Ib.*

6. The beneficiaries may show cause against the decree of sale by an original suit in the nature of an original bill in equity, such as this action is. *Ib.*

## VENDOR AND PURCHASER—

1. If a vendee, under an option, title bond, or other contract, is in possession and in the pendency of profits, he must pay intervening taxes and assessments. *Cobb v. Bohm*. 844

2. Though the vendor is to give a warranty deed at a future day, the vendee cannot require the warranty to cover the interim taxes or assessments. *Ib.*

## VENUE—

1. To authorize a change of venue in a criminal case, on motion of defendant, he must prove, by clear, explicit and convincing evidence, that a fair and impartial trial in the county where the indictment was found, can not be obtained. *State v. Elliott*. 253

2. Newspaper denunciations of defendant and of his alleged crime, are not alone sufficient to warrant a change of venue. 55

3. It is no abuse, but may be a wise exercise, of the discretion conferred by the statute, for the court to postpone, or overrule, for the time being, the motion, till it is ascertained by an examination of jurors whether a constitutional trial can be had. *Ib.*

## VERDICTS—

1. Affidavits of jurors cannot be received to impeach their verdict by showing misconduct of jurors while engaged in their deliberations, nor for the purpose of proving bad motives or fraudulent conduct of jurors in relation to the cause on trial. *Wertz v. Railroad Co.* 872

2. Such affidavits are admissible to show that the verdict as received and entered of record, by reason of a mistake in drawing it, or of a mistake made in open court when it is received, does not embody the true finding of the jury. *Ib.*

3. A verdict cannot be amended by the court on motion, on the affidavits of jurors made after they have been discharged, and showing such a mistake. *Ib.*

4. When a mistake is clearly proven, it is the duty of the court to set aside the verdict and order a new trial. *Ib.*

5. This may be done on the motion to amend the verdict, and with-

## Wages—Wills.

out a separate motion for a new trial on file. *Ib.*

6. The court may direct the jury to return a verdict sustaining a will where the testimony introduced does not tend to prove the issue on the part of contestants. *Edwards v. Davis.* 87<sup>F</sup>

## WAGES—

Workmen may lawfully combine to obtain such wages as they may after consideration agree to insist upon receiving for their work. *Perkins v. Rogg.* 58<sup>F</sup>

## WARRANT OF ATTORNEY—

Where a note and warrant of attorney are written together, over one signature, but not state in whose favor judgment may be confessed, the latter is not void for uncertainty, but authorizes confession of judgment in favor of the payee, and after his death, the warrant is available to his administrator. *Drake v. Simpson.* 854

## WARRANTY—

1. A written contract of sale of a machine not yet constructed will not exclude oral proof of the circumstances, conversations, and representations, showing that it was understood to be sold to do particular work, and thus prove an implied warranty of fitness. *Hauser v. Curran.* 139

2. That the machine has a known name, will not necessarily make the sale one of a known and ascertained article not subject to warranty of fitness. *Ib.*

3. There is an implied warranty of genuineness in the sale of certificates of stock. *Railroad Co. v. Bank.* 50

## WATER AND WATERCOURSE—

1. The thread of a stream is the middle line of the channel; that is of the hollow bed of running water when the water is at its ordinary stage. *Willey v. Lewis.* 607

2. Where a running stream, which is a boundary, changes its channel by a gradual and progressive washing away of one of its banks, the boundary follows the thread of the stream. *Ib.*

3. When such a stream from any cause abandons its old, and seeks a new bed, by rapid and sudden, as distinguished from such gradual and pro-

gressive, change, such change of channel works no change of boundary. *Ib.*

4. The right of access to navigable water of a riparian proprietor on the Ohio river is subordinate to the power of congress over subjects of inter-state commerce. *Coal Co. v. Railway and Bridge Co.* 35

5. Congressional authority to erect a bridge between Kentucky and Ohio is an exercise of power over inter-state commerce. *Ib.*

6. Hence, a riparian proprietor on the Ohio river cannot enjoin the erection of a pier for such bridge opposite his front but below low water mark authorized by congress and the two states. *Ib.*

## WILLS—

1. Where a will points to a period of distribution of the estate, the words "die without issue," are to be restricted to death without issue prior to the period of distribution. *Pendleton v. Bowler.* 551

2. A construction of a will that ties up an estate is not favored. *Ib.*

3. In proceedings to admit to record in this state authenticated copies of wills probated in other states, it is competent for the court to admit persons to appear in such proceedings for the purpose of adducing evidence and taking other steps adverse to applicants. *In re Barr's Will.* 910

4. In such proceedings the court may require the applicants to furnish security for costs. *Ib.*

5. To avoid a will, it is not enough that a delusion may exist in testator's mind, but its connection with his will must be made manifest, and shown to have influenced its provisions before the will can be set aside and declared void by reason of it. *Edwards v. Davis.* 876

6. The burden is on contestants to show, not only that the delusion existed, but also that such delusion affected the testator in the very act of making the will. *Ib.*

7. The court may direct the jury to return a verdict sustaining a will where the testimony introduced does not tend to prove the issue on the part of contestants. *Ib.*

8. Appeal does not lie to the common pleas from a judgment of the probate court in refusing to admit to

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 Wills—Words.
 

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## WILLS—Continued.

record, under sec. 5937, a certified copy of a will claimed to be executed and proven in another state. *Barr v. Chapman.* 862

9. There is no error in the refusal of the probate court to admit such copy of the will to record, when the execution of the will does not appear to have been proven according to the laws of such other state, and

when there is no judgment of probate on the face of the record. *Ib.*

10. A will executed and proven in another state must be admitted to record in this state, before it is effectual to pass title to land in Ohio. *Ib.*

## WORDS—

The word "adjacent" does not necessarily mean "abutting" or "adjoining" but means "lying near." *Cincinnati v. Railroad Co.* 887



